H B
68
FILE 1

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JERALD M. REICHLIN
ASSOCIATE

DATE: 4/27

TO: Chris Christensen / c/o Sen. Faiks

CITY: Juneau

FROM: Mark Moderow
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TOTAL NUMBER OF PAGES (including cover page): 2

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RECEIVING TELECOPIER NUMBER: 465-4923

OTHER INSTRUCTIONS: please call on this issue — I understand there is talk of a rewrite of this bill and the native Community, esp. the villages who could be most affected, is not aware of the "ownership" implications.

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Also, there is existing litigation on this issue between the State and the Federal gov't arising out of an ANCSA transfer near new Chenega in the Prince William Sound. State v. Block U.S. Dist. Ct. Anch. A85-280-Civ.

PROPOSED AMENDMENT TO SCS CSHB 68 (O&G)

BEFORE THE SENATE JUDICIAL COMMITTEE

*AMENDMENT #1, PAGE 3, LINE 27: add a new subsection (2) and renumber the existing subsection to conform. The new subsection shall read:

(2) "The person is a corporation, organized under 43 U.S.C.1601-1628 (Alaska Native Claims Settlement Act) that acquired the facility under the Federal Act; or"

The purpose of this amendment is to allow the defense conceptualized by currently proposed subsection (2) for governmental entities to apply also to Alaska Native Corporations. The lands from which the Native Corporations were allowed to select their entitlement were withdrawn by the Federal Government and in most cases the selections within the withdrawals were mandated by an application of the administrative procedures for selection. Thus in the same way the governmental entities could acquire land through involuntary acquisition, the Native Corporations "involuntarily acquired" their land under the Federal Act. As long as they meet the other requirements set forth in the section, they should be entitled to the same protection.

PROPOSED AMENDMENT TO SCS CSHB 68 (O&G)

BEFORE THE SENATE JUDICIAL COMMITTEE

*AMENDMENT #2, PAGE 2, LINE 8-19: delete subsections (5) & (6)

PAGE 3, LINE 19: delete the word "disposal" and replace with the word "release"

PAGE 3, LINE 25: change the line to read in its entirety "or was released or threatened to be released"

PAGE 4, LINE 3: delete the words "disposed of" and replace with the phrase "released or threatened to be released"

Reason: It is an illogical extension of hazardous substance law to include an imposition of strict enterprise liability through the use of a format developed for hazardous wastes. Most hazardous substances encompassed by the revised act, certainly the newly encompassed uncontaminated refined oil, have useful applications in the stream of commerce. The concepts of "disposal", "storage", and "treatment" are all keyed to substances that have no commercial use and must be disposed of or treated. They are so defined at A.S. 46.03.900(7), (28) & (29), with "dispose" and "treat" referencing the provisions of CERCLA which specifically does not include petroleum in its definition of a hazardous substance. 42 U.S.C. §9601(14). The idea of transport as a liability producing act is logical to deal with the midnight dumping of hazardous waste. It is however illogical that mere ownership, control, possession or transport of items of commerce while they are moving between ordinary users should impose liability once the substance has been safely passed on. A significant amount of the petroleum products delivered within the state are sold by jobbers who own the petroleum for the length the time it takes to transport the product to the retail outlets from another parties wholesale facility. This deminimus ownership and an interpretation that the jobber "selected" the retail facility to would yield unconscionable liability as against the minimal participation in the economic enterprise.

The balance of the changes would simply conform the rest of the language of the act with the remain subsections.

PROPOSED AMENDMENT TO SCS CSHB 68 (O&G)

BEFORE THE SENATE JUDICIAL COMMITTEE

*AMENDMENT #3, PAGE 2, LINE 14: insert the following phrase after the semicolon:

"This paragraph does not apply to the ownership, control or possession of uncontaminated refined oil products;"

PAGE 2, LINE 19: add the words "uncontaminated" and "products" so that the line reads:

"apply to the transport of uncontaminated refined oil products."

REASON: While the retention of a hazardous waste strict enterprise liability standard in the area of hazardous substances remains illogical, the proposed exclusions would allow this segment of ordinary commerce to continue. (See reasons to Proposed Amendment #2) A large amount of the retail petroleum industry in the State is conducted by independent jobbers and dealers who, at present, are barely able to obtain adequate insurance coverage. The imposition of a continuing liability on the jobbers which supply these independent dealers and the lack of insurance availability, could eliminate this segment of the economy. The proposed amendment would retain the extension of liability contained in Subsections (3) and (4) of the Bill as to all substances. It, however, would limit the less well thought out provisions of Subsections (5) and (6) to allow for an independent distribution system within the State.

MEMORANDUM

State of Alaska
Department of Law

Comm		
Deputy		
So Asst		
Sp Asst		
Info Off		
Adm Asst		
Int Aud		
ASD		
ESD		
LS&S		
W/C		
cc:		
cc:		

TO: The Honorable Jim Sampson
Commissioner
Department of Labor

DATE: January 25, 19[illegible]

FILE NO:

TEL. NO: 465-3603

SUBJECT: HB 71 - "An Act relating to elevator safety standards; and provided for an effective date"

RECEIVED
JAN 2 3 1989
OFFICE OF THE COMMISSIONER

Deborah E. Behr

FROM: Deborah E. Behr
Assistant Attorney General
Human Services-Juneau

In response to a House Labor and Commerce Committee inquiry, you have asked whether the latest edition of elevator standards code or inspection manual should be enacted in the statute, instead of naming a particular edition by year. I understand that this information is needed for a committee meeting to be held Thursday, January 26, 1989.

It is our opinion, that the incorporation of all future editions of the code or manual by reference cannot be adopted in law by inclusion of the phase "latest edition." We reach this conclusion for the following reasons.

First, under Article II, Section 14 of the Constitution of Alaska, the Alaska State Legislature has been assigned the function to enact bills into law. In this situation, the legislature would be delegating the development of the content of future legislation to a non-state agency, the American Society of Mechanical Engineers which presently develops the code in question. We believe this delegation to be impermissible under these circumstances, since the legislature would be unaware of the contents of future amendments at time of enactment of the bill into law. Second, contents of future editions of the code may be contrary to state law or violative of the state constitution. There would be no legislative review to avoid such law taking effect. Third, the adoption of a future code by reference may violate Article II, Section 15 of the Constitution of Alaska, since the Governor would have no meaningful way to exercise his veto power over future unknown amendments, which may be contrary to law or not in the best interest of Alaska. Finally, the adoption of the latest edition may cause confusion to the courts and the general public as to which standards apply. Under such a situation, the Department of Labor may find difficulty enforcing compliance with the standards under AS 18.60.820.

If the legislature wishes to avoid having frequently to amend the statute to keep pace with current editions of the code or manual, one approach might be to authorize the Department of Labor to adopt standards in regulation. By giving regulatory authority, the department could have the flexibility to adopt standards to changing conditions, without having to seek legislative modification. Since the legislature has the power to annul regulations, the legislature could still perform its oversight of these functions. See AS 44.62.320.

If you have further questions, please do not hesitate to contact me.

DEB:jh

cc: Arthur H. Peterson
Assistant Attorney General

Bob Evans
Legislative Liason

FLOOR MEMO -- SCS CSHB 68 (JUD) "AN ACT RELATING TO LIABILITY FOR THE RELEASE OR THREATENED RELEASE OF A HAZARDOUS SUBSTANCE; RECOVERY OF STATE COSTS FOR AN OIL OR HAZARDOUS SUBSTANCE RELEASE; LIABILITY OF RESPONSE ACTION CONTRACTORS; AND PROVIDING FOR AN EFFECTIVE DATE.

JAN, THE ATTORNEY GENERAL HAS PREPARED A SECTIONAL ANALYSIS OF THE JUDICIARY CS WHICH THE MEMBERS HAVE ON THEIR DESKS. IT IS A BRIEF, LAYMAN'S LANGUAGE SECTIONAL THAT IS FAIRLY ACCURATE.

AS PASSED BY THE HOUSE, CSHB 68 (JUD) AM DID THREE PRIMARY THINGS:

1. IT PROVIDED THE STATE WITH A LIEN FOR ITS COSTS IN RESPONDING TO A RELEASE OR THREATENED RELEASE OF A HAZARDOUS SUBSTANCE, INCLUDING OIL SPILLS. THE LIEN EXISTS WITH RESPECT TO THE PROPERTY OF THE PERSON WHO IS RESPONSIBLE FOR THE RELEASE OF THE HAZARDOUS SUBSTANCE. THE JUDICIARY SCS DID NOT CHANGE THIS LANGUAGE; IT IS FOUND IN SECTIONS 1 AND 7 OF THE JUDICIARY SCS.

2. IT PROVIDED THAT A RESPONSE ACTION CONTRACTOR, WHO IS A PERSON HIRED TO CLEAN UP A HAZARDOUS SUBSTANCE RELEASE, IS NOT STRICTLY LIABLE FOR HIS ACTIONS, UNLESS HE IS ALSO THE PERSON WHO IS RESPONSIBLE FOR THE ACTUAL RELEASE AND IS SIMPLY TRYING TO CLEAN UP HIS OWN MESS. THIS IS THE STANDARD SET BY FEDERAL LAW, AND IT RECOGNIZES THAT A PERSON HIRED TO CLEAN UP SOMEONE ELSE'S MISTAKE SHOULD ONLY BE LIABLE FOR HIS OWN NEGLIGENCE, AND NOT THE NEGLIGENCE OF THE PERSON WHO ACTUALLY CREATED THE PROBLEM. TO DO OTHERWISE WOULD DISCOURAGE PEOPLE FROM PROVIDING THIS NECESSARY SERVICE. THE JUDICIARY SCS DID NOT CHANGE THE SUBSTANCE OF THIS LANGUAGE; IT IS FOUND IN SECTION 3 OF THE JUDICIARY SCS. THE SCS MAKES ONE MINOR TECHNICAL CHANGE, DRAFTED BY THE AG, THAT CLARIFIES THE ORIGINAL DRAFTER'S INTENT (JAN, THIS IS ON PAGE 7, LINE 3, MARKED ON YOUR COPY).

3. THE THIRD AND MAJOR PORTION OF THE BILL RECEIVED BY THE SENATE REPEALS AND REENACTS AS 46.03.822, WHICH SETS THE STANDARD OF LIABILITY FOR PERSONS RESPONSIBLE FOR THE RELEASE OF A HAZARDOUS SUBSTANCE. CURRENT LAW PROVIDES THAT THE PERSON WHO OWNS OR CONTROLS A HAZARDOUS SUBSTANCE, INCLUDING OIL, IS STRICTLY LIABLE FOR DAMAGES AND RESPONSE COSTS IF THAT SUBSTANCE IS RELEASED. STRICT LIABILITY IS LIABILITY WITHOUT REGARD TO FAULT.

THE BILL RECEIVED BY THE SENATE CHANGED THIS, BY SETTING FORTH A LAUNDRY LIST OF PERSONS WHO WOULD BE HELD STRICTLY LIABLE IN THE EVENT OF A HAZARDOUS SUBSTANCE RELEASE. THIS LIST WAS SO COMPREHENSIVE THAT IT INCLUDED VIRTUALLY EVERYONE IN THE CHAIN

OF COMMERCE WHO HAD EVER HANDLED THE SUBSTANCE, EVEN IF THAT PERSON HAD ABSOLUTELY NOTHING TO DO WITH THE RELEASE. THE BILL ALSO HELD EACH OF THOSE PARTIES 100% RESPONSIBLE FOR THE DAMAGES AND CLEAN UP COSTS, EVEN IF IT COULD BE PROVEN BEYOND DOUBT THAT THE PERSON ONLY CAUSED 1% OF THE HARM. THE FEDERAL COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, KNOWN AS CERCLA, WAS USED AS A PARTIAL MODEL BY THE DRAFTER OF THE ORIGINAL BILL.

IN LOOKING AT THE BILL, AND AT CERCLA, THE COMMITTEE FELT THAT A NUMBER OF MAJOR ISSUES HAD NOT YET BEEN ADDRESSED, AND IN THE HEARING PROCESS AND IN MEETINGS WITH THE AG, WE MADE CHANGES TO THE BILL TO RESOLVE ITS MAJOR PROBLEMS, YET TO STILL ALLOW IT TO ACCOMPLISH ITS ORIGINAL PURPOSE, THAT BEING TO MAKE THE PARTIES RESPONSIBLE FOR A HAZARDOUS SUBSTANCE RELEASE TO PAY, AS WELL AS TO ENCOURAGE PEOPLE HANDLING HAZARDOUS SUBSTANCES TO BE MORE CAREFUL WITH THEM.

ONE MAJOR WAY IN WHICH CERCLA DIFFERED FROM THE ORIGINAL VERSION OF HB 68 IS THAT HB 68 TREATED ALL HAZARDOUS SUBSTANCES IDENTICALLY, WHETHER THEY BE WASTE PRODUCTS OR USEFUL COMPOUNDS STILL IN THE CHAIN OF COMMERCE. CERCLA, ON THE OTHER HAND, IMPLICITLY TREATS WASTES DIFFERENTLY THAN IT TREATS USEFUL SUBSTANCES. IT DOES THIS BY MAKING VIRTUALLY EVERYONE IN THE CHAIN WHOEVER HAD POSSESSION OF A WASTE PRODUCT RESPONSIBLE IN THE EVENT THAT ONE OF THEM SPILLS IT. HOWEVER, FOR USEFUL SUBSTANCES, NOT EVERYONE IN THE CHAIN IS STRICTLY LIABLE; ONLY THE PERSONS IN POSSESSION OF IT AT THE TIME THE SPILL OCCURRED.

THE JUDICIARY COMMITTEE BELIEVED THAT IT WOULD BE USEFUL TO TREAT WASTE PRODUCTS AND USEFUL PRODUCTS STILL IN THE STREAM OF COMMERCE SLIGHTLY DIFFERENTLY. THIS IS PARTICULARLY IMPORTANT IN ALASKA, SINCE SO MANY USEFUL PRODUCTS THAT ARE TECHNICALLY HAZARDOUS SUBSTANCES GET SHIPPED OUT TO THE BUSH. WE WANTED TO CRAFT AN SCS THAT WOULD GIVE PERSONS AN INCENTIVE TO BE CAREFUL, YET DID NOT GIVE THEM A DISINCENTIVE TO CONTINUE PROVIDING RURAL ALASKANS WITH THE NECESSITIES OF LIFE.

WHILE CERCLA WAS A USEFUL MODEL IN CONCEPTUALIZING THE DISTINCTION BETWEEN HAZARDOUS WASTES AND USEFUL HAZARDOUS SUBSTANCES, IT WENT TOO FAR FOR OUR PURPOSES. THE REASON IT WENT TOO FAR IS BECAUSE CERCLA DOES NOT APPLY TO OIL; OIL PRODUCTS ARE COVERED BY OTHER FEDERAL STRICT LIABILITY STATUTES. IN CONTRAST, CURRENT ALASKA LAW AND HB 68 INCLUDE OIL IN THE DEFINITION OF A HAZARDOUS SUBSTANCE. OBVIOUSLY, WHILE OIL IS A USEFUL PRODUCT STILL IN THE STREAM OF COMMERCE, AND NOT A WASTE, LARGE ENOUGH QUANTITIES ARE SHIPPED THROUGH OUR STATE THAT WE DID NOT WANT TO LIMIT RESPONSIBILITY TO ONLY THE PERSON IN POSSESSION; IT IS NECESSARY TO ALSO HOLD STRICTLY LIABLE THE PERSON WHO OWNS IT, AND THE PERSON WHO HAS CONTROL OVER IT, AND THE PERSON OPERATING THE FACILITY OR

VESSEL IN WHICH IT IS CONTAINED.

THUS, THE SCS STRIKES A BALANCE BETWEEN CERCLA AND THE ORIGINAL VERSION OF HB 68. IT ADOPTS SOME LANGUAGE FROM CERCLA, IN AN EFFORT TO BRING SOME OF ITS FAIRNESS IN THE IMPOSITION OF STRICT LIABILITY INTO HB 68. AT THE SAME TIME, IT DOES NOT GO NEARLY AS FAR AS CERCLA IN LIMITING THE LIABILITY OF PERSONS DEALING IN USEFUL SUBSTANCES.

THE SCS RETAINS THE LIABILITY PROVISION OF CURRENT LAW, MAKING THE OWNER OF, AND THE PERSON IN CONTROL OF A HAZARDOUS SUBSTANCE, STRICTLY LIABLE FOR A RELEASE (PAGE 1, LINES 27 - 28). IT THEN SUBSTITUTES THE LIABLE PARTIES LAUNDRY LIST FOUND IN CERCLA, WITH SOME MODIFICATIONS, FOR THE LIABLE PARTIES LAUNDRY LIST FOUND IN THE ORIGINAL VERSION OF HB 68 (PAGE 2 LINES 1 - 21). WHILE THE LANGUAGE CONTAINED IN BOTH BILLS IS DIFFICULT TO COMPREHEND, THE EFFECTS OF THIS SUBSTITUTION ARE FAIRLY SIMPLE:

1. THIS GIVES OUR ALASKA COURTS ACCESS TO THE VAST BODY OF FEDERAL CASE LAW INTERPRETING CERCLA; IT MEANS THAT PERSONS DEALING IN HAZARDOUS SUBSTANCES WILL HAVE AN IDEA OF WHAT BURDENS [illegible]R NEW LAW IS IMPOSING WITHOUT WAITING YEARS FOR THE ALASKA COURTS TO SLOWLY TELL THEM; AND

2. IT MAKES VIRTUALLY EVERYONE IN THE CHAIN OF COMMERCE STRICTLY LIABLE IF THE SUBSTANCE IS A WASTE PRODUCT THAT IS BEING DISPOSED OF. THIS INCLUDES NOT ONLY THE OWNERS AND PERSONS IN POSSESSION AT THE TIME OF THE RELEASE, BUT ALSO THOSE WHO ARRANGED FOR DISPOSAL, THOSE WHO TRANSPORTED THE WASTE TO A DISPOSAL SITE THEY SELECTED, AND THE PERSONS WHO OWN THE DISPOSAL SITE. ON THE OTHER HAND, IF THE PRODUCT IS NOT A WASTE BEING SHIPPED FOR DISPOSAL, IF IT IS INSTEAD A USEFUL PRODUCT STILL IN THE CHAIN OF COMMERCE, NOT EVERYONE WHO HAS EVER TOUCHED IT IS AUTOMATICALLY STRICTLY LIABLE. INSTEAD, THE PERSONS WHO ARE STRICTLY LIABLE INCLUDE THE OWNER OF THE SUBSTANCE, THE PERSON IN CONTROL OF THE SUBSTANCE, THE PERSON IN POSSESSION OF THE SUBSTANCE, THE PERSON WHO OWNS THE LAND ON WHICH THE SUBSTANCE IS SPILLED AND THE PERSON WHO OWNS THE CONTAINER, SUCH AS A VESSEL, FROM WHICH THE SUBSTANCE IS SPILLED.

ONE EXAMPLE MIGHT ILLUSTRATE THE DIFFERENCE BETWEEN THE SCS AND THE ORIGINAL BILL. UNDER THE ORIGINAL BILL, A PERSON WHO LOADED A USEFUL PRODUCT LIKE HEATING OIL OR AV GAS INTO A DRUM FOR SHIPMENT TO A RURAL COMMUNITY, AND THEN SOLD IT TO SOMEONE ELSE, WOULD BE HELD STRICTLY LIABLE IF AT ANY POINT IN THE FUTURE SOMEONE RELEASED THAT SUBSTANCE FROM THE DRUM AND CAUSED DAMAGE. REALISTICALLY, WHO WOULD SELL NECESSITIES TO THE BUSH UNDER SUCH CONDITIONS OF LIABILITY? UNDER THE SCS, THE ORIGINAL SELLER OF THE DRUM WOULD NOT BE HELD LIABLE IF AFTER THE SALE, FOR CIRCUMSTANCES TOTALLY OUT OF HIS CONTROL, SOME

THIRD PARTY RELEASED THE CONTENTS OF THE DRUM. OF COURSE, UNDER THE SCS, EVEN AFTER THE SALE THE DEALER COULD BE HELD LIABLE FOR THE RELEASE IF HE IN SOME WAY CONTRIBUTED TO IT BY HIS OWN NEGLIGENCE.

THE SECOND MAJOR CHANGE MADE IN HB 68 IS IN THE APPORTIONMENT OF LIABILITY (PAGE 5, LINE 28). THE STANDARD OF LIABILITY IS STILL STRICT LIABILITY IN THE SCS. PERSONS ON THE LAUNDRY LIST OF RESPONSIBLE PARTIES ARE STILL STRICTLY LIABLE WITHOUT REGARD TO FAULT. HOWEVER, WHILE HB 68 APPORTIONED LIABILITY ABSOLUTELY, THE SCS USES THE FEDERAL METHOD OF APPORTIONMENT FOUND IN CERCLA. WHAT THIS MEANS IS THAT UNDER THE ORIGINAL BILL, A PARTY WHO WAS STRICTLY LIABLE BUT WHO COULD PROVE THAT HE HAD ONLY CAUSED 1% OF THE HARM WOULD HAVE TO PAY 100% OF THE DAMAGES AND RESPONSE COSTS. THE SCS USES THE FEDERAL METHOD OF APPORTIONMENT, WHICH PROVIDES THAT IF A PARTY CAN SHOW A) THAT THE HARM IS DIVISIBLE, AND B) THAT THERE IS A REASONABLE BASIS FOR APPORTIONMENT OF THE COSTS AND DAMAGES, THEN THE PARTY WILL BE RESPONSIBLE FOR PAYING ONLY HIS SHARE OF THOSE COSTS AND DAMAGES. THE BURDEN OF PROOF IS ON THE PARTY. A QUICK REVIEW OF THE FEDERAL CASE LAW SHOWS THAT ONLY VERY RARELY CAN A PARTY TO A SPILL MEET THIS BURDEN OF PROOF. HOWEVER, FOR THAT ONE CASE OUT OF 10 WHERE IT WOULD WORK A SUBSTANTIAL INEQUITY TO ORDER ABSOLUTE JOINT AND SEVERAL LIABILITY, BOTH CERCLA AND THE JUDICIARY SCS ALLOW FOR APPORTIONMENT.

THE SCS MAKES A NUMBER OF MORE MINOR CHANGES, THAT PRIMARILY IMPACT THE LITTLE GUY:

1. AS ORIGINALLY DRAFTED, HB 68 NOT ONLY IMPOSED STRICT LIABILITY ON COMMERCIAL ACTIVITIES, BUT ALSO ON PEOPLE WHO WEREN'T EVEN IN BUSINESS, AND WHO POSSESSED "HAZARDOUS SUBSTANCES" SUCH AS THE GASOLINE IN THEIR CAR. LIKE CERCLA, THE SCS MAKES A SPECIFIC EXEMPTION FOR "CONSUMER PRODUCTS IN CONSUMER USE." THIS MEANS THAT A HOMEOWNER IS NOT STRICTLY LIABLE FOR THE RELEASE OF THE PAINT THINNER IN HIS GARAGE, OR THE CAN OF RAID UNDER THE KITCHEN SINK, OR THE PROPANE IN HIS CAMPER. THE HOMEOWNER WOULD ONLY BE LIABLE FOR HIS OWN NEGLIGENCE IN THE RELEASE OF THOSE PRODUCTS (PAGE 1, LINE 29; PAGE 9, LINES 11-12)

2. AS ORIGINALLY DRAFTED, HB 68 IMPOSED STRICT LIABILITY ON A RURAL HOMEOWNER WHO HAD A HONEYBUCKET CARTED OFF BY A BUSINESS, OR A CITY DWELLER WHO HAD HIS SEPTIC TANK PUMPED BY A BUSINESS. IF THE HONEY WAGON SPILLED ITS LOAD INTO CAMPBELL CREEK, FOR EXAMPLE, ANY HOMEOWNER WOULD HAVE BEEN STRICTLY LIABLE FOR THE FULL COSTS OF THE SPILL, EVEN IF THE TRUCK CONTAINED THE WASTE OF 25 OTHER HOMES. SINCE THE MOST COMMON KIND OF HAZARDOUS SUBSTANCE THE AVERAGE ALASKAN HAS TRANSPORTED IS DOMESTIC SEWAGE, THE COMMITTEE FELT THAT IT WAS APPROPRIATE TO EXEMPT HOMEOWNERS FROM STRICT LIABILITY FROM ITS TRANSPORT BY ANOTHER PARTY. (PAGE 2, LINE 12) THIS EXEMPTION DOES NOT

RELIEVE THE COMMERCIAL SERVICE CARRYING THE SEWAGE FROM STRICT LIABILITY.

3. HB 68 PROVIDED AN EXEMPTION FROM STRICT LIABILITY FOR THE STATE AS THE OWNER OF LAND WITH PREEXISTING SPILLS ON IT, IF THE STATE ACQUIRED THE LAND BY ESCHEAT, TAX FORECLOSURE, ETC. IT IS UNFAIR TO PENALIZE THE STATE FOR SOMETHING THAT THE PRIOR OWNER LEFT ON THE LAND, IF THE STATE ACQUIRED THE LAND INVOLUNTARILY. THE SCS EXTENDS THIS EXEMPTION TO OTHER CASES OF INVOLUNTARY ACQUISITION OF LAND THAT ARE COMMON IN ALASKA: ANCSA LAND GIVEN TO NATIVE CORPORATIONS; LAND ACQUIRED BY INHERITANCE OR BEQUEST; AND LAND GIVEN TO THE STATE UNDER THE STATEHOOD ACT. (PAGE 4, LINES 4 - 11)

4. A PERSON WHO HAS BEEN HELD STRICTLY LIABLE FOR A RELEASE WOULD UNDER THE COMMON LAW BE ABLE TO INITIATE AN ACTION FOR CONTRIBUTION TO GET THE OTHER LIABLE PARTIES TO REIMBURSE HIM FOR THE DAMAGES HE HAS PAID. WE REPEALED OUR CONTRIBUTION STATUTES IN THE LAST FEW YEARS AS PART OF TORT REFORM, AND TO BE CERTAIN THAT THIS RIGHT OF CONTRIBUTION STILL EXISTS WITH RESPECT TO AS 46.03.822, THE SCS INSERTS A PARAGRAPH RELATING TO CONTRIBUTION ON PAGE 6, LINES 7 - 16.

5. THE SCS ADDS CLARIFICATION OF WHO IS THE OWNER OR OPERATOR OF A VESSEL ON PAGE 9, LINE 17 THROUGH PAGE 10, LINE 7. THIS IS SIMILAR TO THE CERCLA DEFINITION. PERHAPS THE MOST SIGNIFICANT CLARIFICATION IS THE PROVISION MAKING IT CLEAR THAT A PERSON WHO MERELY HAS A SECURITY INTEREST IN A FACILITY, SUCH AS A BANK THAT LOANED MONEY TO A PERSON TO BUY LAND, IS NOT CONSIDERED THE OWNER OF THE LAND.

6. A DEFINITION OF "RELEASE" IS ADDED, SIMILAR TO THE CERCLA DEFINITION, ON PAGE 10, LINES 8 - 17. THIS CLARIFIES THAT THE BILL DOES NOT APPLY TO PERSONS ALREADY COVERED BY THOSE LAWS THAT RELATE TO HAZARDOUS SUBSTANCE RELEASES IN THE WORKPLACE, AND THAT AUTOMOBILE EXHAUST IS NOT SOMETHING THAT A PERSON IS STRICTLY LIABLE FOR. A LOOPHOLE IN THE ORIGINAL BILL WOULD HAVE ALLOWED ANY PERSON EFFECTED BY EXCESSIVE LEVELS OF CARBON MONOXIDE TO SUE ANY MOTOR VEHICLE OWNER IN THE CITY WHOSE VEHICLE EMITTED EXCESSIVE LEVELS OF CARBON MONOXIDE, AND HOLD THAT PERSON LIABLE FOR THE ENTIRE CARBON MONOXIDE PROBLEM. OF COURSE, A DEEP POCKET LIKE THE MUNICIPALITY WITH ITS FLEET OF BUSSES WOULD HAVE BEEN THE TARGET. A LAW THAT IS SUITABLE FOR DEALING WITH TOXIC WASTE DUMPS IN NOT NECESSARILY SUITED FOR AUTOMOBILE EXHAUST.

7. ON PAGE 12, LINES 22 - 28, A RETROACTIVITY SECTION IS ADDED. AS YOU KNOW, ALASKA LAW REQUIRES RETROACTIVE BILLS TO SAY SO. SINCE A MAJOR PURPOSE OF THIS LEGISLATION IS TO FORCE PEOPLE TO CLEAN UP HAZARDOUS SUBSTANCES THAT HAVE ALREADY BEEN SPILLED AND ARE STILL A PROBLEM, THE COMMITTEE FELT IT ADVISABLE TO MAKE CERTAIN THAT THE BILL DOES JUST THAT. OTHERWISE, PEOPLE MIGHT ARGUE THAT SINCE THE HARM

WAS CREATED BEFORE THE LAW PASSED, IT DOESN'T APPLY TO THEM.

THE COMMITTEE WISHED TO ADD A WHISTLEBLOWER PROVISION TO THE BILL, WHICH WOULD HAVE PROTECTED EMPLOYEES FROM EMPLOYER RETRIBUTION FOR WARNING THE GOVERNMENT ABOUT A RELEASE OR SERIOUS THREAT OF RELEASE OF A HAZARDOUS SUBSTANCE. UNFORTUNATELY, THE BILL DRAFTER ADVISED US THAT THIS WOULD NOT FIT IN THE TITLE.

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802 907-586-2345

AEL ISSUE PAPER
HB 68 STRICT LIABILITY FOR HAZARDOUS SUBSTANCES

The Alaska Environmental Lobby strongly supports HB 68 for the following reasons:

This bill will save public money at no additional cost to the State by recovering public costs of containing or cleaning up hazardous substance spills. Currently the State and local communities often must bear the financial burden of clean up costs. Passage of the bill would reduce the demand of the State for funds for the cleanup of hazardous substances.

The bill insures the recovery of public money by granting the State an immediate right to file a lien on an equal basis with other creditors when a party responsible for improper waste disposal declares bankruptcy.

The bill promotes the responsible disposal of hazardous substances through a more clearly defined liability than that found within the current law.

The responsible disposal of hazardous wastes protects the public health, the environment, and the economy of the State.

Becky Achten
3-17-89

ALASKA CENTER FOR THE ENVIRONMENT • ALASKA CHAPTER, SIERRA CLUB • JUNEAU GROUP, SIERRA CLUB • SITKA GROUP, SIERRA CLUB
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KNIK KANOERS AND KAYAKERS

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M May 4, 1989

SUBJECT: Miscellaneous Comments
SCS CSHB 68(Judiciary)

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Terri Lauterbach TWL
Legislative Counsel

Enclosed is a new draft of SCS CSHB 68(Judiciary).

As Tam Cook explained to Chris Christensen yesterday, the time constraints under which this draft was prepared did not allow us to review the draft with the thoroughness we would have liked to exercise.

In addition to time constraints, we were under directions from Chris to avoid making changes in the federal language and assistant AG language submitted for the draft.

Within these constraints, we were able to make some improvements in the draft with Chris' consent. However, we continue to have reservations in the following areas, among others:

(1) Page 2, lines 1 - 5: The placement of the phrase "other than domestic sewage" is awkward at best, and ambiguous at worst.

(2) Subsection (j) on pages 5 - 6: Whether this subsection provides all the essential provisions needed for a contribution action is an open question, particularly in light of the fact that the recent initiative repealed our contribution statutes.

(3) Definition of "owner or operator": The phrase used on page 1, line 27, is "owner and operator." The defined term should be the phrase that is actually

used. Or is it your intent that a person be both the owner and operator before liability attaches? We suggest using "owner or operator" on page 1, line 27.

(4) We are uncertain whether the extent of retroactivity provided in sec. 8 of the draft is consistent with due process requirements.

(5) We are uncertain whether the use of federal language in the definitions and elsewhere achieves a coherent objective within the overall scheme of the bill, which includes language other than federal language. We are not suggesting that more federal language be used, only that you carefully review the federal definitions to see if they accomplish your objectives in the context of this draft.

(6) I have deleted a personal pronoun and some uses of "which" and "such," in the submitted language, in keeping with the plain English requirements of our drafting manual. However, there remain several other types of language that we would not ordinarily use in a bill draft.

Given our reservations as listed, we cannot guarantee that the enclosed draft reflects a cohesive set of sections with workably clear language.

Please let me know if I can be of further assistance.

TL:gc
WKG10/048

Enclosure

MARY NORDALE

CS HB 68 (Judiciary)

page 5, line 17, add new subsection as follows:

(i) In an action to recover damages or costs, a court shall determine if a rational basis exists for apportionment of the harm and shall apportion the damages or costs accordingly.

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

POSITION PAPER

CSHB 68 (Oil and Gas)

April 14, 1989

Title

An Act relating to liability for the release or threatened release of a hazardous substance; recovery of state costs for an oil or hazardous substance release; liability for response action contractors; and providing for an effective date.

Effect of the Bill

The purpose of the bill is to strengthen the State's ability to obtain cleanup of hazardous substance spills.

Section 1 of the bill includes a technical amendment regarding filing of liens.

Section 2 of the bill would make the state's requirements for liability for releases of hazardous substances explicit. The current statute refers to a "person owning or having control over a hazardous substance . . . " as being strictly liable for a release of that substance. The bill would explicitly expand the coverage of this provision to include other parties that have responsibility for hazardous substances. These include:

- Those who generate hazardous wastes;

- Those who have control over sites where hazardous substances are released;

- Those who transport hazardous wastes in cases where the transporter also selects the disposal method.

These parties are currently liable under common law, but the proposed statute would clarify this liability and reduce the need for litigation. This is necessary to ensure that the key parties who manage hazardous substances are liable if the substances are released.

Defenses for liability are included for third party acts, acts of war, innocent landowners, and certain other cases.

The Oil and Gas Committee added an amendment that would clarify that transporters of refined petroleum products are not liable as

transporters under the terms of the bill.

Section 3 establishes provides that response action contractors who are called upon to response to a spill are liable for actions caused by their own negligence.

Sections 4, 5 and 6 include definitions.

Section 7 of the bill would enable the state to file a lien against assets of a responsible party to recover its costs for cleanup of oil and hazardous waste sites, in cases where the responsible party declares bankruptcy. At present, the Department must first secure a judgement through the court and then participate in a bankruptcy proceeding. The bill would not supercede the claims of secured creditors such as mortgage-holders.

Department Position

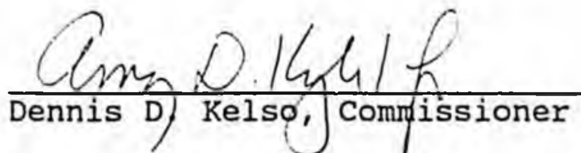
The bill was introduced at the request of the Governor. The Department strongly supports the bill and feels that it is necessary to provide appropriate tools to ensure that hazardous substance releases may be responded to properly. The first two sections of the law incorporate provisions similar to the liability provisions of the federal "Superfund" law into state law. The third section would implement a recommendation made to the states by the U.S. Supreme Court.

The people of th- state are discovering increasing numbers of problems from spills and improper management of hazardous substances. It is imperative that parties who manage these materials take care to keep them out of the state's waters and lands. This will only happen if all the parties who manage hazardous materials are fully responsible for proper management.

This bill would allow the department to ensure that the party responsible for an action such as spilling hazardous substances, dumping barrels of hazardous materials on private propertv or for abandoning a contaminated site and then transferring title, can be held liable. This will provide a powerful incentive for proper management.

Fiscal Effect

There will be no additional costs resulting from this bill. The legislation would reduce State expenditures for cleanup over the long-term, as responsible parties will be footing a greater share of the cleanup bill. The Department has prepared a zero fiscal note.



Dennis D. Kelso, Commissioner

HB 68

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§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. 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 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 or incineration vessel 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, incineration vessels 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—~~ ; this paragraph does not apply to the transport of refined oil.

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe 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;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i) [42 USCS § 9604(i)].

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 [26 USCS §§ 9501 et seq.]. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses. There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the

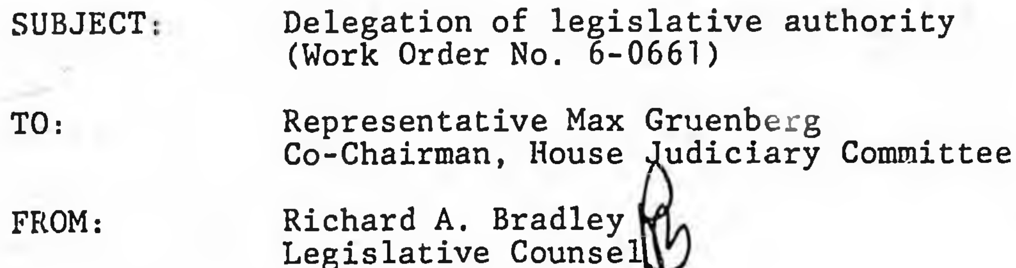
Toni,
the change reflects the amendment made in the Oil & Gas CS
Chris x4523

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

<u>M E M O R A N D U M</u> January 26, 1989



SUBJECT: Delegation of legislative authority
(Work Order No. 6-0661)

TO: Representative Max Gruenberg
Co-Chairman, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

Mark Handley has asked that we comment on the question presented by the adoption of federal law or regulations by reference in state statutes. An example of this is found in a Governor's bill: HB 70. Sec. 3 of the bill provides that the department "shall pay for prescribed drugs under AS 47.07.030(b) in accordance with 42 C.F.R. 447.331 -- 447.334.

Perhaps the best argument for not incorporating Federal references, particularly to regulations but also to laws, is that the Federal authorities may change the Federal laws. If they do, the references are either disregarded ("we know what was intended by the law") or they cripple the law.

A good case can be made that such an adoption is unconstitutional as a delegation of legislative authority. Whether it is, or not, may be unimportant because we believe that it is done frequently and necessarily in many areas where state officers operate under Federal regulations that have a habit of changing frequently.

But the solution to the problem presented in HB 70 can be easily addressed quite constitutionally by granting the commissioner of health and social services the authority to adopt by regulation whatever formula the state wants-- as, for example, by saying that the department "shall pay for prescribed drugs under AS 47.07.030(b) under regulations adopted by the commissioner in conformity with applicable federal regulations." The regulatory framework permits rapid amendment of the regulations and yet a state officer with

expertise in the area is monitoring the developments and is able to keep the law current.

If federal laws or regulations are amended in a fashion unacceptable to state officers, the assistance of the legislature can be requested.

If I may be of further assistance, please advise.

RAB:kb:gc
wkk1/075

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM January 18, 1989

SUBJECT: HB 68 and repeal or amendment of an initiative (HB 68)

TO: Representative Curt Menard, Co-chair
House Resources Committee

FROM: Terri Lauterbach
Legislative Counsel

You have asked whether HB 68's amendment of AS 46.03.822(a) to provide for joint and several liability for the release or threatened release of a hazardous substance violates constitutional restrictions on amendment and repeal of initiatives. You have also asked for a general discussion of the extent to which the legislature may amend or repeal a law that has been enacted by initiative.

With regard to HB 68, it is my opinion that its amendment of AS 46.03.822(a) to provide for joint and several liability for damages described by that section does not violate constitutional restrictions on amendment and repeal of initiatives. It has the effect of amending Initiative 87-02 in a permissibly narrow way.

The constitutional provision governing this question is sec. 6, art. XI, Constitution of the State of Alaska, which provides:

> SECTION 6. ENACTMENT. If a majority of the votes cast on the proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on the proposition favor the rejection of an act referred, it is rejected. The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, is not subject to veto, and <u>may not be repealed by the legislature within two years</u> of its effective date. <u>It may be amended at any time</u>. An act rejected by referendum is void thirty

> days after certification. Additional procedures for the initiative and referendum may be prescribed by law. (Emphasis added.)

The Alaska Supreme Court has addressed the question whether a law may be amended and has shown a tendency to approve amendments quite broadly. Thus a reduction in penalties in an initiated law was approved in Warren v. Thomas, 568 P.2d 400 (Alaska 1977). And, in Warren v. Boucher, 543 P.2d 731 (Alaska 1975), the Alaska Supreme Court acknowledged that the power to amend an initiative was an explicit "check or balance" against the initiative process.

Furthermore, an Attorney General's opinion concluded that the legislature could alter or delete an initiative's requirement that the capital site contain no less than 100 square miles of state land as well as the requirement that the site selected be more than 30 miles from either Anchorage or Fairbanks. Op. Att'y Gen., August 19, 1975.

In my view, the Constitution asks the legislature to give deference to the wishes of the people as expressed in an initiative, at the same time recognizing that an initiative may present policy problems that the legislature may need to resolve. Because the people may not themselves address the difficulties in a particular initiative by amending it but rather must vote it up or down, the constitution permits the legislature to amend it at any time.

The Thomas court suggested that there could be situations in which an amendment so vitiates an act passed by initiative that it constitutes its repeal. In my opinion, that issue is not raised by the amendment in HB 68. The amendment in HB 68 changes the initiative's general rule of several liability with respect to only a limited type of tort action. In being so narrow, the amendment could not be said to vitiate the initiative.

In discussing HB 68, I hope the general parameters of legislative power to amend or repeal an initiative have been clear. The legislature may amend an initiative at any time as long as that amendment does not change the law passed by the initiative so much that it amounts to a repeal of that law. The legislature may repeal an initiative within two years of its effective date.

I hope this discussion is helpful to you. If I may be of further assistance, please let me know.

TL:gc
WKG5/105

January 24, 1989

The Honorable Curt Menard
Alaska State Legislature
House of Reprecentatives
P.O. Box V
Juneau, Alaska 99811

Re: HB 68 and Ballot Measure No. 2
Our File No. 661-89-0302

Dear Representative Menard:

You have asked for our opinion on whether HB 68, which concerns strict and joint and several liability for hazardous substances releases, would conflict with the intent of Ballot Measure No. 2 adopted by the voters during the most recent general election. You have also made a generic inquiry regarding legislative repeal or amendment of laws enacted by initiative.

The short answer to your first question is no. The summary response to your second inquiry is that an initiative may not be repealed by the legislature for a period of two years after its effective date, but it may be amended at any time. Our analysis follows.

First, Ballot Measure No. 2 effected two very specific and discrete changes in the manner in which liability and damages for traditional personal injury torts will be assessed: it limits a party's liability to its actual percentage of fault and it repeals a statutory right of contribution among two or more persons who were jointly and severally liable for the tort. 1/ Ballot Measure No. 2 did not expressly repeal any other statutory provision concerning strict and joint and several liability. Most pointedly, it is silent on the strict and joint and several liability provisions of AS 46.03.758(e) and other statutes set forth in AS. 46.03 and AS 46.04 concerning oil and hazardous substance releases. For this reason, we do not believe that HB 68 would infringe upon Ballot Measure No. 2.

1/ The precise language of Ballot Measure No. 2 amends a portion of AS 09.17.080(d) and repeals AS 09.16.

Furthermore, the intent of the voters in approving Ballot Measure No. 2 can be ascertained from the arguments made in support of the initiative. In Re Lance W., 694 P. 2d 744, 753 (Cal. 1985). See also Carman v. Alford, 644 P. 2d 192 (Cal. 1982) (election materials helpful in discerning voters' intent); Los Angeles County Transp. Comm. v. Richmond, 643 P. 2d 941 (Cal. 1982) (ambiguities in initiative resolved by referring to arguments in support). In this case, that it a relatively easy task.

The attached advertisement paid for by the coalition supporting Ballot Measure No. 2 unequivocally states that:

> Ballot Measure No. 2 will have no impact on Alaska's environmental protection laws.

(emphasis in original). See Attachment 1. In addition, the coalition supporting Ballot Measure No. 2 explicitly agreed with legislative counsel that it would have no effect on state environmental laws. Id. This advertisement is direct evidence of the voters' intent not to affect the liability provisions, including strict and joint and several liability, of state environmental laws. Enactment of HB 68, amending the provisions of AS. 46.03.822, will thus not violate the intent of the voters in approving Ballot Measure No. 2.

As to your second question, section 6 of article XI of the state constitution provides that the legislature may amend a law enacted by initiative, but may not repeal the initiative within two years of its effective date. "[T]he legislature has broad powers to amend an initiative." Warren v. Thomas, 568 P.2d 400, 402 (Alaska 1977)(fn. omitted). There could be a point at which amendment and repeal tend to converge where, for example, "the legislature has exceeded that broad power by passing an amendment which so vitiates the initiative as to 'constitute its repeal'". Supra, 568 P.2d at 402 (citation omitted). 2/ The passage of HB 68, however, does not raise this spectre.

"[A]n amendment of an act operates as a repeal of its provisions to the extent that they are materially changed by, and

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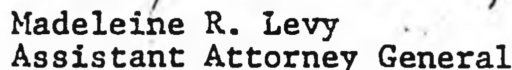
2/ The Alaska Supreme Court has reserved judgment on the precise question of when an amendment might constitute a repeal of an initiative. Warren v. Thomas, supra, 568 P. 2d at 404.

rendered repugnant to, the amendatory act." Id. (citation omitted). Nothing in HB 68 is repugnant to Ballot Measure No. 2. Nothing in Ballot Measure No. 2 is materially changed by HB 68. Ballot Measure No. 2 simply did not address the liability provisions of environmental laws, which is precisely what HB 68 does. Since the subject matter of HB 68 was not even contemplated in the adoption of Ballot Measure No. 2, it can hardly be said to materially change or be repugnant to the ballot measure.

We hope that this adequately responds to your questions. Please feel free to contact us for further information.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL



By:
Madeleine R. Levy
Assistant Attorney General

MRL:jem

Attachment

It's time to clear the air about the effect of tort reform on the environment.

Trial lawyers opposed to Ballot Measure No. 2 would have you believe that this measure poses a threat to our environment. They maintain that if this measure passes, polluters will escape paying for the environmental damage they cause. That's simply not true.

According to the legislature's own independent lawyer, Ballot Measure No. 2 will have *no impact* on Alaska's environmental protection laws. Similarly, it will have *no impact* on federal environmental protection laws.

The truth of the matter is that since 1986, 39 states have passed some form of tort reform. And on November 8th, it will be your turn to set the record straight.

Ballot Measure No. 2 will make Alaska's liability law more equitable. At the same time it will protect the right of the victim to receive compensation from those who are responsible.

These are the facts. Don't allow a lot of legal double talk to cloud the issue.

Support tort reform.
Vote for Ballot Measure No. 2 on November 8th.

Paid for by Citizens Coalition for Tort Reform, P.O. Box [illegible], Anchorage, Alaska [illegible] David McGuire, M.D., Chairman.

ATTACHMENT 1 PAGE 1 OF 1 PAGES

MEMORANDUM State of Alaska

DEPARTMENT OF LAW

TO: The Honorable Dennis Kelso
Commissioner
Department of Environmental Conservation
P.O. Box O
Juneau, Alaska 99811-1800

THRU:

DATE: November 2, 1988

FILE NO: 661-89-0172

TELEPHONE NO: 276-3550

SUBJECT: Implications of Proposed Ballot Measure No. 2

FROM: Madeleine R. Levy
Assistant Attorney General
Natural Resources - Anchorage

CONFIDENTIAL - ATTORNEY CLIENT PRIVILEGE

You have requested our opinion on the implications of proposed ballot measure number 2, the "tort reform" initiative, for oil and hazardous substances spill claims. In a nutshell, our conclusion is that the initiative should not affect recovery of damages, penalties, and costs for oil and hazardous substances releases.

The official ballot language describes the proposed initiative as follows:

> This initiative changes the way damages can be collected from parties to lawsuits who share fault for injury to persons or property. The law now says that a party more than half responsible could be liable for the total judgment. Parties may collect from each other amounts paid over their share. Parties less than half responsible pay only up to twice their fault.
>
> The initiative would make each party liable only for damages equal to his or her share of fault, and repeal the law concerning reimbursement from other parties.
>
> Shall this initiative become law?
>
> YES [ ]
>
> NO [ ]

02-001A (Rev. 8/85)

The actual text of the amendment proposed by the initiative specifically amends two statutes. The first is AS 09.17.080(d) which provides for apportionment of damages in personal injury and property damage cases. The second is AS 09.16, which provides for contribution among joint tortfeasors. 1/

Ballot measure number 2 would limit any party's liability to its actual percentage of fault and would expressly repeal contradictory provisions in AS 09.17.080(d). It would

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1/ Enacted by the legislature as Section 1 of Ch. 139, SLA 1986, AS 09.17.080 was part of a statutory package to put a lid on classic tort liability. The statutory package has several components. It limits noneconomic damages for personal injury to $500,000.00. AS 09.17.010. It specifies that the burden of proof for imposing punitive damages is "clear and convincing" evidence. AS 09.17.020. It limits the liability of certain non-profit and public bodies. AS 09.17.050. It provides for calculation and payment of future economic damages as well as special verdicts itemizing various damages. AS 09.17.040. It authorizes diminution of recovery in the case of contributory fault and certain collateral benefits. AS 09.17.060-09.17.070.

AS 09.17.080 provides that the trier of fact must first find the percentage of the total fault attributable to each party. The court will then enter judgment against each liable party on the basis of joint and several liability,

> except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

"Fault" includes acts or omissions that are negligent or reckless as well as acts that subject a person to strict tort liability. AS 09.17.900.

The joint tortfeasors act, adopted in 1970, provides a right of contribution among two or more persons who are jointly or severally liable in tort for the same injury.

also expressly repeal AS 09.16.010, et seq., the "Contribution Among Joint Tortfeasors Act." See Full Text of Proposed Amendment by Ballot Initiative Number 2, attached as Appendix A.

Ballot measure number 2 (henceforth "the initiative") does not expressly repeal any other statutory provision concerning joint and several liability. Specifically, the initiative is silent on joint and several liability authorized by AS 46.03.758(e) or civil liability which could be imposed pursuant to AS 46.03 and AS 46.04 for oil and hazardous substance releases. Therefore, the initiative could only affect liability under these statutes if a court were to conclude that the initiative has repealed them by implication. We agree with the attached September 7, 1988 memorandum from the Legislative Affairs Agency that there is no implied repeal of these statutes. See Appendix B.

As the Legislative Affairs memo points out, repeal by implication is not favored. This is because "subsequent legislation is not presumed to repeal the existing law in the absence of expressed intent." 1A Sutherland Statutory Construction § 23.09 (4th ed). The Alaska Supreme Court has uniformly held that "the implied repeal of an act is disfavored and will be limited to that which is necessary to carry out the intent of the legislature." Warren v. Thomas, 568 P.2d 400, 403 (Alaska 1977) (citations omitted); see also Peter v. State, 531 P.2d 1263, 1268 (Alaska 1975). The same analysis should be applied to an initiative: implied repeal by initiative will be disfavored and should be limited to that which is necessary to carry out the intent of the voters.

Clearly, the voters, if they approve the initiative, will be expressing their intent to repeal only those two statutes which are specifically mentioned in the actual text of the amendment proposed by the initiative. Implied repeal of any other statutes will not be presumed. This is particularly true where there is not an irreconcilable conflict between the express intent of the initiative and other statutes. Peter v. State, supra, 531 P.2d at 1268. "Where a reasonable construction of a statute [or initiative] can be adopted which realizes the [voter's] intent and avoids conflict or inconsistency with another statute this should be done." Hafling v. Inlandboatmen's Union, 585 P.2d 870, 875 (Alaska 1978) (quotation and footnote omitted). Moreover, the mere fact that there may be an inconsistency between the initiative and other statutes does not mean that a repeal of the other statutes will be implied. "[I]f the inconsistency between the two enactments is not fatal to the

operation of either, the two may stand together and there will be no implied repeal." Id., 585 P.2d at 876 n.20 (citations omitted).

As the Legislative Affairs memo acknowledges, there is no irreconcilable conflict between the initiative and the anti-pollution laws set forth in AS 46.03 and AS 46.08. The former adopts a generic limit on recovery in garden variety tort claims while the latter authorize recovery of damages, penalties and costs only in the instance of unpermitted oil and hazardous substances spills. As statutes promoting and protecting the conservation of natural resources and preventing their destruction, AS 46.03 and AS 46.08 shall be liberally interpreted to achieve their stated ends. Kenai Pen. Fisherman's Co-op Ass'n. v. State, 628 P.2d 897, 903 (Alaska 1981). Implied repeal of these statutes by a generic initiative which, on its face, is silent on anti-pollution laws, will not be assumed.

If you have further questions, please do not hesitate to contact us.

MRL:jem

BALLOT MEASURE NO. 2

Initiative No. 87TOR2
Civil Liability

BALLOT LANGUAGE

(As it will appear on the November 8, 1988, General Election Ballot)

This initiative changes the way damages can be collected from parties to lawsuits who share fault for injury to persons or property. The law now says that a party more than half responsible could be liable for the total judgement. Parties may collect from each other amounts paid over their share. Parties less than half responsible pay only up to twice their fault.

The initiative would make each party liable only for damages equal to his or her share of fault, and repeal the law concerning reimbursement from other parties.

Shall this initiative become law?

YES ☐

NO ☐

LEGISLATIVE AFFAIRS AGENCY SUMMARY

This measure will affect lawsuits in which two or more persons are at fault.

The new law would tell the court to enter judgment against each person at fault, but only in an amount that represents that person's share of the fault.

Existing law now tells the court to enter judgment against each person at fault in an amount equal to the total liability of all persons at fault. Those at fault are required to share the total cost of the fault. The measure repeals that law.

The measure applies to suits based on acts occurring after its effective date.

FULL TEXT OF PROPOSED AMENDMENT

What follows is the actual text of the amendment to Title 9 of the Alaska Statutes proposed by the initiative which would become law if the measure is passed by the voters. Capitalized words appearing in brackets are those in the current law which would be deleted. Words that are underlined would be added to the current law.

*Section 1. AS 09.17.080(d) is amended to read:

(d)The court shall enter judgment against each party liable on the basis of [JOINT AND] several liability [, EXCEPT THAT A PARTY WHO IS ALLOCATED LESS THAN 50 PERCENT OF THE TOTAL FAULT ALLOCATED TO ALL THE PARTIES MAY NOT BE JOINTLY LIABLE FOR MORE THAN TWICE THE PERCENTAGE OF FAULT ALLOCATED TO THAT PARTY] in accordance with that party's percentage of fault.

*Sec. 2. AS 09.16 is repealed.

*Sec. 3. Underlined material in this Act indicates text that is being added to the law, and bracketed material in capital letters in this act indicates deletions from the law.

*Sec. 4. Sections 1–2 of this Act apply to all causes of action accruing after the effective date of this Act.

*Sec. 5. If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

October 24, 1988

Lonni Levy
Office of the Attorney General
State of Alaska
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501

Dear Ms. Levy,

Enclosed is the memorandum concerning the effect of the "tort reform" initiative on certain environmental protection statutes that you requested.

The release of this memorandum has been approved by Senator Jan Faiks, for whom the memorandum was prepared.

Sincerely,

George Utermohle

George Utermohle
Legislative Counsel

Enclosure

GU:gc
WKG4/012

M E M O R A N D U M   September 7, 1988

SUBJECT: Tort reform initiative (Work Order No. 6-0079)

TO: Senator Jan Faiks

FROM: Michael F. Ford
Legislative Counsel

Assuming the ballot initiative repealing joint liability under AS 09.17.080(d) passes, you have asked if this will also affect the joint liability for discharges of oil or other pollutants under AS 46.03, or the liability for clean-up or containment of oil or hazardous substances under AS 46.08.070. As explained in this memo, I do not believe that passage of the initiative will affect the joint and several liability provided for under AS 46.03.758(e) or other civil liability imposed under AS 46.03 or AS 46.08.

Passage of the initiative would amend AS 09.17.080(d) and eliminate joint liability under that law. The initiative does not directly amend any other civil penalty or reflect an intent to repeal or amend civil liability established under other statutes. Absent a specific intent to repeal or amend, the question becomes will the passage of the initiative result in amendment by implication? A statute can certainly be amended by implication, but generally only when the statute falls into one of two categories. First, when there is irreconcilable conflict between two laws, then the later act constitutes implied repeal to the extent of the conflict. Second, if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will similarly repeal the earlier act. Peter v. State, 531 P.2d 1263 (AK 1975).

Concerning the first category, there is not an irreconcilable conflict between the AS 09.17.080(d) and the pollution laws, particularly when comparing these laws in the context of their respective chapters. The AS 09.17 pro-

vision is a general limitation on civil liability, imposed in tort cases. The AS 46.03 and AS 46.08 provisions only apply to civil suits brought for illegal oil or other hazardous pollution. These environmental provisions are narrow public interest statutes, clearly distinguishable from the tort limitations imposed under AS 09.17.

Given the distinctions between AS 09.17 and AS 46.03 and 08, it is also difficult to argue that the second category of repeal by implication applies. There is no indication that the tort reform act was intended to address the natural resource protection policies outlined in AS 46.03 and 08, or that the tort reforms were intended as a substitute for the civil penalties contained in those chapters. Therefore amendment of AS 09.17.080(d) by initiative will not amend these provisions by implication. This same reasoning applies to regulations adopted under the environmental statutes. Unless the limitation on tort liability irreconcilably conflicts with the regulations, or is intended as a substitute, passage of the initiative will have no affect on these regulations.

Federal law in the area of hazardous pollution is contained in 46 U.S.C. 9601 - 9657. While the federal law does not preempt the states from imposing additional liability, a person who receives compensation under federal law is precluded from recovering compensation for the same damages under state law. See 46 U.S.C. 9614(b). Under federal law, "hazardous substance" does not include petroleum or natural gas, unless specifically designated as a hazardous substance by the administrator of the Environmental Protection Agency. See 46 U.S.C. 9601(14).

If you have further questions please contact me.

MFF:gc
WKG3:090

March 21, 1989

RECEIVED
MAR 23 1989
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

Hayden Kaden
Committee Co-counsel
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Re: CSHB 68

Dear Mr. Kaden:

You have asked this office for a very brief analysis of the standard of liability which has been imposed on parties who generate, transport, treat, store or dispose of hazardous substances, or own land where disposal has occurred, under the federal Comprehensive Environmental Response, Compens[illegible] and Liability Act of 1980, 42 U.S.C. §9601, et seq (CE[illegible] after which CSHB 68 is modeled.

First, the courts have uniformly rul[illegible] at CERCLA establishes strict liability for the classes of p[illegible] referred to above, subject only to the defenses set fo[illegible] in section 107(b) of CERCLA. Essentially the same defenses [illegible] the strict liability of CSHB 68 are set forth in pr[illegible]ed section AS.46.03.822(b). As the federal Court of Appeals [illegible] the Second Circuit explained in the leading case of New York v. [illegible]ore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985), "Cong[illegible]ess intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included . . . [CERCLA] provides that 'liability' under CERCLA 'shall be construed to be the standard of liability under Section 311 of the Clean Water Act, which courts have held to be strict liability, . . . and which Congress understood to impose such liability.'" Under strict liability, parties are liable without regard to negligence unless they come within the specified defenses.

Second, federal courts have reached the consensus position that CERCLA imposes joint and several liability for hazardous wastes cleanups unless the defendant meets its burden of proving that the harm is divisible and that there is a reasonable basis for apportionment of costs and damages. For example, in the seminal case of U.S. v. Chem-Dyne, 572 F. Supp. 802, 810-11 (S.D. Ohio 1983), the federal district court held

that joint and several liability is appropriate for most cleanup cases because wastes have been commingled and it is difficult to establish "a reasonable basis for division according to the contribution of each." The Chem-Dyne facility contained 608,000 pounds of hazardous material received from 289 separate generators and transporters.

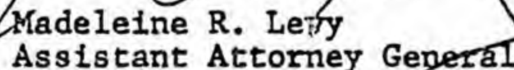
In other words, where mixing of wastes results in one single harm to the environment, <u>all</u> contributors to that harm are "held liable jointly and severally for the entire harm." <u>U.S. v. Monsanto</u>, 858 F.2d 160, 172 (4th Cir. 1988). (A copy of the relevant portion of the brief filed by the federal government in <u>Monsanto</u> is attached for your convenience.) Courts have uniformly rejected the notion that liability to the government should be apportioned based on the amount of waste contributed by each defendant. <u>Monsanto</u>, 858 F.2d at 172.

However, once joint and several liability to the government has been established, liable parties may seek reimbursement from each other in accordance with each party's relative contribution to the site. As the <u>Monsanto</u> court put it, "making the government whole for response costs was the primary consideration [of CERCLA] . . ." but "the defendants still have the right to sue responsible parties for contribution and in that action they may assert both legal and equitable theories of cost allocation." 858 F.2d at 173 (fn omitted).

The 1986 amendments to CERCLA specifically provide for an action for contribution among responsible parties (although courts had previously held that a right of contribution among responsible parties was implied under the joint and several liability scheme of CERCLA.) <u>See</u> section 113(f) of CERCLA, 42 U.S.C. §9613(f), and attachment at pp. 39-42. If you require further assistance from us, please do not hesitate to ask.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL



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CITATIONS

Cases:

<u>Anderson v. Liberty Lobby, Inc.</u>, 106 S. Ct. 2505 -- 23,24
<u>Andrus v. Glover Construction Co.</u>, 446 U.S. 608 --- 31
<u>Azure v. City of Billings</u>, 596 P.2d 460 --------------- 38
<u>Bell v. New Jersey</u>, 461 U.S. 773 ---------------------- 42
<u>Board of Governors v. Agnew</u>, 329 U.S. 441 --- 60
<u>Bradley v. Richmond School Board</u>, 416 U.S. 696 --- 3,68
<u>Brandon Township v. Jerome Builders, Inc.</u>, 80 Mich. App. 180 ----------------------------------- 25
<u>Brink v. DaLesio</u>, 667 F.2d 420 ------------------------- 56
<u>Campbell v. United States</u>, 365 U.S. 85 ---------------- 22

out an additional, and potentially enormous exception, for landlord-tenant contracts.

The landowners next contend (Br 16) that they only intended to rent a warehouse building on the site, [illegible] the entire Bluff Road site. But even if it were true that they intended to rent only part of the site, the activities of SCRDI were still "in connection with" a contractual relationship with the landowners. In any event, the landowners admittedly became aware of the disposal of hazardous wastes outside the warehouse in late 1977, yet continued to rent the property on a month-to-month basis. There can be no question that the continued disposal of wastes at Bluff Road after 1977 was "in connection with" a contractual relationship with the landowners.

Furthermore, a Section 107(b) defense is unavailable because the landowners have never attempted to show a critical element of such a defense: that they "took precautions against foreseeable acts or omissions" of the party they claim is responsible. Such a showing would be impossible in this case since, (1) in renting the property to a chemical company in 1972 the landowners did not take the simple precaution of insisting on lease terms to assure that the property was not used improperly so as to create a hazardous situation; (2) the landowners never

---

19/ (...continued)
that he undertook "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice * * *." This definition confirms that contracts conveying interests in land, such as leases, fall within the statute unless the narrow terms of the exception apply.

inspected the property in over eight years; and (3) even after learning of the enormous environmental hazard which had developed on their property in 1977, they did not institute ejectment proceedings, or even insist on new lease terms that might have remedied the situation or at least prevented the accumulation of additional waste. Instead, they continued to renew the existing month-to-month lease which apparently contained no protections whatsoever. As the landowners cannot hope to show that they "took precautions against foreseeable acts or omissions," the Section 107(b)(3) defense is unavailable to them. See Shore Realty, 759 F.2d at 1049.

III

JOINT AND SEVERAL LIABILITY WAS APPROPRIATE BECAUSE THE UNDISPUTED FACTS SHOWED THAT THE HARM AT THE SITE WAS INDIVISIBLE; THE DISTRICT COURT PROPERLY REJECTED ARBITRARY METHODS OF COST APPORTIONMENT AS A WAY TO "DIVIDE" THE HARM

The courts have uniformly agreed that although the phrase "joint and several liability" does not appear on CERCLA's face, Congress intended that the doctrine be applied in appropriate circumstances. "[T]he legislative history evinces the intent that the scope of liability under CERCLA, 42 U.S.C. § 9607, be determined from traditional and evolving principles of common law * * *." United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983). The courts have found that those principles support joint and several liability for defendants made liable by Section 107(a) where the harm or threat of harm to which the government had to respond was "indivis-

ible."[20] Chem-Dyne, 572 F. Supp. at 810; see also Ottati, 630 F. Supp. 1395-1396, State of Idaho v. Bunker Hill Co., 635 F. Supp. 665, 676-677 (D.Idaho 1986); United States v. Conservation Chemical Co., 589 F. Supp. 59, 63 (W.D. Mo. 1984); United States v. Medley, 25 ERC 1315, 1318 (D.S.C. 1986). Furthermore, where defendants liable under Section 107 seek to limit the scope of their liability on the ground that the entire harm is capable of apportionment, the burden of proof of apportionment is on those defendants. Chem-Dyne, 572 F. Supp. at 810; Wade, 577 F. Supp. at 1338-1339; Bunker Hill, 635 F. Supp. at 677; Ottati, 630 F. Supp. at 1396; Conservation Chemical, 589 F. Supp. at 63; see also Restatement (Second) of Torts § 433B (1965).

The district court adopted the analysis of the seminal Chem-Dyne decision.[21] The court concluded (2/23/84 order at 15; JA) that, "based on undisputed facts, the harm at the Bluff Road site was indivisible."

> There were thousands of corroded, leaking drums at the site not segregated by source or waste type. Unknown, incompatible materials commingled to cause fires, fumes, and explosions. Because of the constant

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20/ It is settled that Congress intended the courts to apply a uniform federal rule of joint and several liability under Section 107(a), rather than apply the law of the forum state. Chem-Dyne, 572 F. Supp. at 809; Wade, 577 F. Supp. at 1338; Colorado v. ASARCO, 22 ERC 1927, 1928 (D.Colo. 1985); see 126 Cong. Rec. H11787 (Dec. 3, 1980), 1 Leg. Hist. at 778 ("the bill will encourage the further development of a Federal common law in this area") (remarks of Rep. Florio); see also, S. Rep. 96-848 at 11, 1 Leg. Hist. at 318.

21/ As noted infra at 42, Congress has recently affirmed that Chem-Dyne properly sets out the rules governing joint and several liability under CERCLA.

> threat of further fires, explosions, and other reactions, all of the materials at the site were, if not actually oozing out, in danger of being released. Thus, while all of the substances at the site contributed synergistically to the threatening condition at the site, it is impossible to ascertain the degree of relative contribution of each substance.

Neither the generators (Br 20-21) nor the landowners (Br 13-14) contest that Chem-Dyne sets out the proper test for joint and several liability. Nor do they contest the district court's characterization of the site as one where it was "impossible to ascertain the degree of relative contribution of each substance." The generators merely protest the rejection of their argument that "'there may be a means of roughly apportioning the costs of cleanup among responsible parties by calculating their relative volumetric contributions from shipping documents'" (Br 22, quoting order at 15), while the landowners protest the imposition of joint and several liability on assertedly "innocent" parties (Br 14). These arguments are without merit.

A. Under the common law, the harm at a site like Bluff Road would not be divided among defendants [illegible] the basis of volume of waste sent to the site. -- The ge[illegible] begin with a faulty reading of the common law of joint and several liability, and in particular the Restatement (Second) of Torts. Under Restatement Section 433A, joint and several liability does not apply where there are distinct harms, or where "there is a reasonable basis for determining the contribution of each cause to a single harm" (emphasis added). The Restatement explains what a "reasonable

basis" for dividing a harm among defendants is by means of an example:

> [W]here the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop, the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each, <u>and the reasonable assumption that the respective harm done is proportionate to that number</u>.

2 Restatement (Second) of Torts 436 (1965) (emphasis added).

Similarly, in the case of two factories which pollute a stream, the injury may be apportioned among the factory owners on the basis of the quantity of pollution discharged by each. Id. While the generators cite this example (Br 21), they fail to see that it too is based on the assumption that the respective harm done by each factory is proportionate to the quantity of pollution discharged. This is made clear by the example set forth to illustrate this point, which involves two factories which discharge the same pollutant (oil) into a stream, thereby depriving a landowner of the use of the water. Id. at 437. In that case the harm is proportionate to the amount of oil each defendant contributed to the stream. However, the Restatement cautions that if the oil had ignited and burned down the landowner's barn, or if it had poisoned his cattle, the harm could no longer be logically apportioned between the two factories. Id. at 441, illustrations 14 & 15.

Clearly, the generators presented no "reasonable basis" for determining the contribution of each to the harm at Bluff Road, where many different hazardous wastes have leaked and

combined, leading to fires, fumes and explosions. The situation at Bluff Road is not analogous to the Restatement illustration of two factories discharging the same pollutant which renders a stream unusable; it is instead analogous to (and even less "divisible" than) oil which catches fire and burns the barn.

The courts have recognized that traditional and evolving principles of common law do not permit dividing the harm at a waste site such as Bluff Road on the basis of how much waste each generator sent to the site. The Chem-Dyne court noted that "the volume of waste of a particular generator is not an accurate predictor of the risk associated with the waste because the toxicity or migratory potential of a particular hazardous substance generally varies independently with the volume of the waste." 572 F. Supp. at 811. In Medley, 25 ERC at 1319, the court granted summary judgment on joint and several liability, finding that "[t]he mixing of various hazardous substance [sic] in the lagoons is indivisible and the environmental harm presented by the Medley Farm site cannot be rationally or reasonably apportioned among waste generators, site owners and site operators in this case."22/ As the district court here

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22/ Medley reaffirms that summary judgment on the issue of indivisibility of injury is appropriate where the undisputed facts show that wastes have spilled and commingled, as at Bluff Road. The generators do not dispute that the issue of divisibility of harm may be resolved on motions for summary judgment. Indeed, the caselaw affirms that divisibility is an issue of law. See, Richardson v. Volkswagenwerk, A.G., 552 F. Supp. 73, 83-84 (W.D.Mo. 1982); Azure v. City of Billings, 596 P.2d 460, 471 (Mont. 1979); Restatement (Second) of Torts § 434(1)(b).

noted (order at 16 n.8; JA), cases decided under state law and other federal statutes also make clear that arbitrary methods of apportionment such as generators suggest here do not render an injury "divisible" for purposes of joint and several liability. See, In the Matter of the Complaint of Berkeley Curtis Bay Co., 557 F. Supp. 335, 339 (S.D.N.Y. 1983); City of Perth Amboy v. Madison Industries, Inc., 13 ENVTL.L.REP. (ENVTL.L.INST.) 20554, 20555 (N.J. Super. App. Div. 1983); State Department of Environmental Protection v. Ventron Corp., 182 N.J. Super. 210, 440 A.2d 455, 461 (1981), modified in part on other grounds, 94 N.J. 473, 468 A.2d 150 (1983).

B. The 1986 Amendments to CERCLA confirm that factors such as the volume of waste sent to a site are relevent only in contribution actions, and may not be used to undercut joint and several liability.-- In enacting the recent Superfund Amendments and Reauthorization Act of 1986 (SARA), 100 Stat. 1613, Congress reconfirmed that joint and several liability applies whenever an injury is indivisible, and that contribution is then available as a mechanism for applying equitable apportionment factors. The amendments add an explicit contribution provision, new Section 113(f), 42 U.S.C. 9613(f).23/ The legislative history makes

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23/ Even before SARA, the courts had held that contribution among responsible parties was an integral part of the joint and several liability scheme of CERCLA. See, e.g., Colorado v. ASARCO, 22 ERC at 1927-1934; Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985); Chem-Dyne, 572 F. Supp. at 807 n.3. These courts relied on Section 107(e)(2), 42 U.S.C. 9607(e)(2), and legislative history indicating that a right of contribution was intended. SARA simply made this right more explicit.

clear that Congress intends factors such as waste volume to be considered in contribution actions, not in the determination of liability. The Report of the House Judiciary Committee explains that the new section on contribution was intended "to ratify current judicial decisions that the courts may use their equitable powers to apportion the costs of clean-up among the various responsible parties involved with the site." H.R. Rep. 99-253, 99th Cong., 1st Sess., Part 3 at 18 (1985). The Committee made clear that, "after all questions of liability and remedy have been resolved, courts may consider any criteria relevant to determining whether there should be an apportionment" (Id. at 19 (emphasis supplied)). Apportionment criteria suggested by the committee for use in contribution actions included "the amount of hazardous substances involved," as well as degree of toxicity, degree of involvement by the parties, and equitable factors (Id.). It is clear from this discussion that factors such as waste volume belong in contribution actions, and not in the determination of joint and several liability.[24/]

24/ To avoid confusion between an "apportionment" of a divisible injury (which has significance for joint and several liability) and an "apportionment" of costs in contribution (which has none), Congress carefully chose the word "allocate" rather that "apportion" for new Section 113(f). Senator Stafford explained (131 Cong. Rec. S12021 (daily ed. Sept. 24, 1985)):

> The amendment does not diminish the liability of any person under CERCLA nor does it suggest that anything other than the standard of liability which has been held by the courts to apply, continue to be applied. Indeed, as originally drafted, the Senator's amendment contained the word "apportion" for which we agreed to substitute "allocate" in order to avoid any possible confusion on this point.

Significantly, Congress rejected efforts to add a mandatory apportionment scheme that would have prevented joint and several liability on the basis of considerations like waste volume. Senator Mitchell explained (131 Cong. Rec. S11586 (daily ed. Sept. 17, 1985)):

> One proposed change to this law is a mandatory apportionment scheme under which the burden of proof would fall on the Government to establish the portion of the harm for which each party is responsible, and apportion the cleanup costs accordingly. While this may have a surface appeal, the impacts of such a change on the Superfund Enforcement Program would be far-reaching.

The Senator explained that a mandatory apportionment scheme "would delay cleanups and increase costs." Id.

Rather than enact a mandatory apportionment scheme, Congress determined to deal with the problem of the "small contributor" by adding Section 122(g), 42 U.S.C. 9622(g). This section directs the President to exercise enforcement discretion to determine whether defendants responsible for "minimal" amounts of waste by reference to relative volume and hazardousness could be included in early settlements. This amendment reinforces the point that waste volume is not a factor which affects joint and several liability, but instead affects a responsible party's ability to limit its monetary exposure by early settlement. Congressman Dingell explained that new Section 122 was fashioned "to facilitate settlement negotiations to expedite effective site cleanup by private parties while maintaining the liability standard of the 1980 act as it has been interpreted by the

federal courts." 132 Cong. Rec. H9563 (daily ed. Oct. 8, 1986). The Congressman pointed out that Chem-Dyne "correctly expresses congressional intent" in this regard (Id.).[25/] Thus, Congress has dealt with the issue of small-quantity generators, not by shift- ing the burden of proof of indivisibility to the government, as the generators recommend (Br 26-27), but by encouraging early settlements with such generators.

The legislative history of SARA thus illuminates and confirms Congress' original intent in enacting CERCLA,[26/] and confirms as well the correctness of the district court's holding that evidence as to the volume of waste the generators sent to the site would relate only to the allocation of costs in a contribution action, not to the issue of joint and several liability.

C. The fact that government agencies sent wastes to Bluff Road does not make joint and several liability inappro-

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25/ As the primary sponsor of SARA in the House, Congressman Dingell's statements are entitled to substantial weight in interpreting that legislation. Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976). Congressman Eckart, who also played a significant role in drafting SARA, noted as well that SARA "maintains the strict, joint and several standards of current law as enumerated in the leading case, United States v. Chemdyne Corporation." 132 Cong. Rec. H9624 (daily ed. Oct. 8, 1986).

26/ The courts have recognized the appropriateness of looking to the legislative history of SARA where it confirms or clarifies congressional intent behind CERCLA. See Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 888 (3rd Cir. 1985); J.V. Peters & Co. v. EPA, 767 F.2d 263, 265 (6th Cir. 1985); see generally Bell v. New Jersey, 461 U.S. 773, 784-785 (1983) cert. denied 106 S.Ct. 1970 (1986); United States v. Waste Industries, Inc., 734 F.2d 159, 166 (4th Cir. 1984).

priate against these defendants. -- The generators argue (Br 22-25) that joint and several liability is inappropriate because both the State and agencies of the federal government dealt with SCRDI. The generators argue that an "apportionment" should have been made between plaintiffs and defendants as part of the government's case in chief. That approach, however, is inconsistent with the clear congressional intent to have liability issues resolved first, and apportionment issues resolved later in contribution actions.

As noted in the preceding section, Congress in enacting SARA reaffirmed that contribution rights are important as a means of achieving equitable allocations among responsible parties, but must not interfere with EPA's ability to achieve rapid recovery of Superfund costs through early determinations of liability. As noted by Senator Stafford, "the theory underlying Superfund's liability scheme was, and is, that the Government should obtain the full costs of cleanup from those it targets for enforcement, and leave remaining costs to be recovered in private contribution actions * * *." 132 Cong. Rec. S14903 (daily ed. Oct. 3, 1986).

The principle that contribution issues should be deferred to avoid interference with the governments' case in chief is no less applicable where agencies of the governments are alleged to be liable parties themselves. As noted in the Report of the House Energy and Commerce Committee, H.R. Rep. 99-253, 99th Cong., 1st Sess., Part 1 at 79-80 (1986)(emphasis added):

> This Section [granting an exlicit right of contribution] does not affect the right of the United States to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, whether or not the U.S. was an owner or operator of a facility or a generator of waste at the site.

See also H.R. Rep. 99-253, part 3 at 20. These passages show that the possible liability status of some federal agency in some other role does not convert an action brought by the United States as trustee of the Superfund into an action for contribution, where the United States is merely an additional party whose share of costs must be sorted out with that of all others at the same time. This result is also compelled by the frequently expressed principle that Congress intends Superfund liability to assure rapid cost recovery and replenishment of the fund. See, *e.g.*, Dedham Water Company, 805 F.2d at 1081-1082 (CERCLA provides for rapid cost recovery "because the resources of the Fund alone are simply insufficient to provide an adequate remedy to the national problem of hazardous waste disposal"). If the judgment below is upheld, the funds recovered from defendants will go into the Superfund, and be available for further remediation at the Bluff Road site or other hazardous waste sites. If defendants later were to prove the elements of Section 107(a) against government agencies, money for the equitably allocated share of those agencies would be paid from their budgets or from general revenues -- not rebated from the Superfund. The two types of recovery are different in kind, and are determined in different phases of the litigation.

The Restatement passage relied upon by the generators (Br 23) is clearly inapposite. That illustration, like the earlier illustrations cited by the generators (see supra at) involves harm that is reasonably divisable on the basis of volume, because each defendant, as well as the plaintiff, discharged an identical substance (water) which caused an identical injury (flooding). Here, the injury was indivisible, and apportionment questions among defendants and plaintiffs must be resolved in the context of any later contribution action.

The generators' reliance (Br 24) on United States v. Conservation Chemical Co., 628 F. Supp. 391 (W.D.Mo. 1985), is curious, since that case supports the very points we make here. In Conservation Chemical, the United States sued four generators and the owner and operator of the site. These parties filed claims against scores of other generators, and alleged that agencies of the United States were responsible for some of the wastes at the site. See Conservation Chemical, 619 F. Supp at 181, 237 n.26. The district court bifurcated proceedings so that liability would be decided first, and apportionment among the parties later. Id. at 229 ("the plaintiff is entitled to receive full relief in Phase One from the original defendants if the original defendants are found jointly and severally liable * * * the method of apportionment must await determination in Phase Two of these proceedings * * *"). See also, 628 F. Supp. at 393. After the United States reached a settlement agreement with the original four generators wherein they agreed to clean up the

site, the court set out rules to govern Phase Two apportionment. Keeping in mind that "contribution is a remedy that developed in equity," the court ruled that "the effect of settlements upon non-settling parties should be determined in accordance with the 1977 Uniform Comparative Fault Act * * *." 628 F.Supp. at 401-402.[27] The bifurcation of proceedings in Conservation Chemical shows that issues of apportionment among the parties, including government agencies, as well as issues related to the effect of settlements, must be resolved after a determination of the original defendants' joint and several liability.[28] The case demonstrates that the generators' arguments regarding the role of government agencies as generators are not properly raised at this

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27/ Although not pertinent to the issues of this case, we note that the Conservation Chemical court erred in looking to the Uniform Comparative Fault Act, rather that the Uniform Contribution Among Tortfeasors Act, for contribution rules. "Fault" is irrelevant under CERCLA, and Section 113 of CERCLA, added in 1986, appropriately follows the Contribution Among Tortfeasors approach. In any event, adoption of comparative fault principles would not affect the necessity of imposing joint and several liability, since "[t]he feasibility of apportioning fault on a comparative basis does not render an indivisible injury 'divisible' for purposes of the joint and several liability rule." Coney v. J.L.G. Industries, Inc., 73 Ill. 337, 454 N.E.2d 197, 205 (1983).

28/ The generators' reliance on United States v. Shell Oil Co., 605 F. Supp. 1064, 1083 (D.Colo. 1985), is equally strained. The court there drew an analogy to a comparative negligence case in the course of agreeing with the government that the Army did not have to be joined as a defendant, since it was already a plaintiff. The court was discussing joinder, not liability, and in no way indicated that apportionment issues should precede the contribution phase of a case.

time -- they present issues that will only become relevant in a later contribution action.[29]

D. The landowners are jointly and severally liable. -- Unlike the generators, the landowners do not attempt to show that the harm at the site is divisible. They merely rely on their purported status as "innocent" parties (Br 14). But as we showed supra at 29, CERCLA is a strict liability statute, and the landowners were hardly innocent in any event. Having stood idly by for years while an environmental problem of staggering proportions developed on their land, they cannot hope to avoid joint and several liability by arguing that they bear no responsibility for the harm at the site.

IV

THE DECISION BELOW DOES NOT VIOLATE CONSTITUTIONAL PRINCIPLES OF SEPARATION OF POWERS

The generators' separation of powers argument was not raised before the district court. The rule in this Court is that "[q]uestions not raised and properly preserved in the trial forum will not be noticed on appeal, in the absence of exceptional circumstances." United States v. One 1971 Mercedes Benz 2-Door Coupe, 542 F.2d 912, 915 (4th Cir. 1976); United States v. Chesapeake & Ohio Ry. Co., 215 F.2d 213 (4th Cir. 1954). The generators suggest no exceptional circumstances, hence, their belated separation of powers challenge should be disregarded.

29/ In any event, the State and the federal agency generators have agreed to reimburse the Superfund (2/23/84 order at 5; JA).

Alaska State Legislature

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Senator Tim Kelly
Senator Rick Halford
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SENATE SPECIAL COMMITTEE ON OIL AND GAS

To: Members of the Senate Special Committee on Oil and Gas

From: Committee staff

Re: HB 68, Sectional analysis

Date: April 11, 1989

Section 1. Adds a lien for the state's expenses associated with cleanup and containment as a document eligible for recording.

Section 2.

AS 46.03.822. Strict Liability for the Release of Hazardous Substances

This section repeals and reenacts existing AS. 46.03.822 to expand and specifically identify all the potential responsible parties who are liable for the release or threatened release of a hazardous substance. Those identified are:

1) the owner and person controlling the substance at the time of the release or threatened release;

2) the owner and operator of a facility or vessel form which the release occurred or was threatened;

3) if a facility or vessel is abandoned, the owner, operator and any other person controlling activities on the facility or vessel just before abandonment;

4) the owner or operator of a facility or vessel from which the release occurred or was threatened, at the time the substance was received by the facility or vessel;

— O&G SECTIONAL —

5) the owner of the substance who arranges for disposal, treatment, or transport for disposal or treatment by a third party, if a release occurs or was threatened at a facility or incineration vessel that contained the substance and was owned or operated by the third party;

6) a person who transported or accepted the substance for transport to the place from which the release occurred or was threatened, if in fact the person chose that place.

Reenacted AS 46.03.822(b) would provide relief from strict liability for a person who proves that the damage solely resulted from: 1) an act of war; 2) an intentional or negligent act or omission of a third party, provided that it is not a response action contractor or a party or agent in privity of contract with that person, and further requires that the party to be relieved from responsibility, took reasonable precautions against the third party act or omission; 3) an act of God; and that the party, in the case of a third party act or omission, or act of God, discovered within a reasonable time the release or threatened release and began operations to contain and cleanup the hazardous substance.

Reenacted AS 46.03.822(c) would clarify that the relief from strict liability for the intentional or negligent conduct of a third party is also limited by factors relating to the way a facility is acquired, including that the person did not know and had no reason to know that the facility had a hazardous substance disposed on, in or at it; and that a government entity acquired the facility by escheat, eminent domain or through involuntary transfer.

Reenacted AS 46.03.822 (d) would establish the standards by which a person can, under subsec. (c) be considered to have reason to know.

Reenacted AS 46.03.822(e) would provide that the liability of a previous owner or operator is not lessened if that owner or operator is otherwise liable and if that owner or operator transfers ownership without disclosing the fact of a release or threatened release.

Reenacted AS 46.822.(f) would clarify that the liability of a person who causes or contributes to a release or a threatened release is liable in any event.

AS. 46.03.822(g) provides that a person otherwise liable may not transfer liability by agreement. However, these persons may be insured or indemnified and may enforce such agreements.

Section 3. amends As 46.03, Environmental Conservation, by adding a new section.

AS 46.03.823.(a) relieves a person who is a response action contractor from liability unless the release or threatened release

is caused by an act or omission of the response contractor that is negligent or grossly negligent or constitutes intentional misconduct. This liability limitation does not apply if the response contractor would be strictly liable under any other provision of state or federal law.

A person who is liable under 46.03.822 cannot claim that the response action contractor is a third party liable for the release or threatened release. This section does not relieve response action contractors from liability under other state or federal laws or other liabilities which may arise from terms and conditions of a contract or remedial action plan.

Section 4. AS 46.03.826(3) amends the definition of "having the control over a hazardous substance" to include an emission into the atmosphere.

Section 5. AS 46.03.826(4) amends the definition of "hazardous substance" to include an element or compound when it enters the atmosphere.

Section 6. AS 46.08.075. is amended by adding a new section to allow liens by the state for costs associated with expenditures from the oil and hazardous substance release response fund or from any other state fund for clean-up, containment, removal or remedial action resulting from an oil or hazardous substance spill or threat of a spill.

This section also identifies the method for enforcing the lien and would require the commissioner of the DEC to certify that the lien has been reduced or satisfied if payment's are made on the liable party's obligation.

The commissioner may reduce, discharge or partially release a lien if a bond or other security is posted. The bond or security shall include an amount sufficient to cover the cost of execution, collection or foreclosure.

A person against whom a lien has been recorded can seek a court order to remove it. The lien can be released if the person can show that he is not liable for the state's costs in the cleanup or in responding to a threat of a spill.

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

May 2, 1989

The Honorable Jan Faiks
Alaska State Senator
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

I am writing to reaffirm my support for HB 68, which is scheduled for hearing in the Senate Judiciary Committee today.

I prepared this legislation to ensure that parties responsible for managing hazardous substances are held accountable for spills. The people of the state must be assured that they will not have to absorb the costs of cleanup from hazardous substance spills. The State needs to create maximum incentives for parties that manage hazardous substances to avoid spills. It is particularly important to close loopholes that allow liability for hazardous substances to be shifted to operators who may have insufficient resources to perform cleanup.

This bill would establish a standard of liability to accomplish these purposes. This bill is essential to the State's overall environmental protection program.

The proposed Committee Substitute and other objections raised by your office to HB 68 have been discussed with the Attorney General's Office, and we feel they do not present a significant problem. We urge that you pass out the bill as it was reported out of the Oil and Gas Committee on April 14.

I hope that you will report this bill out of your committee today.

Sincerely,

Steve Cowper
Governor

transporters under the terms of the bill.

Section 3 establishes provides that response action contractors who are called upon to response to a spill are liable for actions caused by their own negligence.

Sections 4, 5 and 6 include definitions.

Section 7 of the bill would enable the state to file a lien against assets of a responsible party to recover its costs for cleanup of oil and hazardous waste sites, in cases where the responsible party declares bankruptcy. At present, the Department must first secure a judgement through the court and then participate in a bankruptcy proceeding. The bill would not supercede the claims of secured creditors such as mortgage-holders.

Department Position

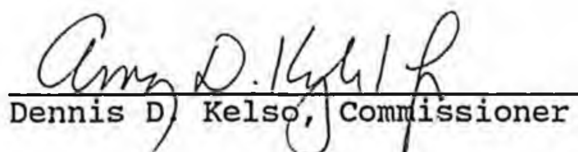
The bill was introduced at the request of the Governor. The Department strongly supports the bill and feels that it is necessary to provide appropriate tools to ensure that hazardous substance releases may be responded to properly. The first two sections of the law incorporate provisions similar to the liability provisions of the federal "Superfund" law into state law. The third section would implement a recommendation made to the states by the U.S. Supreme Court.

The people of the state are discovering increasing numbers of problems from spills and improper management of hazardous substances. It is imperative that parties who manage these materials take care to keep them out of the state's waters and lands. This will only happen if all the parties who manage hazardous materials are fully responsible for proper management.

This bill would allow the department to ensure that the party responsible for an action such as spilling hazardous substances, dumping barrels of hazardous materials on private property or for abandoning a contaminated site and then transferring title, can be held liable. This will provide a powerful incentive for proper management.

Fiscal Effect

There will be no additional costs resulting from this bill. The legislation would reduce State expenditures for cleanup over the long-term, as responsible parties will be footing a greater share of the cleanup bill. The Department has prepared a zero fiscal note.



Dennis D. Kelso, Commissioner

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802 907-586-2345

AEL ISSUE PAPER
HB 68 STRICT LIABILITY FOR HAZARDOUS SUBSTANCES

The Alaska Environmental Lobby strongly supports HB 68 for the following reasons:

This bill will save public money at no additional cost to the State by recovering public costs of containing or cleaning up hazardous substance spills. Currently the State and local communities often must bear the financial burden of clean up costs. Passage of the bill would reduce the demand of the State for funds for the cleanup of hazardous substances.

The bill insures the recovery of public money by granting the State an immediate right to file a lien on an equal basis with other creditors when a party responsible for improper waste disposal declares bankruptcy.

The bill promotes the responsible disposal of hazardous substances through a more clearly defined liability than that found within the current law.

The responsible disposal of hazardous wastes protects the public health, the environment, and the economy of the State.

Becky Achten
3-17-89

ALASKA CENTER FOR THE ENVIRONMENT • ALASKA CHAPTER, SIERRA CLUB • JUNEAU GROUP, SIERRA CLUB • SITKA GROUP, SIERRA CLUB
KNIK GROUP, SIERRA CLUB • DENALI GROUP, SIERRA CLUB • ANCHORAGE AUDUBON SOCIETY • ARCTIC AUDUBON SOCIETY
DENALI CITIZENS' COUNCIL • ALASKA FRIENDS OF THE EARTH • JUNEAU AUDUBON SOCIETY • KACHEMAK BAY CONSERVATION SOCIETY
KENAI PENINSULA AUDUBON SOCIETY • KODIAK AUDUBON SOCIETY • LYNN CANAL CONSERVATION • ALASKA WILDLIFE ALLIANCE
SITKA CONSERVATION SOCIETY • NORTHERN ALASKA ENVIRONMENTAL CENTER • SOUTHEAST ALASKA CONSERVATION COUNCIL
KNIK KANOERS AND KAYAKERS

April 25, 1989
DSPNW

Senator Jan Faiks
Mr. Chris Christensen

Re: Section 3 of House Bill 68

As suggested by Mr. Christensen, I am writing a few comments regarding House Bill 68. My name is William Pyle, I am an Alaska resident and I am writing on behalf of 7 Alaska firms who have joined together to form the Alaska Hazardous Waste Action Coalition. Each of the firms is actively involved in the investigation, evaluation, plan development, mapping and surveying, engineering, design and construction, removal, or equipment provision in response to hazardous or toxic waste spills and leaks. We strongly support Section 3 of House Bill 68 (HB68) which deals with response action contractors. However, there are 2 changes in the wording of Section 3 which we wish to recommend in order to clarify and strengthen the legislation.

A. Page 5, Section 3, Subparagraph (a), line 24 of HB68 says "...is negligent or grossly negligent or ..." in reference to determining liability of response action contractors. Our group suggests that the words "...negligent or ..." be deleted so that the phrase would read "...is grossly negligent or ...". Our reasons for this change are described below.

   1. The present wording of Subparagraph (a), Section 3 is based on language from the Federal Superfund Amendment and Reauthorization Act of 1986 (SARA).

WCC OAKLAND

The federal act includes indemnification provisions referring to response action contractors being held harmless and indemnified against any liability "...for negligence arising out of the contractor's performance in carrying out response action contracts under this title unless such liability was caused by conduct of the contractor which was grossly negligent or which constituted intentional misconduct".

The federal wording does refer to "negligence" but specifies "grossly negligent or which constituted intentional misconduct". HB68 does not provide indemnification of the response action contractor and is not equivalent to the SARA legislation as presently written.

2. We also believe that a response action contractor's services must be judged under the standards of professional practice in existence at the time the services were provided. Standards of practice in hazardous waste work are changing rapidly. We believe that work done by a response action contractor should be evaluated on the basis of professional standards of practice prevailing at the time the work is done. In some cases, litigation may not start for several years, after work has been done. We do not think that newer, possibly more rigid stands should be used to judge work done under earlier standards of practice. This is particularly important because litigation may not be initiated until several years after the work has been done.

3. HB68 holds the state and municipalities to a standard of "...gross negligence or intentional misconduct" (Subparagraph (h) of Section 2, beginning on line 11 of Page 5). We do not think it is reasonable for the state and municipalities to be held at a different standard than the response action contractors they may employ.

B. Page 6, Subparagraph (b), line 1. This states that liability referred to in Subparagraph (a) "...does not apply to a response action contractor who would otherwise be strictly liable under any other provisions of state or federal law". We believe tht the ADEC's intent on this was to assure that a responsible party (who should be strictly liable) cannot avoid responsibility by performing response action services. We believe that Subparagraph (b) is far too broad because there may (probably) be a lot of state or federal laws that could be interpreted to hold response action contractors in strict liability, regardless of the intent of HB68. We recommend that the phrase "...under any other provisions of state or federal law ..." be deleted from Subparagraph (b), line 3, and that the phrase be replaced by "...as an owner, operator, or generator of the hazardous substance ...", to be added after the word "liable" on line 3.

489-14 / CJM

SUMMARY OF PROPOSED CHANGES TO SCS CSHB 68 (JUD)
WORK DRAFT DATED 5/1/89

1. Joint and several liability/ contribution issues

Amend Section 2 as follows:

a. add new subsection (i)--see attachment no. 1

b. add new subsection (j):

A person may seek contribution from any other person who is liable or potentially liable under subsection (a), during or following any civil action under subsection (a). Such claims shall be brought in accordance with the Alaska Rules of Civil Procedure, and shall be governed by state law. In resolving contribution claims, the court may allocate damages and costs among liable parties using such equitable factors as the court determines are approporiate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under subsection (a).

2. Liable persons

Amend Section 6 to add new subsection, in alphabetical order on p.8 :

insert "owner and operator definition" contained in CERCLA section 101 (20) (A), attached as attachment 2.

3. Additional relief from liability

Amend Section 2 to add new subsections (3)-(5) to subsection (c) on page 3:

(3) the person acquired the facility by inheritance or bequest;

(4) [insert Sealaska amendment after checking language and statutory cites]; or

(5) the state acquired the facility under P.L. 85-508 (" he Statehood Act").

ADD NEW LANGUAGE TO LIABILITY PROVISIONS, section 2

Page 1, line 19, after "strictly" add:

"jointly and severally"

Page 1, line 28, after "facility" add:

"or vessel"

Page 2, line 3-4, delete "incineration"

Page 2, line 7, delete "incineration"

4. Definitions

a. Amend Section 6 to add the following on page 7, line 27 after the word "works":

", but does not include any consumer product in consumer use"

b. Add definition of "release" in section 6 on page 8 as follows:

[insert attachment 3]

c. Add definition of "transport" in section 6 on page 8 as follows:

[insert attachment 4]

5. no action necessary

6. Chris to draft whistleblower provision using HB 91 but eliminating restriction to public employers

7. Retroactive clause

Add a new section 9 at end of bill:

[insert attachment 5]

8. Residential sewage disposal

Amend section 2 on Page 2, line 3, after "person", add:

", other than domestic sewage,"

9. No change necessary as discussed.

10. No change necessary as discussed.

A M E N D M E N T

TO: SCS CSHB 68 (Oil & Gas)

Page 1, Line 18, after "section,":

Insert "and the exception set out in (i) of this section"

Page 5, after line 17:

Insert a new subsection to read:

"(i) In an action to recover damages and costs, a person otherwise jointly and severally liable under this section is relieved of joint liability and is liable severally for damages and costs attributable to that person if the person proves that

(1) the harm caused by the release or threatened release is divisible; and

(2) there is a reasonable basis for apportionment of costs and damages to that person."

ATTACHMENT /

Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317 (a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)[;].

(15) *The term* "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas[;].

►I.H. Indian Tribes
SARA § 101(a)

(16) *The term* "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) any State or local government, [or] any foreign government, *any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe*[;].◄

(17) *The term* "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel[;].

(18) *The term* "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or nonnavigable waters within the United States[;].

(19) *The term* "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided by international agreement to which the United States is a party[;].

►II.B. Liability Limits
SARA § 101(b)

(20)(A) *The term* "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment [;] *(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.* Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility[;].

(B) [i]*I*n the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) 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, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control[;].

(C) [i]*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 9607(a)(3) or (4) of this title (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[;].

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally-and substantively,-as any nongovernmental entity, including liability under section 9607.◄

(21) *The term* "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body[;].

►I.A. Scope of Superfund
SARA § 101(c)

(22) *The term* "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment *(including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant),* but excludes (A) any release which results in exposure to persons soley within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear [illegible] under section

ATTACHMENT 2

Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317 (a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)[;].

(15) *The term* "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas[;].

►I.H. Indian Tribes
SARA § 101(a)

(16) *The term* "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) any State or local government, [or] any foreign government, *any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe*[;].◄

(17) *The term* "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel[;].

(18) *The term* "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or nonnavigable waters within the United States[;].

(19) *The term* "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided by international agreement to which the United States is a party[;].

►II.B. Liability Limits
SARA § 101(b)

(20)(A) *The term* "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and [(iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment.] *(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand*. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility[;].

(B) [i]*In* the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) 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, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control[;].

(C) [i]*In* 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 9607(a)(3) or (4) of this title (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[;].

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607.◄

(21) *The term* "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body[;].

►I.A. Scope of Superfund
SARA § 101(c)

(22) *The term* "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment *(including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)*, but excludes (A) any release which results in exposure to persons soley within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel ~~or pipeline pumping station engine~~, ~~(C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear~~ Regulatory Commission ~~under section~~

ATTACHMENT 3

170 of such Act [42 U.S.C.A. § 2210], or ~~for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title~~, and (D) the normal application of fertilizer[;]. ◄

(23) *The terms* "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974 [42 U.S.C.A. § 5121 et seq.][;].

►I.F. Cleanup Standards
SARA § 101(d)

(24) *The terms* "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or [welfare. The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions (A) are more cost-effective than other remedial actions, (B) will create new capacity to manage, in compliance with subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], hazardous substances in addition to those located at the affected facility, or (C) are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials;] *welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.* ◄

►I.C. Federal/State Cost Sharing
SARA § 101(e)

(25) *The terms* "respond" or "response" means remove, removal, remedy, and remedial action[;], *all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.* ◄

(26) *The terms* "transport" or "transportation" means the movement of a hazardous substance by any mode, including pipeline (as defined in the Pipeline Safety Act), and in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier, the term "transport" or "transportation" shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance[;].

(27) *The terms* "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction[;].

(28) *The term* "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water[;].

(29) *The terms* "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C.A. § 6903][;].

(30) *The terms* "territorial sea" and "contiguous zone" shall have the meaning provided in section 1362 of Title 33.

(31) *The term* "national contingency plan" means the national contingency plan published under section 1321(c) of Title 33 or revised pursuant to section 9605 of this title[; and].

(32) *The terms* "liable" or "liability" under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33.

(33) The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; except that the term "pollutant or contaminant" shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous

170 of such Act [42 U.S.C.A. § 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer[:]. ◄

(23) *The terms* "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974 [42 U.S.C.A. § 5121 et seq.][:].

►I.F. Cleanup Standards SARA § 101(d)

(24) *The terms* "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or [welfare. The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions (A) are more cost-effective than other remedial actions, (B) will create new capacity to manage, in compliance with subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], hazardous substances in addition to those located at the affected facility, or (C) are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials;] *welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.* ◄

►I.C. Federal/State Cost Sharing SARA § 101(a)

(25) *The terms* "respond" or "response" means remove, removal, remedy, and remedial action[;], *all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.* ◄

(26) *The terms* "transport" or "transportation" means the movement of a hazardous substance by any mode, including pipeline ~~(as defined in the Pipeline Safety Act)~~, and in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier, the term "transport" or "transportation" shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance[;].

(27) *The terms* "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction[;].

(28) *The term* "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water[;].

(29) *The terms* "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C.A. § 6903][;].

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Insert a new bill section to read:

"* Sec. 7. AS 46.03.822, as amended by sec. 1 of this Act, applies to releases and substantial threats of releases that occurred before the effective date of this Act, and to that extent, AS 46.03.822, as amended by sec. 1 of this Act, is retroactive in its effect. However, AS 46.03.822, as amended by sec. 1 of this Act, does not apply to an action in which final judgment no longer subject to appeal has been entered before the effective date of this Act."

Renumber the following bill section accordingly.

ATTACHMENT 5

HOGE AND LEKISCH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
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(907) 276-1726
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TELECOPY COVER SHEET

HOGE AND LEKISCH
Telecopier Number: 907-258-2426 (automatic)

* *

No. of Pages (including cover page) 4 Date: April 28, 1989

MESSAGE TO: Charles S. Christensen III (465-4923)

MESSAGE FROM: Peggy Rawitz
Hoge and Lekisch

WE ARE USING A PANAFAX 920

IF THERE ARE ANY PROBLEMS, PLEASE CALL US AS SOON AS POSSIBLE AT:

907-276-1726

MESSAGE:

At your request, I am sending comments on the joint and several liability provisions of HB 68.

COMMENTS ON JOINT AND SEVERAL LIABILITY
PROVISIONS OF HB 68

House Bill 68 is modeled on the federal "Superfund" laws, the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601, *et seq.*, and the Superfund Amendments and Reauthorization Act of 1986 (SARA).

A provision imposing joint and several liability upon persons handling hazardous substances has been inserted into HB 68. No comparable provision exists in CERCLA and SARA. This has created great concern among parties who may be exposed to joint and several liability for the following reasons:

1. Mandatory joint and several liability may produce inequitable and unintended results in some cases.

2. Joint and several liability developed as a common law standard applicable to multiple-generator hazardous waste sites. It is not an appropriate standard to apply to the release of a single hazardous substance which is not a waste.

In *U.S. v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), the court examined the legislative history of CERCLA. The term "joint and several liability" was intentionally deleted from CERCLA "to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases." 572 F. Supp. at 808. The term was omitted

> . . . in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste cites will assess the propriety of applying joint and several liability on an individual basis.

572 F. Supp. at 808 (Emphasis added).

The court wished to preserve the availability of the common law apportionment standard where the harm is divisible. Restatement (Second) of Torts §§ 433A, 881 (1976). Where two or more persons cause a single and indivisible harm, as in a multiple-generator waste site, the common law calls for joint and several liability. Restatement (Second) of Torts § 875. Where two or more persons are liable under CERCLA § 9607, and one of the defendants seeks to limit his liability on the ground that the harm is capable of apportionment, the burden of proof as to apportionment is upon each defendant. Restatement (Second) of

Torts § 433B. The Chem-Dyne court concluded that these common law rules "clearly enumerate the analysis to be undertaken when applying [CERCLA] and are most likely to advance the legislative policies and objectives of the Act." 572 F. Supp. at 810.

The concept of joint and several liability received further attention in U.S. v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988). The defendants in this case were the owner of a hazardous waste facility and a group of hazardous waste generators. The Monsanto court noted "that the approach taken in Chem-Dyne was subsequently confirmed as correct by Congress in its consideration of SARA's contribution provisions." 858 F.2d at 171 n.23. The Monsanto defendants were found to be jointly and severally liable because, under the Restatement rule, they had failed to sustain their burden of establishing a reasonable basis for apportioning liability. 858 F. Supp. at 172. This is not surprising since this case involved a multiple-generator waste site.

The concern raised by HB 68 is that unconditional joint and several liability will be imposed in inappropriate situations. First, HB 68 is not limited to multiple-generator waste sites. Where multiple generators have all dumped wastes at a disposal site, they have each contributed to the harm in a similar manner. Since it is technologically impossible to apportion such harm, it is deemed indivisible and brought under the joint and several liability umbrella. This situation should be contrasted with a case where a hazardous substance passes through a chain of custody until an accidental release or disposal occurs. HB 68 would impose joint and several liability on a person in the chain of custody, without regard to such factors as the care exercised by the person, the length of time during which the person was responsible for the hazardous substance, the person's role with regard to the hazardous substance (e.g. broker, investor, jobber, common carrier vs. manufacturer, waste generator, disposer, or consumer).

Second, the concept of joint and several liability is a harsh one and should be applied sparingly in only the most compelling circumstances, such as the disposal of hazardous wastes. However, HB 68 encompasses not only hazardous wastes, but any substance which may have adverse environmental impacts. This includes useful substances in the stream of commerce as well as wastes which have no economic value or use. One of the main purposes of CERCLA and SARA, and of HB 68 as well, is to discourage the irresponsible disposal of wastes. It is not necessary to discourage the irresponsible disposal of valuable substances in the stream of commerce because the marketplace will dictate that these substances are handled responsibly.

Finally, Alaska tort law does not favor joint and several liability because of the widely-held perception that it

is unfair. This is evidenced by the Tort Reform Act of 1986 (AS 09.17.080) and the 1987 Initiative Proposal No. 2. The rationale behind this trend away from joint and several liability is that liability should bear some relationship to degree of fault. HB 68 provides for strict liability without regard to fault. To engraft joint and several liability onto this strict liability scheme is patently unfair and is fundamentally inconsistent with current state law. The burden of joint and several <u>strict</u> liability is so onerous that it is likely to have a chilling effect, especially on smaller businesses whose connection with hazardous substances is incidental.

In conclusion, it appears that an adequate framework for joint and several liability has evolved in Congress and the federal courts. Rather than creating a new framework which will not work because it is overbroad, inappropriate and unfair, the original federal model should be emulated.

MJR/ms
114/MEM4-28.049/ms

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M May 1, 1989

SUBJECT: Awkward federal language
SCS CSHB 68(Judiciary)

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a new draft of SCS CSHB 68(Judiciary). As requested by Chris, paragraphs (1) - (4) of section 2 of the bill track the federal language he sent me, except for the addition of "other than refined oil" in paragraph (4).

Paragraphs (1) - (4) cannot be set out as separate paragraphs because the final phrase of paragraph (4) of the federal language applies to all four paragraphs. That language is: "from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance." In the federal law, this phrase appears as part of paragraph (4), but, as you know, Alaska drafting requirements do not allow a phrase that applies to an entire list to be put in the last paragraph of the list if the list is set out as separate paragraphs.

Therefore, in order to track the federal language, as requested, the special paragraph indentations have been removed from section 2 of the bill.

Please let me know if I can be of further assistance on this matter.

TL:gc
WKG10/021

Enclosure

HB 68

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es (1987, CA6 Ohio) 816
d 659, 17 ELR 20663.

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Daggett (1986, CA2 NY)
21001, 87 ALR Fed 205.
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or recovery action under
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ted States Environmental
984, CD Cal) 599 F Supp
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LR 20377.

are proper under Compre-
l Response, Compensation,
USCS §§ 9601 et seq.) in
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nited States v Conservation
WD Mo) 619 F Supp 162,
proceeding (CA8) 770 F2d
229, 15 ELR 20774, on
28 F Supp 391, 17 ELR
ng (WD Mo) 653 F Supp
(WD Mo) 661 F Supp
g (WD Mo) 681 F Supp
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l. & Tel. Co. v Chateaugay
R 581) and (disagreed with
(CA6 Ohio) 816 F2d 1083,
7 ELR 20663) and (disap-
es v Northeastern Pharma-
Co. (CA8 Mo) 810 F2d
lisagreed with by Maryland
nco, Inc. (CA4) 822 F2d
cert den (US) 98 L Ed 2d
nd cert den (US) 98 L Ed

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. 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 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 or incineration vessel 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, incineration vessels 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~~ ; this paragraph does not apply to the transport of refined oil.

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe 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;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i) [42 USCS § 9604(i)].

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 [26 USCS §§ 9501 et seq.]. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses. There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the

Toni,
the change reflects the amendment made in the Oil & Gas CS

Chris x4523

Submitted by ARECA to Senate Judiciary Committee

April 27, 1989

PROPOSED AMENDMENT TO SCS CSHB 68 (O&G)

Page 3, line 12 change: the period to a semicoln and add "or (3) in relation to (a)(5) of this section, that the person exercised due care in arranging for disposal, storage, or treatment of the substance by another party or entity or in arranging with a transporter to transport the substance for disposal, storage, or treatment by another party or entity."

SENATE CS FOR CS FOR HOUSE BILL NO. 68 (Judiciary)

Section-by-Section Analysis

Section 1: Section 1 amends the existing recordation statutes to provide that liens for state expenditures from the oil and hazardous substance release response fund may be recorded.

Section 2: Section 2 repeals and reenacts existing AS 46.03.822. Reenacted AS 46.03.822 identifies certain categories of responsible parties that may be held strictly jointly and severally liable for hazardous substance releases. These categories are:

(1) The person who owned or controlled the hazardous substance at the time of the release (hazardous substance owner).

(2) The present owner of the spill site (present site owner).

(3) The person who owned the site at the time the spill occurred (past site owner).

(4) The person who arranged for disposal of the hazardous substance (arranger).

(5) The person who transports the hazardous substance to a site the person selects (transporter). Note: This transporter liability provision excludes transporters of refined oil.

Reenacted AS 46.03.822 also provides specific exemptions to the imposition of joint and several liability. Joint and several liability does not apply where the spill resulted from

(1) an act of war

(2) an act of an independent third party, or

(3) an act of God.

The Sec. 2 exceptions also provide exclusions for certain categories of innocent landowners. The exceptions provide that a person is not liable as spill site owner if the person acquired the site after the spill and the person is:

(1) an innocent purchaser of the site;

(2) a governmental body that acquired the site through an involuntary transfer or condemnation;

(3) a Native corporation that acquired the site under ANCSA;

(4) a person that acquired the site through inheritance or bequest; or

(5) a state entity that acquired the site under the Statehood Act.

Section 2 also provides that joint and several liability will not apply if the person proves (1) that the harm caused by the spill

is divisible, and (2) that there is a reasonable basis for apportioning the costs and damages.

Section 2 also provides that a person may seek contribution from other liable persons. In a lawsuit for contribution, the court would apportion damages and costs based upon fault and equity considerations.

Section 3: Section 3 provides a limitation on liability for hazardous substance response action contractors. The section exempts a response action contractor from liability unless the contractor's actions were negligent, or grossly negligent, or constituted intentional misconduct.

Sections 4, 5, and 6: Sections 4, 5, and 6 amend the definition provisions of AS 46.03.826. The amended definitions conform the bill's liability provisions (Section 2) to those of the federal act (CERCLA). The most important definitions are:

"Hazardous Substance": The definition includes oil as a hazardous substance.

"Facility": The definition excludes consumer products. CERCLA definition is similar.

"Owner and operator": For abandoned sites, the definition includes the person who previously owned the site. However, the definition excludes persons who have same equitable interests but do not participate in active management of a site or vessel. The CERCLA definition is similar.

"Release": The definition excludes the exposures which are covered by workers' comp. The definition also excludes exhaust emissions. The CERCLA definition is similar.

"Transport": The definition includes movement through a pipeline. The CERCLA definition is similar.

Section 7: Section 7 provides the state with a lien for response costs resulting from a hazardous substance release.

Section 8: Section 8 provides that the liability provisions contained in amended AS 46.03.822 are retroactive.

Section 9: Section 9 provides that the act takes effect immediately.

A M E N D M E N T

TO: SCS CSHB 68 (Oil & Gas)

Page 1, Line 18, after "section,":

Insert "and the exception set out in (i) of this section"

Page 5, after line 17:

Insert a new subsection to read:

"(i) In an action to recover damages and costs, a person otherwise jointly and severally liable under this section is relieved of joint liability and is liable severally for damages and costs attributable to that person if the person proves that

(1) the harm caused by the release or threatened release is divisible; and

(2) there is a reasonable basis for apportionment of costs and damages to that person."

SEALASKA

Proposed Amendment to SCS CSHB 68 (O&G)

On Page 3, Line 26, delete "or".

On Page 4, Line 1, delete ".", and insert in lieu thereof "; or".

On Page 4, after Line 1, insert a new paragraph to read : "(3) the person is a corporation organized under 43 U.S.C. 1601-1628 (Alaska Native Claims Settlement Act) that acquired the facility under that Act."

Proposed Amendment to SCS CSHB 68 (O&G)

SCS CSHB 68 amends the current state statute imposing strict liability for the release of a hazardous substance. The bill establishes two defenses to the strict liability standard.

One defense would apply where a person otherwise liable under the Act proves that a third party, other than one in privity of contract with the person, caused the release and that the person exercised due care and took reasonable precautions with respect to the substance.

The second defense would apply where, even though a person may be in privity of contract with a third party, the property was acquired by the person after the release and the person establishes satisfaction of the due care and reasonable precaution requirements and establishes either that 1) at the time of the acquisition the person did not know and had no reason to know about the release, or that 2) the person is a government entity who involuntarily acquired the land.

The attached, proposed amendment to SCS CSHB 68 would treat Native Corporations in the same manner as a government entity who acquired land by involuntary transfer. In other words, if this proposed amendment is adopted, a Native Corporation, like a government entity, would not have to establish as a matter of fact that it did not know and had no reason to know that a hazardous substance was

released on ANCSA land prior to acquisition by a Native Corporation to escape liability under the Act. On the other hand, the Corporation, like any other person or government entity otherwise liable under the Act, would have to prove it exercised due care with respect to the hazardous substance and took reasonable precautions against third party acts or omissions to escape liability under the Act.

Although Native Corporations, in a strict sense, did not involuntarily acquire lands under the Alaska Native Claims Settlement Act, they selected vast areas of land from limited choices in a relatively short period of time. So, while the ANCSA selections were not truly involuntary in nature, they should be distinguished from and treated differently than other private sector acquisitions involving discreet business decisions.

PREPARED BY THE DEPARTMENT OF LAW

SENATE CS FOR CS FOR HOUSE BILL NO. 68 (Judiciary)

Section-by-Section Analysis

Section 1: Section 1 amends the existing recordation statutes to provide that liens for state expenditures from the oil and hazardous substance release response fund may be recorded.

Section 2: Section 2 repeals and reenacts existing AS 46.03.822. Reenacted AS 46.03.822 identifies certain categories of responsible parties that may be held strictly jointly and severally liable for hazardous substance releases. These categories are:

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(4) The person who arranged for disposal of the hazardous substance (arranger).

(5) The person who transports the hazardous substance to a site the person selects (transporter). Note: This transporter liability provision <u>excludes</u> transporters of refined oil.

Reenacted AS 46.03.822 also provides specific exemptions to the imposition of joint and several liability. Joint and several liability does not apply where the spill resulted from

(1) an act of war
(2) an act of an independent third party, or
(3) an act of God.

The Sec. 2 exceptions also provide exclusions for certain categories of innocent landowners. The exceptions provide that a person is not liable as spill site owner if the person acquired the site after the spill and the person is:

(1) an innocent purchaser of the site;
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(4) a person that acquired the site through inheritance or bequest; or
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Section 2 also provides that joint and several liability will not apply if the person proves (1) that the harm caused by the spill

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Section 2 also provides that a person may seek contribution from other liable persons. In a lawsuit for contribution, the court would apportion damages and costs based upon fault and equity considerations.

Section 3: Section 3 provides a limitation on liability for hazardous substance response action contractors. The section exempts a response action contractor from liability unless the contractor's actions were negligent, or grossly negligent, or constituted intentional misconduct.

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Section 7: Section 7 provides the state with a lien for response costs resulting from a hazardous substance release.

Section 8: Section 8 provides that the liability provisions contained in amended AS 46.03.822 are retroactive.

Section 9: Section 9 provides that the act takes effect immediately.

Earl Billingsly

PROPOSED AMENDMENT TO SCS CSHB 68 (O&G)

1.A. Page 7, line 27, delete subparagraph (B) and replace with:

(B) oil, except "hazardous substance" does not include refined petroleum products; or

go0399hP-
Lauterbach
4/26/89

Original sponsor: Rules/Governor

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 SENATE CS FOR CS FOR HOUSE BILL NO. 68 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to liability for the release or
7 threatened release of a hazardous substance; recovery
8 of state costs for an oil or hazardous substance
9 release; liability of response action contractors;
10 and providing for an effective date."

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

12 * Section 1. AS 40.17.110(b) is amended by adding a new paragraph to
13 read:

14 (60) a certificate relating to a lien under AS 46.08.075.

15 * Sec. 2. AS 46.03.822 is repealed and reenacted to read:

16 Sec. 46.03.822. STRICT LIABILITY FOR THE RELEASE OF HAZARDOUS
17 SUBSTANCES. (a) Notwithstanding any other provision or rule of law
18 and subject only to the defenses set out in (b) of this section, the
19 ① following persons are strictly liable [jointly and severally] for damages [to persons or property, whether public or private, including] for injury to,
20 ② destruction of, or loss of [damages to the] natural resources of the state or a munic-
21 ipality [resources of the state or municipality, and], including the reasonable costs of assessing the injury,
22 destruction, or loss, and for the costs of response, containment,
23 removal, or remedial action incurred by the state or a municipality,
24 " and any other necessary costs of response incurred by any other party,
25 resulting from an unpermitted release of a hazardous substance or,
26 with respect to response costs, the substantial threat of an unpermit-
27 ③ ted release of a hazardous substance:

28 (1) the owner and operator of the vessel or facility from
29 which the release or threatened release occurred;

deleted language not included

1 (2) a person who, at the time of disposal of the hazardous
2 substance, owned or operated the facility at which the hazardous
3 substance was disposed of and the release or threatened release oc-
4 curred at that facility;
5 (3) a person who by contract, agreement, or otherwise
6 arranged for disposal or treatment, or arranged with a transporter for
7 transport for disposal or treatment, of a hazardous substance owned or
8 possessed by the person or by any other party or entity, at any facil-
9 ity owned or operated by another party or entity and containing haz-
10 ardous substances, and the release or threatened release occurred
11 during transport, disposal, or treatment;
12 (4) a person who accepted the hazardous substance for
13 transport to disposal or treatment facilities or sites selected
14 by the person, from which there was a release or threatened re-
15 lease of the hazardous substance that caused response costs to be
16 incurred.
17 (b) In an action to recover damages or costs, a person otherwise
18 liable under this section is relieved from liability under this sec-
19 tion if the person proves
20 (1) that the release or threatened release of the hazardous
21 substance to which the damages relate occurred solely as a result of
22 (A) an act of war;
23 (B) except as provided under AS 46.03.823(c), an
24 intentional or negligent act or omission of a third party, other
25 than a party or its agents in privity of contract with, or em-
26 ployed by, the person, and that the person
27 (i) exercised due care with respect to the haz-
28 ardous substance; and
29 (ii) took reasonable precautions against the act

1 or omission of the third party and against the consequences
2 of the act or omission; or
3 (C) an act of God; and
4 (2) in relation to (1)(B) or (C) of this subsection, that
5 the person, within a reasonable period of time after the act occurred,
6 (A) discovered the release or threatened release of
7 the hazardous substance; and
8 (B) began operations to contain and clean up the
9 hazardous substance.
10 (c) For purposes of (b)(1)(B) of this section, a third party or
11 an agent of a third party is in privity of contract with the person
12 who is otherwise liable, if the third party or its agent and the
13 person are parties to a land contract, deed, or other instrument
14 transferring title or possession of the real property on which the
15 facility in question is located, unless that property was acquired by
16 the person after the disposal or placement of the hazardous substance
17 on, in, or at the facility, and the person establishes that the person
18 has satisfied the requirements of (b)(1)(B) of this section and estab-
19 lishes that
20 (1) at the time the person acquired the facility the person
21 did not know and had no reason to know that a hazardous substance that
22 is the subject of the release or threatened release was disposed of
23 on, in, or at the facility; or
24 (2) the person is a governmental entity that acquired the
25 facility by escheat, or through another involuntary transfer or acqui-
26 sition, or through the exercise of eminent domain authority by pur-
27 chase or condemnation.
28 (d) To establish that a person had no reason to know that the
29 hazardous substance was disposed of on, in, or at the facility, as

provided in (c)(1) of this section, the person must have undertaken, at the time of acquisition, all reasonable inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of this subsection a court shall take into account all relevant facts, including

(1) any specialized knowledge or experience the person has;

(2) the relationship of the purchase price to the value of the property if it were uncontaminated;

(3) commonly known or reasonably ascertainable information about the property;

(4) the obviousness of the presence or likely presence of contamination at the property; and

(5) the ability to detect contamination by appropriate inspection.

(e) This section does not diminish the liability of a person who previously owned or operated a facility or vessel and who would otherwise be liable. If the person obtained actual knowledge of the release or threatened release of a hazardous substance at the facility or vessel and subsequently transferred ownership to another without disclosing that knowledge, the person is liable under (a)(2) of this section, and a defense under (b)(1)(B) of this section is not available to the person.

(f) This section does not diminish the liability of a person who, by an act or omission, caused or contributed to the release or threatened release of a hazardous substance that is the subject of the action relating to the facility or vessel.

(g) An indemnification, hold harmless, or similar agreement, or conveyance of any nature is not effective to transfer liability under

this section from the owner or operator of a facility or vessel or from a person who might be liable for a release or substantial threat of a release under this section. This subsection does not bar an agreement to insure, hold harmless, or indemnify a party to the agreement for liability under this section. This subsection does not bar a cause of action that an owner, operator, or other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against another person.

(h) The state or a municipality is not liable under this section for costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance generated by or from a facility or vessel owned by another person unless the actions taken by the state or municipality constitute gross negligence or intentional misconduct.

* Sec. 3. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.823. HAZARDOUS SUBSTANCE RESPONSE ACTION CONTRACTORS. (a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

(b) The liability limitation under (a) of this section does not apply to a response action contractor who would otherwise be strictly

1 liable under any other provision of state or federal law.

2 (c) The defense provided in AS 46.03.822(b)(1)(B) is not avail-
3 able to a potentially liable person with respect to costs or damages
4 caused by an act or omission of a response action contractor.

5 (d) Except as provided in (c) of this section, this section does
6 not affect the liability under this chapter or under any other state
7 law of a person other than a response action contractor.

8 (e) This section does not affect the liability of a response
9 action contractor that may arise from the response action contractor's
10 failure to comply with the terms or conditions of a response action
11 contract or a remedial action plan if one has been approved by the
12 department.

13 (f) This section does not affect the liability of an employer
14 who is a response action contractor with respect to an employee of the
15 employer under any provision of law, including a law related to work-
16 ers' compensation.

17 (g) In this section,

18 (1) "response action" means an action taken in connection
19 with the mitigation or cleanup of a hazardous substance release or
20 threatened release, including investigation, evaluation, plan develop-
21 ment, mapping and surveying, engineering, design and construction,
22 removal, and equipment provision;

23 (2) "response action contract" means a written contract or
24 agreement to provide response action with respect to a release or
25 threatened release of a hazardous substance, entered into by a person
26 with

27 (A) the department; or

28 (B) another person who has entered into an agreement
29 with the department that provides for response action subject to

the department's oversight and control;

(3) "response action contractor" means

(A) a person who enters into a response action contract with respect to a release or threatened release of a hazardous substance and who is carrying out the contract; and

(B) a person who is retained or hired by and is under the control of a person described in (A) of this paragraph to provide services related to the response action contract.

* Sec. 4. AS 46.03.826(3) is amended to read:

(3) "having control over a hazardous substance" means producing, handling, storing, transporting, or refining a hazardous substance for commercial purposes immediately before entry of the hazardous substance into the atmosphere or in or upon the water, surface, or subsurface land of the state, and specifically includes bailees and carriers of a hazardous substance;

* Sec. 5. AS 46.03.826(4) is amended to read:

(4) "hazardous substance" means

(A) an element or compound which, when it enters into the atmosphere or in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found; [OR]

(B) oil; or

(C) a substance defined as a hazardous substance under 42 U.S.C. 9601(14);

* Sec. 6. AS 46.03.826 is amended by adding new paragraphs to read:

(8) "facility" includes a

(A) building, structure, installation, equipment,

1 well, pit, pond, lagoon, impoundment, ditch, landfill, storage
2 container, motor vehicle, rolling stock, aircraft, or pipe or
3 pipeline, including a pipe into a sewer or publicly-owned treat-
4 ment works;
5 (B) site or area at which a hazardous substance has
6 been deposited, stored, disposed of, placed, or otherwise locat-
7 ed;
8 (9) "natural resources" means land, fish, wildlife, biota,
9 air, water, ground water, drinking water supplies, and other such
10 resources belonging to, managed by, held in trust by, appertaining to,
11 or otherwise controlled by the state or a municipality;
12 (10) "vessel" means every description of watercraft or other
13 artificial contrivance that is used, or is capable of being used, as a
14 means of transportation on water, or that carries hazardous substances
15 for the purpose of incineration of the hazardous substances.
16 * Sec. 7. AS 46.08 is amended by adding a new section to read:
17 Sec. 46.08.075. LIENS AGAINST PROPERTY AS SECURITY FOR STATE
18 EXPENDITURES. (a) The state has a lien for expenditures by the state
19 from the oil and hazardous substance release response fund or from any
20 other state fund, for the costs of response, containment, removal, or
21 remedial action resulting from an oil or hazardous substance spill,
22 or, with respect to response, costs, the substantial threat of a
23 release of oil or a hazardous substance against all property owned by
24 a person who is determined by the commissioner to be liable for the
25 expenditures under this chapter, AS 46.03, AS 46.04, 42 U.S.C. 9607,
26 or other state or federal law. The lien includes interest, at the
27 maximum rate allowable under AS 45.45.010(a), from the date of the
28 expenditures. The state may file an action in a court of competent
29 jurisdiction in order to foreclose on the lien.

1 (b) A lien established under this section against real property
2 is not effective until
3 (1) a certificate of lien is recorded in the district
4 recorder's office for the district in which the property is located,
5 describing the property and stating the amount of the lien, the name
6 of the owner as grantor, and, if known, the name of the person causing
7 the oil or hazardous substance release; and
8 (2) the commissioner sends a copy of the certificate of
9 lien by certified mail return receipt requested, or actually delivers
10 a copy of the certificate of lien, to the persons described in (1) of
11 this subsection and to all other persons of record holding an interest
12 in the property.
13 (c) When any amount with respect to which a lien has been re-
14 corded under this section has been paid or reduced, the commissioner
15 shall, upon request of the property owner, issue a certificate dis-
16 charging or partially releasing the lien. That certificate may be
17 recorded in the office in which the certificate of lien was recorded.
18 (d) The commissioner may, in the commissioner's discretion,
19 reduce, discharge or partially release a lien under this section if a
20 bond, or other security, in a form and an amount satisfactory to the
21 commissioner is posted. The bond or other security must include an
22 amount sufficient to cover the cost of execution, collection, or
23 foreclosure, including attorney fees. A reduction, discharge, or
24 partial release may not be granted under this subsection if it would
25 be contrary to the public interest. When a lien is reduced, dis-
26 charged, or partially released under this subsection, the commissioner
27 shall, at the request of the property owner, issue a certificate to
28 that effect.
29 (e) A person with an ownership interest in property against

1 which a lien is recorded may bring an action in a court of competent
2 jurisdiction to require that the lien be released. The lien may be
3 released to the extent of that person's ownership interest if the
4 court finds that the person is not liable for the expenses incurred by
5 the state in connection with the costs of response, containment,
6 removal, or remedial action resulting from the oil or hazardous sub-
7 stance release or threat of release of oil or a hazardous substance.
8 * Sec. 8. This Act takes effect immediately under AS 01.10.070(c).
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Original sponsor: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

SENATE CS FOR CS FOR HOUSE BILL NO. 68 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to liability for the release or threatened release of a hazardous substance; recovery of state costs for an oil or hazardous substance release; liability of response action contractors; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 40.17.110(b) is amended by adding a new paragraph to read:

(60) a certificate relating to a lien under AS 46.08.075.

* Sec. 2. AS 46.03.822 is repealed and reenacted to read:

Sec. 46.03.822. STRICT LIABILITY FOR THE RELEASE OF HAZARDOUS SUBSTANCES. (a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section and the exception set out in (i) of this section, the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private, including damage to the natural resources of the state or a municipality, and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

(1) the owner of, and the person having control over, the hazardous substance at the time of the release or threatened release;

~~this does not include any product in consumer use~~

(2) the owner and the operator of a vessel or facility,

this paragraph does not apply to a consumer product in consumer use.

1 from which there is a release, or a threatened release that causes the
2 incurrence of response costs, of a hazardous substance;
3 (3) any person who at the time of disposal of any hazardous
4 substance owned or operated any facility or vessel at which the haz-
5 ardous substances were disposed of, from which there is a release, or
6 a threatened release that causes the incurrence of response costs, of
7 a hazardous substance;
8 (4) any person who by contract, agreement, or otherwise
9 arranged for disposal or treatment, or arranged with a transporter for
10 transport for disposal or treatment, of hazardous substances owned or
11 possessed by the person, other than domestic sewage, or by any other
12 party or entity, at any facility or vessel owned or operated by
13 another party or entity and containing hazardous substances, from
14 which there is a release, or a threatened release that causes the
15 incurrence of response costs, of a hazardous substance;
16 (5) any person who accepts or accepted any hazardous sub-
17 stances, other than refined oil, for transport to disposal or treat-
18 ment facilities, vessels or sites selected by the person, from which
19 there is a release, or a threatened release that causes the incurrence
20 of response costs, of a hazardous substance.
21 (b) In an action to recover damages or costs, a person otherwise
22 liable under this section is relieved from liability under this sec-
23 tion if the person proves
24 (1) that the release or threatened release of the hazardous
25 substance to which the damages relate occurred solely as a result of
26 (A) an act of war;
27 (B) except as provided under AS 46.03.823(c), an
28 intentional or negligent act or omission of a third party, other
29 than a party or its agents in privity of contract with, or

1 employed by, the person, and that the person
2 (i) exercised due care with respect to the haz-
3 ardous substance; and
4 (ii) took reasonable precautions against the act
5 or omission of the third party and against the consequences
6 of the act or omission; or
7 (C) an act of God; and
8 (2) in relation to (1)(B) or (C) of this subsection, that
9 the person, within a reasonable period of time after the act occurred,
10 (A) discovered the release or threatened release of
11 the hazardous substance; and
12 (B) began operations to contain and clean up the
13 hazardous substance.
14 (c) For purposes of (b)(1)(B) of this section, a third party or
15 an agent of a third party is in privity of contract with the person
16 who is otherwise liable, if the third party or its agent and the
17 person are parties to a land contract, deed, or other instrument
18 transferring title or possession of the real property on which the
19 facility in question is located, unless that property was acquired by
20 the person after the disposal or placement of the hazardous substance
21 on, in, or at the facility, and the person establishes that the person
22 has satisfied the requirements of (b)(1)(B) of this section and estab-
23 lishes that
24 (1) at the time the person acquired the facility the person
25 did not know and had no reason to know that a hazardous substance that
26 is the subject of the release or threatened release was disposed of
27 on, in, or at the facility;
28 (2) the person is a governmental entity that acquired the
29 facility by escheat, or through another involuntary transfer or

1 acquisition, or through the exercise of eminent domain authority by
2 purchase or condemnation;
3 (3) the person is a corporation organized under 43 U.S.C.
4 1601 - 1628 (Alaska Native Claims Settlement Act) that acquired the
5 facility under those sections;
6 (4) the person acquired the facility by inheritance or
7 bequest; or
8 (5) the person is a state governmental entity and the state
9 acquired the facility under Public Law 85 - 508 (Alaska Statehood
10 Act).
11 (d) To establish that a person had no reason to know that the
12 hazardous substance was disposed of on, in, or at the facility, as
13 provided in (c)(1) of this section, the person must have undertaken,
14 at the time of acquisition, all reasonable inquiries into the previous
15 ownership and uses of the property consistent with good commercial or
16 customary practice in an effort to minimize liability. For purposes
17 of this subsection a court shall take into account all relevant facts,
18 including
19 (1) any specialized knowledge or experience the person has;
20 (2) the relationship of the purchase price to the value of
21 the property if it were uncontaminated;
22 (3) commonly known or reasonably ascertainable information
23 about the property;
24 (4) the obviousness of the presence or likely presence of
25 contamination at the property; and
26 (5) the ability to detect contamination by appropriate
27 inspection.
28 (e) This section does not diminish the liability of a person who
29 previously owned or operated a facility or vessel and who would

1 otherwise be liable. If the person obtained actual knowledge of the
2 release or threatened release of a hazardous substance at the facility
3 or vessel and subsequently transferred ownership to another without
4 disclosing that knowledge, the person is liable under (a)(2) of this
5 section, and a defense under (b)(1)(B) of this section is not avail-
6 able to the person.

7 (f) This section does not diminish the liability of a person
8 who, by an act or omission, caused or contributed to the release or
9 threatened release of a hazardous substance that is the subject of the
10 action relating to the facility or vessel.

11 (g) An indemnification, hold harmless, or similar agreement, or
12 conveyance of any nature is not effective to transfer liability under
13 this section from the owner or operator of a facility or vessel or
14 from a person who might be liable for a release or substantial threat
15 of a release under this section. This subsection does not bar an
16 agreement to insure, hold harmless, or indemnify a party to the agree-
17 ment for liability under this section. This subsection does not bar a
18 cause of action that an owner, operator, or other person subject to
19 liability under this section, or a guarantor, has or would have, by
20 reason of subrogation or otherwise against another person.

21 (h) The state or a municipality is not liable under this section
22 for costs or damages as a result of actions taken in response to an
23 emergency created by a release or threatened release of a hazardous
24 substance generated by or from a facility or vessel owned by another
25 person unless the actions taken by the state or municipality consti-
26 tute gross negligence or intentional misconduct.

27 (i) In an action to recover damages and costs, a person other-
28 wise jointly and severally liable under this section is relieved of
29 joint liability and is liable severally for damages and costs

1 attributable to that person if the person proves that
2 (1) the harm caused by the release or threatened release is
3 divisible; and
4 (2) there is a reasonable basis for apportionment of costs
5 and damages to that person.
6 (j) A person may seek contribution from any other person who is
7 liable under (a) of this section during or after a civil action under
8 (a) of this section. Actions under this subsection shall be brought
9 under the Alaska Rules of Civil Procedure and are governed by state
10 law. In resolving claims for contribution under this section, the
11 court may allocate damages and costs among liable parties using equi-
12 table factors determined to be appropriate by the court. This subsec-
13 tion does not diminish the right of a person to bring an action for
14 contribution in the absence of a civil action under (a) of this sec-
15 tion.
16 * Sec. 3. AS 46.03 is amended by adding a new section to read:
17 Sec. 46.03.823. HAZARDOUS SUBSTANCE RESPONSE ACTION CONTRACTORS.
18 (a) A person who is a response action contractor with respect to a
19 release or threatened release of a hazardous substance is not civilly
20 liable for injuries, costs, damages, expenses, or other liability that
21 results from the release or threatened release unless the release or
22 threatened release is caused by an act or omission of the response
23 action contractor that is negligent or grossly negligent or consti-
24 tutes intentional misconduct. To show negligence by a response action
25 contractor, a claimant must show that the acts or omissions of the
26 contractor under the response action contract were not in accordance
27 with generally accepted professional standards and practices at the
28 time the response action services were performed.
29 (b) The liability limitation under (a) of this section does not

1 apply to a response action contractor who would otherwise be strictly
2 liable under [this section] any other provision of state or federal law.
3 (c) The defense provided in AS 46.03.822(b)(1)(B) is not avail-
4 able to a potentially liable person with respect to costs or damages
5 caused by an act or omission of a response action contractor.
6 (d) Except as provided in (c) of this section, this section does
7 not affect the liability under this chapter or under any other state
8 law of a person other than a response action contractor.
9 (e) This section does not affect the liability of a response
10 action contractor that may arise from the response action contractor's
11 failure to comply with the terms or conditions of a response action
12 contract or a remedial action plan if one has been approved by the
13 department.
14 (f) This section does not affect the liability of an employer
15 who is a response action contractor with respect to an employee of the
16 employer under any provision of law, including a law related to work-
17 ers' compensation.
18 (g) In this section,
19 (1) "response action" means an action taken in connection
20 with the mitigation or cleanup of a hazardous substance release or
21 threatened release, including investigation, evaluation, plan develop-
22 ment, mapping and surveying, engineering, design and construction,
23 removal, and equipment provision;
24 (2) "response action contract" means a written contract or
25 agreement to provide response action with respect to a release or
26 threatened release of a hazardous substance, entered into by a person
27 with
28 (A) the department; or
29 (B) another person who has entered into an agreement

with the department that provides for response action subject to the department's oversight and control;

(3) "response action contractor" means

(A) a person who enters into a response action contract with respect to a release or threatened release of a hazardous substance and who is carrying out the contract; and

(B) a person who is retained or hired by and is under the control of a person described in (A) of this paragraph to provide services related to the response action contract.

* Sec. 4. AS 46.03.826(3) is amended to read:

(3) "having control over a hazardous substance" means producing, handling, storing, transporting, or refining a hazardous substance for commercial purposes immediately before entry of the hazardous substance <u>into the atmosphere or</u> in or upon the water, surface or subsurface land of the state, and specifically includes bailees and carriers of a hazardous substance;

* Sec. 5. AS 46.03.826(4) is amended to read:

(4) "hazardous substance" means

(A) an element or compound which, when it enters <u>into the atmosphere or</u> in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found; [OR]

(B) oil; <u>or</u>

<u>(C) a substance defined as a hazardous substance under 42 U.S.C. 9601(14);</u>

* Sec. 6. AS 46.03.826 is amended by adding new paragraphs to read:

(8) "facility"

1 (A) includes a
2 (i) building, structure, installation, equipment,
3 well, pit, pond, lagoon, impoundment, ditch, landfill,
4 storage container, motor vehicle, rolling stock, aircraft,
5 or pipe or pipeline, including a pipe into a sewer or
6 publicly-owned treatment works;
7 (ii) site or area at which a hazardous substance
8 has been deposited, stored, disposed of, placed, or other-
9 wise located;
10 (B) does not include any consumer product in consumer
11 use;
12 (9) "natural resources" means land, fish, wildlife, biota,
13 air, water, ground water, drinking water supplies, and other such
14 resources belonging to, managed by, held in trust by, appertaining to,
15 or otherwise controlled by the state or a municipality;
16 (10) "owner" and "operator"
17 (A) mean
18 (i) in the case of a vessel, any person owning,
19 operating, or chartering by demise, a vessel;
20 (ii) in the case of facility, any person owning or
21 operating the facility;
22 (iii) in the case of an abandoned facility or
23 vessel, any person who owned, operated, or otherwise con-
24 trolled activities at the facility or vessel immediately
25 before the abandonment; and
26 (iv) in the case of a facility or vessel, title or
27 control of which was conveyed due to bankruptcy, foreclo-
28 sure, tax delinquency, abandonment, or similar means to a
29 unit of the state or a political subdivision of the state,

1 any person who owned, operated, or otherwise controlled the
2 facility or vessel immediately beforehand;
3 (B) do not include a person who, without participating
4 in the management of a vessel or facility, holds indicia of
5 ownership primarily to protect that person's security interest in
6 the vessel or facility;
7 (11) "release" means any spilling, leaking, pumping, pour-
8 ing, emitting, emptying, discharging, injecting, escaping, leaching,
9 dumping, or disposing into the environment, including the abandonment
10 or discarding of barrels, containers, and other closed receptacles
11 containing any hazardous substance, but excluding
12 (A) any release that results in exposure to persons
13 solely within a workplace, with respect to a claim that those
14 persons may assert against the persons' employer; and
15 (B) emissions from the engine exhaust of a motor
16 vehicle, rolling stock, aircraft, or vessel;
17 (12) "transport" means the movement of a hazardous substance
18 by any mode, including pipeline; in the case of a hazardous substance
19 that has been accepted for transportation by a common or contract
20 carrier, "transport" includes any stoppage in transit that is tempo-
21 rary, incidental to the transportation movement, and at the ordinary
22 operating convenience of a common or contract carrier, and any stop-
23 page of this type shall be considered as a continuity of movement and
24 not as the storage of a hazardous substance;
25 (13) "vessel" means every description of watercraft or other
26 artificial contrivance that is used, or is capable of being used, as a
27 means of transportation on water, or that carries hazardous substances
28 for the purpose of incineration of the hazardous substances.
29 * Sec. 7. AS 46.08 is amended by adding a new section to read:

1 Sec. 46.08.075. LIENS AGAINST PROPERTY AS SECURITY FOR STATE
2 EXPENDITURES. (a) The state has a lien for expenditures by the state
3 from the oil and hazardous substance release response fund or from any
4 other state fund, for the costs of response, containment, removal, or
5 remedial action resulting from an oil or hazardous substance spill,
6 or, with respect to response costs, the substantial threat of a
7 release of oil or a hazardous substance against all property owned by
8 a person who is determined by the commissioner to be liable for the
9 expenditures under this chapter, AS 46.03, AS 46.04, 42 U.S.C. 9607,
10 or other state or federal law. The lien includes interest, at the
11 maximum rate allowable under AS 45.45.010(a), from the date of the
12 expenditures. The state may file an action in a court of competent
13 jurisdiction in order to foreclose on the lien.
14 (b) A lien established under this section against real property
15 is not effective until
16 (1) a certificate of lien is recorded in the district
17 recorder's office for the district in which the property is located,
18 describing the property and stating the amount of the lien, the name
19 of the owner as grantor, and, if known, the name of the person causing
20 the oil or hazardous substance release; and
21 (2) the commissioner sends a copy of the certificate of
22 lien by certified mail return receipt requested, or actually delivers
23 a copy of the certificate of lien, to the persons described in (1) of
24 this subsection and to all other persons of record holding an interest
25 in the property.
26 (c) When any amount with respect to which a lien has been re-
27 corded under this section has been paid or reduced, the commissioner
28 shall, upon request of the property owner, issue a certificate dis-
29 charging or partially releasing the lien. That certificate may be

1 recorded in the office in which the certificate of lien was recorded.

2 (d) The commissioner may, in the commissioner's discretion,
3 reduce, discharge or partially release a lien under this section if a
4 bond, or other security, in a form and an amount satisfactory to the
5 commissioner is posted. The bond or other security must include an
6 amount sufficient to cover the cost of execution, collection, or
7 foreclosure, including attorney fees. A reduction, discharge, or
8 partial release may not be granted under this subsection if it would
9 be contrary to the public interest. When a lien is reduced, dis-
10 charged, or partially released under this subsection, the commissioner
11 shall, at the request of the property owner, issue a certificate to
12 that effect.

13 (e) A person with an ownership interest in property against
14 which a lien is recorded may bring an action in a court of competent
15 jurisdiction to require that the lien be released. The lien may be
16 released to the extent of that person's ownership interest if the
17 court finds that the person is not liable for the expenses incurred by
18 the state in connection with the costs of response, containment,
19 removal, or remedial action resulting from the oil or hazardous sub-
20 stance release or threat of release of oil or a hazardous substance.

21 * Sec. 8. AS 46.03.822, as amended by sec. 2 of this Act, applies to
22 liability for releases and substantial threats of releases that occurred
23 before the effective date of this Act, and therefore, AS 46.03.822, as
24 amended by sec. 2 of this Act, is retroactive in its effect. However,
25 AS 46.03.822, as amended by sec. 2 of this Act, does not apply to an action
26 in which final judgment no longer subject to appeal has been entered before
27 the effective date of this Act.

28 * Sec. 9. This Act takes effect immediately under AS 01.10.070(c).

29

11.	Unalakleet Spill	665-89-0012	Recent oil spill. State and Native corporation hope to negotiate in clean-up effort.

NON-OIL HAZARDOUS SUBSTANCES

1.	Forward Alaska, DNR, Deadhorse Tract 75 & 76	665-89-0068	Multiple spills on leased tracts adjacent to NANA Reservoir at Deadhorse.
2.	Deadhorse Hotel Pad	665-89-0058	Contamination of gravel pad and adjacent tundra.
3.	Alaska Gold/ Steadman Field	665-87-0002	Negotiated containment and clean-up of mercury and arsenic contamination. First stage of clean-up is complete.
4.	Nome Barrel Dump	665-88-0024	Clean-up underway of site with numerous abandoned barrels containing hazardous substances.
5.	Halliburton Services	665-88-0037	Hazardous substance contamination at Deadhorse site operated by oil field service company. Clean-up is in sampling and analysis stage.
6.	Lease Tract 54 (Childs Pad)	665-87-0204	Hazardous substance discharges on abandoned Deadhorse Tract. DEC and oil companies are attempting to resolve outstanding clean-up issues.
7.	Tri-Con Mining	665-89-0117	Suspected cyanide discharge from Ester Dome heap leach mining operation. Enforcement is at preliminary site assessment stage.
8.	Citigold Mining	665-89-0088	Leaking inner liner indicates possible cyanide discharge from Ester Dome heap leach mining operation.

The above cases have been referred by the Department of Environmental Conservation to the Attorney General's Office for assistance in enforcement actions. The Attorney General's Office is also assisting the Department of Natural Resources on several other Deadhorse lease tract problems, involving oil and hazardous substance contamination. In addition to the Forward Alaska tract, there are problems with the Childs Tract (Tract 54, work management #665-89-0021) and the Newco Tract (Tract 57, work management #665-89-0104).

OIL SPILL/DISCHARGE MATTERS - ANCHORAGE

State v. Block: Action in federal district court against U.S. Forest Service seeking cleanup of an oil spill from former cannery site on Evans Island in Chenega Bay.

State v. Tesoro Alaska Petroleum, et al.: Action in state superior court for cleanup, penalties and damages from underground oil spill at gasoline station in Peters Creek.

State v. Breeden: Action in superior court for damages (will be followed by action for cleanup and penalties) for gasoline contamination of water well at Independence Mine Visitor's Center at Hatcher Pass.

State v. Aoyagi Maru: Investigation proceeding and Complaint to be filed for damages and penalties for marine spill from grounded vessel at Lost Harbor near Dutch Harbor.

State v. M/T Thompson Pass: Investigation proceeding and Complaint to be filed for damages and penalties for oil spill from tanker while loading at Trans-Alaska Pipeline System (TAPS) terminal in Valdez.

State v. Chil Bo San: Investigation proceeding and Complaint for damages and penalties to be filed for marine spill from grounded vessel near Spray Cape, Unalaska Island.

AMOCO (Nikiski): Disposal of petroleum waste products and drilling muds to unlined pits. Compliance Order being negotiated for cleanup and groundwater assessment.

Texaco Station (Anchor Point): Extensive groundwater contamination has forced some residents to seek alternate water supply. Contamination resulted from leaking fuel delivery system; also, possible surface spill. Cost of cleanup may exceed $500,000.00. Investigation proceeding.

Coastal Drilling (Soldotna): Unpermitted dumping site for drill muds, solvents, oils, equipment, etc. Investigation proceeding.

Ridgeway Service Station (Kenai): Leaking fuel delivery system polluted groundwater, wells, in residential subdivision. Several residents put in new wells. Compliance Order being negotiated for cleanup.

Tesoro Refinery (Nikiski): Tesoro estimates they have spilled and/or leaked 400,000 to 750,000 gallons of petroleum product

HAZARDOUS SUBSTANCE SPILL/DISCHARGE MATTERS - ANCHORAGE

Tesoro Refinery Hazardous Waste (Nikiski): Hazardous waste deposited in unlined pits at refinery in 1970's and possibly early 1980's. Waste has leached into the groundwater. Tesoro has applied to EPA for permit to leave the waste in the ground. Tesoro required to do groundwater monitoring, possibly groundwater remediation.

Union Chemical Fertilizer Plant: Soil and perhaps groundwater at plant contaminated with ammonia. UNOCAL has agreed to determine extent of contamination.

Norgetown Dry Cleaners (Anchorage): Substantial solvent discharge into sewer line resulting in major groundwater contamination. Investigation proceeding and Complaint to be filed.

McGahan Subdivision (Kenai): Tetrachloroethylene contamination in public water system. Investigation proceeding.

Alyeska Basin Subdivision: Tetrachoroethylene contamination of public water system. Complaint to be filed.

M & M Enterprises (Anchorage): Compliance Order under negotiation for PCB and lead contamination.

into the soil and water around the refinery. The contamination has migrated onto neighboring property, polluting neighboring wells. Cleanup is underway; will be ongoing for years to come.

Union Oil v. State -- DEC denied Union's permit application for six unlined pits for disposal of drill muds. DEC's decision was upheld by administrative hearing officer. DEC to undertake enforcement for proper disposal of the pit contents.

State v. Union Oil -- Litigation over a seventh unpermitted, unlined drill mud disposal site. Substantial site testing underway.

State v. All Alaska -- Investigation proceeding and Complaint to be filed for damages and penalties from oil spill from fish processing vessel at St. Paul Island.

State v. Glacier Bay -- Complaint for damages and penalties to be filed for marine oil spill from tanker in Kenai.

State v. M/V Swallow -- Investigation proceeding and Complaint for damages and penalties to be filed for marine spill from grounded vessel near Dutch Harbor.

State v. Cove Leader -- Investigation proceeding and complaint for damages and penalties to be filed for marine spill from tanker in Valdez.

Unocal Service Stations (Anchorage) -- Three sites are being investigated for oil contamination from leaking underground storage tanks. Compliance orders under negotiation for each site.

Kim's Service Station (Anchorage) -- Oil contamination from leaking underground storage tanks.

Topper's Service Stations (Anchorage) -- Four sites are being investigated for oil contamination from leaking underground storage tanks. Compliance orders under negotiation for each site.

Chevron Service Station (Anchorage) -- Oil contamination from leaking underground storage tanks. Compliance orders under negotiation.

7-Eleven Service Station (Eagle River) -- Oil contamination from leaking underground storage tanks. Compliance order signed and clean up proceeding.

Amoco Platform Anna -- Investigation proceeding and Complaint for damages and penalties to be filed for marine spill from off shore drilling pad.

Union Oil Gravel Pit (Kenai) -- Discharge of condensate and other oil waste. Compliance order under negotation.

Ft. Richardson -- Investigation proceeding on leaking underground storage tanks.

Sterling Chevron Station -- Leaking underground storage tank. Criminal complaint filed. Complaint to be filed for cleanup and civil penalties.

Chevron Bulk Plant (Valdez) -- Soil and groundwater contamination from refined petroleum products. Investigation proceeding.

Amoco Platform Anna -- Investigation proceeding and Complaint for damages and penalties to be filed for marine spill from off shore drilling pad.

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ENVIRONMENTAL LAW REPORTER

NEWS & ANALYSIS

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NEWS & ANALYSIS

ARTICLE

An Annotated Legislative History of The Superfund Amendments and Reauthorization Act of 1986 (SARA)

by Timothy B. Atkeson, Seth Goldberg, Frederick E. Ellrod III, and Sandra L. Connors

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Glossary

The following statutes and administrative designations are used throughout this article:

ATSDR: Agency for Toxic Substances and Disease Registry, part of the Public Health Service's Center for Disease Control in Atlanta, Georgia (assigned health effects responsiblities under CERCLA §104(i))

CERCLA: Comprehensive Environmental Response, Compensation, and Liability Act (law creating the Superfund)

EPA: Environmental Protection Agency

FWPCA: Federal Water Pollution Control Act

GAO: General Accounting Office

HRS: Hazard ranking system (EPA's system for ranking the priority of cleanup sites)

NPAR: Nonbinding preliminary allocation of responsibility (prepared by EPA as an aid to settlement under CERCLA §122)

NCP: National contingency plan (operating rules for Superfund cleanups promulgated by EPA under CERCLA §105(a)(8)(B))

NPL: National priorities list (sites most in need of cleanup, promulgated by EPA under CERCLA §105(a)(8))

OSHA: Occupational Safety and Health Administration

PRP: Potentially responsible party (who may be held liable for cleanup costs)

RCRA: Resource Conservation and Recovery Act

RI/FS: Remedial investigation/feasibility study (study of cleanup need and desirable remedy at cleanup site)

ROD: Record of decision (EPA administrative record of selection of remedial action to be taken at cleanup site)

SARA: Superfund Amendments and Reauthorization Act of 1986

SDWA: Safe Drinking Water Act

TSCA: Toxic Substances Control Act

The following legislative documents are also referred to throughout the article sections:

Senate Environment Committee Report: SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, SUPERFUND IMPROVEMENT ACT OF 1985, S. REP. No. 11, 99th Cong., 1st Sess. (1985).

Senate Finance Committee Report: SENATE COMMITTEE ON FINANCE, SUPERFUND REVENUE ACT OF 1985, S. REP. No. 73, 99th Cong., 1st Sess. (1985).

House Commerce Committee Report: HOUSE COMMITTEE ON ENERGY AND COMMERCE, SUPERFUND AMENDMENTS OF 1985, H.R. REP. No. 253, pt. 1, 99th Cong., 1st Sess. (1985).

House Ways and Means Committee Report: HOUSE COMMITTEE ON WAYS AND MEANS, SUPERFUND AMENDMENTS OF 1985, H.R. REP. No. 253, pt. 2, 99th Cong., 1st Sess. (1985).

House Judiciary Committee Report: HOUSE COMMITTEE ON THE JUDICIARY, SUPERFUND AMENDMENTS OF 1985, H.R. REP. No. 253, pt. 3, 99th Cong., 1st Sess. (1985).

House Merchant Marine Committee Report: HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES, SUPERFUND AMENDMENTS OF 1985, H.R. REP. No. 253, pt. 4, 99th Cong., 1st Sess. (1985).

House Public Works Committee Report: HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, SUPERFUND AMENDMENTS OF 1985, H.R. REP. No. 253, pt. 5, 99th Cong., 1st Sess. (1985).

Conference Committee Report: COMMITTEE OF CONFERENCE, SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. (1986).

Introduction

While there are undoubtedly fascinating stories of the dynamics that shaped the Superfund Amendments and Reauthorization Act of 1986 (SARA) waiting to be written, interpretation of SARA as a statute must be governed by its language, by relevant legislative history in the committee reports, and to some extent by the legislative debates. The volume of this material is daunting.

It is the goal of this annotated legislative history to produce a comprehensive guide to understanding the development of the new law and interpreting the significance of its provisions. The first basic tool to understanding is the composite text of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended,[1] which includes both the new language accomplished by the SARA amendments and the text of deleted CERCLA provisions. This annotated text of CERCLA is cross-referenced both to SARA and to detailed comments on over 40 topics. The reader will next find three sections (i) summarizing the principal new features that will affect the Superfund practitioner;[2] (ii) setting out the steps in the enactment of SARA that are important to understanding its legislative history;[3] and (iii) offering tentative conclusions as to what are the main changes wrought by SARA.[4] The guide then provides separate detailed discussions for more than 40 of the principal topics dealt with in SARA.[5] For each topic, there is a developmental history, relating the topic to existing CERCLA provisions, outlining the role of the Administration and the seven congressional committees involved in the reenactment process, and listing all the relevant legislative history sources.

Note on Superfund Terminology

CERCLA creates a revolving fund (Superfund or Fund) which can be tapped by the Environmental Protection Agency (EPA), state, and local governments to clean up hazardous waste sites which have been listed by EPA on the National Priorities List (NPL). Sites are listed on the NPL if the risk they present is high enough on EPA's Hazard Ranking System (HRS). Cleanup of sites must be consistent with EPA's National Contingency Plan (NCP).

Generators and transporters of hazardous substances, as well as past and present owners and operators of hazardous waste sites, are made strictly, jointly and severally liable for the costs of cleanup of that waste by CERCLA §107. They are referred to as "potentially responsible parties" (PRPs) for what are called "§107 response costs." Where PRPs can be identified, they can be ordered to perform cleanups under §106 enforcement actions, can be sued for §107 response costs after the federal or state government has performed a cleanup, or can enter into voluntary settlements with the government concerning their liability for cleanup costs. The existence of Superfund enables the government to go ahead with cleanups where PRPs are not willing to undertake the work, are not available, or are insolvent. In theory, Superfund is replenished by PRP recoveries although these recoveries have amounted to very little.[6]

For the PRP, the most critical factors in the program are the standards governing cleanups. EPA has considerable latitude about initial response actions (removals) to clean the surface and stabilize a site. Thereafter, either the government or the PRPs obtain a remedial investigation/feasibility study (RI/FS) to analyze the problem and alternative remedial actions. EPA documents its selection of remedy in what is known as a record of decision (ROD).

Glossary

A glossary has been provided to assist the reader in interpreting the numerous abbreviations, acronyms, and standardized citations that appear in this annotated legislative history.[7]

SARA: A New Ball Game for the Superfund Practitioner

SARA is the first major overhaul of CERCLA[8] since that statute was enacted in 1980. This section attempts to summarize the main new developments SARA is likely to bring about in Superfund practice and to alert the practitioner to these changes. Its message is that SARA creates strong new incentives for private parties to begin active participation in the site assessment and negotiation process as early as possible. The new cleanup standards, settlement and enforcement provisions, and the much larger fund provide EPA with additional tools and greater leverage to achieve its goals. Only if PRPs position themselves to have an early impact on remedy selection can they minimize the ultimate remediation cost.

Implications of New Cleanup Standards

The experience of PRPs under CERCLA has increasingly indicated that it is in their interest to become involved in site assessment early and to participate in the RI/FS pro-

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1. ELR STAT. 44005. ELR's text of CERCLA as amended does not include certain sections of SARA that do not actually amend CERCLA, although some of these sections appear in the annotated guide. These sections are §205 (cleanup of petroleum from leaking underground storage tanks); §211 (Defense Environmental Restoration Program); §§300-330 (Emergency Planning and Community Right-to-Know Act of 1986); and §§501-531 (Superfund Revenue Act of 1986, amending the Internal Revenue Code). *See* SARA, PUB. L. No. 99-499, 100 Stat. 1613 (1986).
2. *See infra* text at notes 8-50.
3. *See infra* text at notes 51-100.
4. *See infra* text at notes 101-168.
5. *See infra* text beginning at 16 ELR 10377. This annotated guide does not discuss certain sections of SARA that are free-standing provisions of law or that amend statutes other than CERCLA, although these sections appear in the composite amended text. *See* SARA §§128(c), (e), (g), (l). ELR STAT. 44046.
6. OFFICE OF INSPECTOR GENERAL, ENVIRONMENTAL PROTECTION AGENCY, CONSOLIDATED REPORT ON EPA'S COST RECOVERY ACTIONS AGAINST POTENTIALLY RESPONSIBLE PARTIES (1986). As of Sept. 30, 1985, EPA had obligated $1.3 billion from the Fund. During the same period it had negotiated 84 cost recovery cases which resulted in only a $14 million reimbursement to the Fund, or a cost recovery ratio of a little over 1 percent. *Id.* at 2.
7. *See supra* p. 10362.
8. 42 U.S.C. §§9601-9675, 42 U.S.C. §9621, ELR STAT. 44005.

cess in order to exert some measure of influence over the remedy. The new SARA cleanup standards provide even greater incentives in this direction. These standards are likely to be more onerous than they look.[9] Although it has been EPA's policy for some time to call for application of federal environmental standards that were legally "applicable or relevant and appropriate,"[10] in practice there has been room for discussion. The statutory cleanup standards in SARA compel EPA to apply the "legally applicable or relevant and appropriate" cleanup standard and will make cleanups more difficult for at least four reasons.

☐ *Detailed Federal Standards.* Many more detailed federal standards, particularly the recommended maximum contaminant levels (RMCLs) being developed under the Safe Drinking Water Act (SDWA)[11] (now designated under the 1986 amendments to the SDWA as "maximum contaminant level goals")[12] and the water quality criteria established under the Federal Water Pollution Control Act (FWPCA),[13] will now be applicable to the cleanup process.[14] These stringent numerical standards will apply under SARA's general cleanup standard and could result in groundwater cleanups having to meet RMCLs that are 100 times purer than the requirements for tap water. In addition, other new federal standards will make SARA cleanup increasingly more costly. For example, EPA will be phasing in the land ban restrictions required by the 1984 amendments to the Resource Conservation and Recovery Act (RCRA) over the next several years,[15] in part in response to the charge made during SARA enactment that it was creating new Superfund sites with the land disposal of wastes from the Superfund cleanups.[16] The periodic issuance of new regulations implementing the 1984 RCRA amendments is also likely to have a heavy impact on future remedial action under CERCLA.

☐ *Applicability of State Standards.* The new SARA §121 requires that more stringent state standards be applied to CERCLA cleanups.[17] Standards in a number of states[18] may make Superfund cleanups even more costly than if only federal standards were applied.[19]

☐ *Health Assessments.* The requirement that the Agency for Toxic Substances and Disease Registry (ATSDR) perform a health assessment on every site on the NPL, with the goal of completing the health assessment before the RI/FS,[20] will put a red flag on every trace of toxicity at sites and will tend to alarm the surrounding community if anything (real, suspected, or possible) is identified as a potential health concern. This, in turn, will have a powerful effect on community comment on both the RI/FS and proposed remedial decision.[21] It also may trigger a citizen suit challenging the remedy selected in any ROD or consent decree.[22]

☐ *Permanent Cleanups.* The emphasis in SARA §121 on permanent cleanups is new and based on very little engineering experience.[23] With EPA, the community, and the states expecting permanent solutions, PRPs will be pushed hard in this direction. Cleanup engineering firms will see much new business and stand ready to enter uncharted seas for handsome fees.

Because SARA's cleanup standards will make Superfund cleanups much more expensive, they place a premium on PRP participation. To the extent private parties can perform the RI/FS and otherwise run the site cleanup, they can save money over what it would cost if EPA uses the Fund to do the job. Early and continuous participation

---

9. SARA §121(a) adds a new §121 to CERCLA requiring EPA to adhere to stringent requirements favoring permanent on-site treatment as the remedy for all sites. SARA §121, CERCLA §121, 42 U.S.C. §9621, ELR Stat. 44054. Under CERCLA §121(b), EPA is required to conduct an assessment of permanent solutions and alternative treatment technologies at each site. The agency must select a remedy that protects human health and the environment, and that employs permanent solutions, alternative treatment technologies, or resource recovery technologies to the maximum extent practicable. *Id. See generally infra* text at I.F. (annotated section on cleanup standards).

10. Memorandum from J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, EPA, to Regional Administrators, Regions I-IX, Re: CERCLA Compliance With Other Environmental Statutes (Oct. 2, 1985), ELR Admin. Materials 30066.

11. 42 U.S.C. §§300f-300j-11, ELR Stat. 41101.

12. SDWA §1412(a)(2), 42 U.S.C. §300g-1(a)(2), ELR Stat. 41102.

13. FWPCA §304(a), 33 U.S.C. §1314(a), ELR Stat. 42126.

14. SARA §121(a), CERCLA §121(d)(2)(A), 42 U.S.C. §9621(d)(2)(A), ELR Stat. 44054.

15. The 1984 RCRA amendments prohibit land disposal of 12 categories of wastes effective November 8, 1986, unless EPA addresses safe land disposal by regulation before that date. *See* 51 Fed. Reg. 19300, 19304 (1986). On November 7, 1986, EPA published a final rule banning land disposal and establishing treatment standards for several categories of solvent wastes. As treatment technologies become available, land disposal bans will be broadened. 51 Fed. Reg. 40572 (1986).

16. Senator Moynihan (D-N.Y.), during Senate floor debate on SARA, noted "a pattern of simply digging up [illegible] planting it in another." 131 Cong. Rec. S[illegible] 1985).

17. SARA §§121(a), CERCLA §121(e) and (f), 42 U.S.C. §§9621(e) and (f), ELR Stat. 44056.

18. For example, Proposition 65, known as the Toxic Initiative and approved by the the voters in California this November, provides in effect that industry shall not release any toxic pollutant in any detectable amount. A New Jersey statute requires cleanup of an industrial site whenever it is closed or ownership is transferred. New Jersey Environmental Cleanup Responsibility Act, N.J. Stat. Ann. §13:1K-6 *et seq.*

19. SARA §121 also provides for greater state participation in development and selection of remedial actions. EPA must issue regulations providing states an opportunity to object to any proposed remedial action that the state believes does not conform to applicable federal or state standards. SARA §121, CERCLA §121, 42 U.S.C. §9621, ELR Stat. 44054.

20. SARA §110(4) requires the ATSDR to perform a health assessment on each site on the NPL, with priority given to sites where there is documented evidence of a release with potential risk to human health. SARA §110(4), CERCLA §104(i)(6), 42 U.S.C. §9604(i)(6), ELR Stat. 44018. *See generally infra* text at I.L. (annotated section on health-related authorities).

21. SARA §117 requires public participation in the development of remedial actions. EPA is required to issue regulations providing, at a minimum, notice and an opportunity to comment on the proposed remedial action plan. SARA §117, CERCLA §117, 42 U.S.C. §9617, ELR Stat. 44045. *See generally infra* text at I.J. (annotated section on public participation).

22. SARA adds a new §310 to CERCLA authorizing citizens to sue EPA, or any other person, alleged to be in violation of CERCLA or its regulations. This section also allows suits against EPA for failing to perform any nondiscretionary duty under the Act. *See generally infra* text at II.L. (annotated section on citizen suits).

23. *See, e.g.,* 132 Cong. Rec. H9603 (daily ed. Oct. 8, 1986) (statement of Rep. Henry (R-Mich.) discussing the current lack of permanent treatment technologies, even the lack of standardized testing and demonstration protocols for such technologies).

will allow PRPs to exert some control over the selection of the remedy. This is the best opportunity the new statute gives the PRP to work toward greater cost-effectiveness. For example, the PRPs should concentrate on what is the most cost-effective solution, what waivers might be appropriate, and whether some alternative technology should be considered.

Settlements and Litigation Under SARA

SARA makes it much harder to postpone or challenge hard choices about remedial decisions. Under the new SARA procedure, EPA builds an administrative record, reaches a remedial decision, and then can implement that decision itself with ample resources from a replenished Superfund under §104[24] or order the PRP to carry out that remedial decision under §106.[25] If EPA elects to do the cleanup itself, experience to date suggests it will be much more costly than if PRPs perform the work.[26] Also, SARA's preenforcement review limitations prevent the PRP from bringing any court challenge until the Department of Justice sues the PRP under §106 or §107.[27] To defend a §107 response cost action or a §106 enforcement proceeding, the PRP generally will have to show a busy court that some incredibly technical judgment, copiously documented by EPA, was arbitrary and capricious.[28] In other words, PRPs should be warned that litigation to challenge EPA cleanup decisions generally will take place years later, *after* EPA has incurred massive expenditures, and will impose upon PRPs a very difficult burden to overcome.

The SARA rules on deferral of judicial review provide additional incentives for PRPs to f[illegible]eir use of expert opinions, data submission, and [illegible] s early as possible in the process. PRPs sh[illegible] centrate on shaping the RI/FS and the admini[illegible] ecord of the remedial decision. Once the ROD [illegible] it is likely to be too late to do anything to correc[illegible] costly cleanup decision. EPA will issue importa[illegible] tions on development of the administrative reco[illegible] its RODs.[29] Significantly, SARA expressly states th[illegible] e regulations need not provide an adjudicatory hear[illegible] fore the ROD is finalized.[30]

Another aspect of pay[illegible] rly attention to CERCLA problems to minimize liabil[illegible] rises out of the SARA provision offering some hope t[illegible] e "innocent landowner"[31] who exercised due diligence in purchasing property later found to be contaminated. This provision should guide the "due diligence" procedures private parties follow in acquiring property, and also should be considered in connection with acquisitions or mergers. SARA thus creates additional reasons to review real property transactions for potential CERCLA exposure before proceeding with a transaction, whether or not there is any pending EPA study or cleanup.

An essential element of organizing early on Superfund issues is identifying other PRPs likely to have significant involvement at the same site. SARA invites EPA to seek voluntary settlements.[32] It also encourages private conduct of both RI/FS work[33] and remedial action.[34] To facilitate settlement, SARA establishes a procedure for EPA to provide PRPs with information about a site and then allow a grace period for negotiations.[35] It takes time to educate the parties to cooperate on such problems, and practitioners should consider ways of accelerating and facilitating the distribution of the information that SARA authorizes EPA to acquire and share with PRPs. Private suits for response costs among PRPs under §107 are becoming more numerous, and SARA lays an ample basis for extensive litigation about contribution among PRPs[36] if they choose not to cooperate. The Superfund practitioner should educate not only his own client, but also other PRPs, on the merits of cooperation as early as possible.

Once the client, the other PRPs, and EPA or the state are on the road to an understanding of the facts through the RI/FS, the Superfund practitioner will need to explore the aids to settlement authorized in SARA. These include mixed funding,[37] a request to EPA to give the parties its Nonbinding Preliminary Allocation of Responsibility

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24. CERCLA §104, 42 U.S.C. §96[illegible], ELR Stat. 44011. The new Fund will contain $8.5 billion, compared with $1.6 billion Congress previously authorized. Conference Committee Report at 318, 320-21.

25. CERCLA §106, 42 U.S.C. §9606, ELR Stat. 44023; *see* SARA §121, CERCLA §121, ELR Stat. 44054.

26. *See, e.g.*, Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 Duke L.J. 261, 301-02 (EPA assessment and cleanup costs average 30 to 40 percent more than equivalent private cleanups).

27. SARA §113(e) precludes preenforcement judicial review of any response action taken or ordered under §§104 or 106 of CERCLA. Review generally is available only in enforcement actions, and even then it is limited to the administrative record EPA has compiled supporting its decision. SARA §113(e), CERCLA §113(h)(1), 42 U.S.C. §9613(h)(1), ELR Stat. 44042. *See generally infra* text at II.A. (annotated section on judicial review).

28. SARA §113(e), CERCLA §113(j), 42 U.S.C. §9613(j), ELR Stat. 44042.

29. SARA §113(e), CERCLA §113(k), 42 U.S.C. §9613(k), ELR Stat. 44043.

30. *Id.*

31. SARA provides some protection to landowners who purchase property without knowing that hazardous substances were present on it. A new definition adding §101(35)(A) of CERCLA confirms that a contract for sale of land or a deed establishes a contractual relationship for purposes of §107 liability. However, landowners who acquired property without knowledge of contamination, and who had no reason to know of it, may have a defense under this provision.

32. SARA §122(a), CERCLA §122, 42 U.S.C. §9622, ELR Stat. 44058.

33. SARA §104(a) provides that private parties may conduct RI/FSs provided that EPA approves the work and the private parties agree to reimburse EPA for the cost of retaining an EPA expert to oversee the study. SARA §104(a), CERCLA §104(a), 42 U.S.C. §9604(a), ELR Stat. 44011.

34. SARA §122(a) authorizes EPA to enter into agreements with private parties to perform remedial work provided the work "will be done properly." Voluntary agreements are encouraged "to expedite effective remedial actions and minimize litigation." SARA §122(a), CERCLA §122, 42 U.S.C. §9622, ELR Stat. 44058.

35. SARA §122(a) provides that EPA may provide PRPs with information on other PRPs, the volume and nature of wastes contributed, and a ranking by volume of wastes contributed. PRPs have 60 days from receipt of this information to make a proposal to EPA for voluntarily undertaking or funding the action under a consent agreement. EPA cannot commence an RI/FS for 90 days following notice, or an action under §104 for 120 days. SARA §122(a), CERCLA §122(e), 42 U.S.C. §9622(e), ELR Stat. 44059.

36. Contribution actions are expressly provided for by SARA §113(b). SARA §113(b), CERCLA §113(f), 42 U.S.C. §9613(f), ELR Stat. 44041.

37. SARA §122(a) authorizes EPA to agree to mixed funding settlements where the agency reimburses PRPs for tasks they have agreed to perform, but not to pay for. SARA §122(a), CERCLA §122(b)(1), 42 U.S.C. §9622(b)(1), ELR Stat. 44058. This provision [illegible] to facilitate settlements where some responsible parties are unknown, insolvent, or refuse to settle. Conference Committee Report at 252.

(NPAR),[38] de minimis settlements with minor parties,[39] and possibly a covenant not to sue, although SARA greatly limits EPA's discretion with respect to the last.[40]

As a result of SARA, settlement will usually take the form of a consent decree.[41] The state in which the site is located and the public will be invited to comment.[42] The client's attention should be drawn to the fact that SARA requires a provision in the decree allowing fines of up to $25,000 a day for its violation.[43] The statute also provides penalties of up to $75,000 per day for the second and subsequent violations.[44] These penalties can be significant, particularly if there is a breakdown of PRP cooperation under consent decrees.

The greatly increased role given by SARA to states and the public will be an important new factor in Superfund cases. Not only must EPA be satisfied with the remedy selected, but input from these groups must be considered as well. And SARA authorizes EPA to provide $50,000 technical assistance grants from the Fund to community groups to aid their scrutiny of cleanup decisions.[45] Practitioners also should anticipate increased media attention on the cleanup process and take steps to ensure that media relations are properly addressed.

The previously mentioned SARA requirement for health assessments at each site on the NPL[46] means that the Superfund practitioner should pay careful attention to this aspect of the proceeding. Health concerns are one of the basic forces behind enactment of SARA.[47] A health assessment indicating a hazard is likely to trigger not only much more expensive cleanup but also toxic tort suits by area residents.[48] Early preparation and participation in this process to the fullest extent possible represent the best approach to this potential problem.

The overall impact of SARA on the CERCLA process has caused EPA staff to project a nine-month increase in the time it will take to handle a Superfund cleanup, from 58 months to 67 months.[49] The RI/FS work plan is supposed to be developed within six months of the commencement of discussions with cooperative PRPs. The RI/FS itself will take another year-and-a-half. The health assessment should be available toward the end of the second year, as will be a possible NPAR. Public and state comment will occur in the third year, after which the ROD is prepared. The remedial design will be available around the end of the third year, and consent decrees may be entered if there is a settlement. Thereafter, review and contracting will occupy most of the fourth year. Remedial action, which takes an average of two-and-a-half years, brings EPA's estimate of total time elapsed to over six-and-a-half years.

This schedule illustrates that SARA has created a cleanup process with great potential for inflation of costs. New cleanup standards, health assessments, state and public participation, and other new requirements of the statute all contribute to this potential. The principal damage control strategy the statute appears to provide PRPs is the opportunity to participate as early and as fully as possible throughout the study and remediation process and to actively put forward the most cost-effective cleanup strategy. Only in this way can PRPs hope to shape the outcome.

The above rather stern warnings about SARA should provide some appreciation of the importance of SARA to practitioners and clients alike. To fully understand the complex new Superfund statute, it is useful not only to analyze SARA itself, but also to consider the intent of Congress in enacting the statutory language. The annotated legislative history that follows will provide a more in-depth understanding about provisions of concern.

SARA: How It Came to Be

For three years Congress had worked on Superfund reauthorization and had finally produced a laboriously crafted compromise to be known as "SARA." EPA had announced that it had finally exhausted its Superfund resources after several program slowdowns and would now have to shut down the program unless SARA became law. Congress was making preparations to adjourn within days. A veto, based principally on objections to SARA's broad $2.5 billion environmental tax on corporations, threatened to undo three years of intense congressional effort and to leave EPA with hundreds of unfinished cleanups.

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38. To encourage agreement on private funding on remedial action after completion of an RI/FS, SARA 122(a) authorizes EPA to prepare a NPAR and provide it to the parties. SARA §122(a), CERCLA §122(e)(3), 42 U.S.C. §9622(e)(3), ELR STAT. 44060. The NPAR is not admissible as evidence in any proceeding and is not subject to judicial review. The cost of preparing an NPAR is considered a response cost recoverable under §107.

    Assistant Attorney General Henry Habicht, who handles EPA's Superfund litigation, stated in a recent talk that "[a]lthough performance of an NPAR is within the Administrator's discretion, we expect that such allocations will be prepared for a significant proportion of sites on the NPL, assuming that the parties want such an allocation." F. Henry Habicht II, Superfund Enforcement After Reauthorization: How Much Will the Process Change? (Oct. 23, 1986) (speech given at ALI-ABA Conference on Hazardous Wastes, Superfund, and Toxic Substances, Washington, D.C.).

39. SARA authorizes EPA to enter into settlements with parties responsible for only a minor portion of response costs at a facility, based upon volume and toxicity of waste contributed. SARA §122(a), CERCLA §122(g), 42 U.S.C. §9622(g), ELR STAT. 44061.

40. SARA §122(a) authorizes EPA to enter into covenants not to sue with settling parties under certain, narrowly defined circumstances. SARA §122(a), CERCLA §122(f), 42 U.S.C. §9622(f), ELR STAT. 44060 Generally, covenants can only be as effective as the remedy completed is permanent.

41. SARA §122(a), CERCLA §122(e), 42 U.S.C. §9622(e), ELR STAT. 44058. Subject to certain exceptions, SARA §122(a) requires settlements with respect to remedial action to be in the form of consent decrees under CERCLA §106.

42. SARA §§117, 121(a), CERCLA §§117, 121(f), 42 U.S.C. §§9617, 9621(f), ELR STAT. 44045, 44054.

43. SARA §109, 42 U.S.C §9609, CERCLA §109, ELR STAT. 44031.

44. *Id.*

45. *See* SARA §117, CERCLA §117, 42 U.S.C. §9617, ELR STAT. 44045.

46. SARA §110, CERCLA §104(i), 42 U.S.C. §9604(i), ELR STAT. 44017. *See also supra* text accompanying note 20.

47. *See, e.g.,* SARA §104(a), CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1), ELR STAT. 44011. This section inserts a directive requiring that "the President shall give primary attention to those releases which the President deems may present a public health threat."

48. The toxic waste episode at Woburn, Massachusetts, with its extensive private damage claims, was as much a factor in congressional thinking about SARA as Love Canal was to CERCLA. *See* 132 CONG. REC. S14932 (daily ed. Oct. 3, 1986) (statement of Sen. Kennedy (D-Mass.)).

49. Gene Lucero, Director, Office of Waste Programs Enforcement, EPA, The New Superfund Enforcement Program: What do Potentially Responsible Parties do Now? (Oct. 23, 1986) (speech given at ALI-ABA Conference on Hazardous Wastes, Superfund, and Toxic Substances, Washington, D.C.).

Early on the afternoon of Friday, **October 17, 1986,** the White House Press Secretary, speaking from Grand Forks, North Dakota, announced that President Reagan had signed the Superfund reauthorization legislation during his flight on Air Force One to Grand Forks.[50] A brief Presidential statement was made available, pointing out various considerations that had enabled the President to overcome his earlier objections to "any broad-based tax as a new revenue source for Superfund."[51] Thus, without the usual fanfare of a signing ceremony, SARA became law and the three-year battle over amendment of CERCLA and replenishment of Superfund suddenly came to an end. Little more than 24 hours later, Congress, which had passed SARA by margins ample to overcome any veto and which had threatened to stay in session long enough to prevent a pocket veto of SARA, adjourned.

The three-year process leading to SARA's enactment began in 1984 in the same politically charged atmosphere in which it ended. President Reagan had said in his January 25, 1984, State of the Union message, "And because the Superfund law expires in 1985, I've asked Bill Ruckelshaus to develop a proposal for its extension so there'll be additional time to complete this important task."[52] But the Administration took no steps to make any such proposal in 1984.[53] Some members of Congress apparently took the view that the reauthorization of Superfund would fare better in a Presidential election year and, if opposed by the Administration, could become a useful election issue. For a variety of reasons, even though EPA did not seek action then, both the Senate Environment and Public Works Committee and the House Energy and Commerce Committee initiated reviews of Superfund renewal in 1984. The Senate Environment and Public Works Committee filed a report[54] but no floor debate occurred in the Senate.

The House was more active than the Senate. The House Energy and Commerce Committee filed a report,[55] as did the Ways and Means Committee which made a proposal on Superfund replenishment.[56] The House committees succeeded in getting their Superfund bill[57] to the floor on August 9-10, 1984.[58] The most hotly disputed issue was a proposal to enact a federal cause of action for claims for injury from hazardous substances.[59] This proposal was narrowly defeated by a vote of 208-200 on August 9. The Senate did not respond to the House invitation to also take floor action on Superfund extension, and the expectation that Superfund might be an election issue in 1984 fizzled out.

In February 1985, the Administration-sponsored proposals for CERCLA amendment were introduced into the new Congress as S. 494 and H.R. 1342.[60] The Administration proposed that Superfund replenishment be set at a level of $5.3 billion for a five-year period. EPA Administrator Thomas predicted that by the end of fiscal year 1990 engineering studies would have been started on 1,500 sites and actual construction would be underway or completed at more than 900 sites.[61] In addition, emergency cleanup actions at over 1,700 sites would have been undertaken. Nevertheless, Thomas maintained the position that EPA could not use more than $5.3 billion for Superfund over the next five years.

In all, EPA made presentations to seven congressional committees during 1985 on the renewal of the Superfund program; all seven committees filed reports.[62] Senate floor debate leading to passage of the Superfund amendments occurred on September 17-26, 1985; the House floor debate

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50. *Reagan Signs Superfund Bill,* Washington Post, October 18, 1986, at A1.

51. Superfund Amendments and Reauthorization Act of 1986, President's Statement on Signing H.R. 2005 into Law, Oct. 17, 1986, 22 WEEKLY COMP. PRES. DOC. 1412 (Oct. 27, 1986) [hereinafter President's Statement].

52. President Reagan's State of the Union Address, 20 WEEKLY COMP. PRES. DOC. 87 (Jan. 30, 1984).

53. There were a number of provisions in CERCLA which argued for making 1985 the time for this action. The 1980 CERCLA legislation which established a $1.6 billion Superfund for hazardous substances cleanups authorized appropriations to the Fund over the following five years, 1981-1985. CERCLA §221, 42 U.S.C. §9631, ELR STAT. 44065. CERCLA §303 terminated taxation to finance Superfund as of September 30, 1985 or when the Treasury Department had collected $1.3 billion, whichever came first. CERCLA §301(a) provided that the President should submit to Congress, within four years after enactment of CERCLA, a comprehensive report on implementation of the Act. CERCLA §301(a), 42 U.S.C. §9651(a), ELR STAT. 44067. EPA filed this report in December 1984. OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, ENVIRONMENTAL PROTECTION AGENCY, SECTION 301(a)(1) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (CERCLA OR SUPERFUND): A REPORT TO CONGRESS ON THE ENVIRONMENTAL PROTECTION AGENCY'S EXPERIENCE WITH IMPLEMENTING SUPERFUND (1984) [hereinafter SECTION 301(a)(1) REPORT].

54. S. REP. No. 631, 98th Cong., 2d Sess. (1984).

55. H.R. REP. No. 890, pt. 1, 98th Cong., 2d Sess. (1984).

56. H.R. REP. No. 890, pt. 2, 98th Cong., 2d Sess. (1984).

57. H.R. 5640, 98th Cong., 2d Sess., 130 CONG. REC. H3778 (daily ed. May 10, 1984).

58. 130 CONG. REC. H8736-8747, H8791-8855 (daily ed. Aug. 9, 1984); 130 CONG. REC. H8928-8947, H8992-9027 (daily ed. Aug. 10, 1984).

59. 130 CONG. REC. H8847 (daily ed. Aug. 9, 1984). For discussions of this dispute, *see* Cheek, *The Proposed Federal Cause of Action is No Solution to Victims Compensation Problems,* 13 ELR 10296 (Aug. 1984); Hathaway, *Hazardous Substance Victims Need a Federal Cause of Action,* 14 ELR 10294 (Aug. 1984).

60. H.R. 1342, 99th Cong., 1st Sess., 131 CONG. REC. H944 (daily ed. Feb. 28, 1985); S. 494, 99th Cong., 1st Sess., 131 CONG. REC. S1823 (daily ed. Feb. 22, 1985). An EPA section-by-section analysis interpreting these proposals is reprinted in the House Commerce Committee Report on the Superfund Amendments of 1985. H.R. REP. No. 253, pt. 1, 99th Cong., 1st Sess. 126 (1985).

61. House Commerce Committee Report at 120-124 (statement of EPA Administrator Lee M. Thomas).

62. Senate Environment Committee Report, S. REP. No. 11, 99th Cong., 1st Sess. (1985); Senate Finance Committee Report, S. REP. No. 73, 99th Cong., 1st Sess. (1985); House Commerce Committee Report, H.R. REP. No. 253, pt. 1, 99th Cong., 1st Sess. (1985); House Ways and Means Committee Report, H.R. REP. No. 253, pt. 2, 99th Cong., 1st Sess. (1985); House Judiciary Committee Report, H.R. REP. No. 253, pt. 3, 99th Cong., 1st Sess. (1985); House Merchant Marine Committee Report, H.R. REP. No. 253, pt. 4, 99th Cong., 1st Sess. (1985); House Public Works Committee Report, H.R. REP. No. 253, pt. 5, 99th Cong., 1st Sess. (1985).

EPA's presentations were made at hearings before these seven committees. *Superfund Improvement Act of 1985: Hearings Before the Senate Committee on Environment and Public Works,* 99th Cong., 1st Sess. (1985); *Superfund Revenue Act of 1985: Hearings Before the Senate Committee on Finance,* 99th Cong., 1st Sess. (1985); *Superfund Amendments of 1985: Hearings Before the House Committee on Energy and Commerce,* 99th Cong., 1st Sess. (1985); *Superfund Amendments of 1985: Hearings Before the House Committee on Ways and Means,* 99th Cong., 1st Sess. (1985); *Superfund Reauthorization, Judicial and Legal Issues: Hearings Before the House Committee on the Judiciary,* 99th Cong., 1st Sess. (1985); *Superfund Amendments of 1985: Hearings Before the House Committee on Merchant Marine and Fisheries,* 99th Cong., 1st Sess. (1985); *Superfund Amendments of 1985: Hearings Before the House Committee on Public Works and Transportation,* 99th Cong., 1st Sess. (1985).

leading to passage occurred on December 5, 6, and 10, 1985.[63] Many differences still remained after the filing of committee reports and intensive floor debate. The Conference Committee began its task of reconciling these differences in February 1986, and a Conference Report on the Superfund Amendments and Reauthorization Act of 1986 was filed October 3, 1986.[64] The Senate passed the Conference Report on October 3, 1986,[65] and the House followed suit on October 8, 1986.[66] The bill, H.R. 2005, was sent to the President and signed on October 17, 1986.[67]

To understand the issues involved in SARA it is necessary to have some background on EPA's implementation of CERCLA during the previous five years. Although Congress' review of Superfund reauthorization took three years and thousands of pages of hearings, there is actually litt[illegible] discussion about how the Superfund program has evolved or operates. Late in 1984 EPA filed its report on four years of implementation of CERCLA, as required by CERCLA §301(a).[68] During the last two years EPA has also amended the NCP[69] governing Superfund operations and added to the NPL[70] listing priority sites for cleanup. These regulations, together with EPA's CERCLA §301(a) implementation report,[71] provide useful detail on EPA's present interpreta[illegible]on of CERCLA. So does the agency's growing library [illegible] RODs[72] on the remedial action to be taken at specific sites. In addition, EPA has many informal policy documents on Superfund implementation such as its December 5, 1984 Interim CERCLA Settlement Policy[73] and its memoranda on community relations activities at Superfund enforcement sites[74] that give useful background on how EPA operates under the Superfund program. Since 1981 there have been over 100 judicial decisions interpreting CERCLA which also give perspective on key CERCLA provisions.[75]

EPA's experience in the implementation of Superfund during the years 1981-83 was stormy, and the distrust bred in Congress during the Burford-Lavelle portion of this period explains much about the curbs on EPA discretion placed by SARA. During the period between CERCLA's enactment and the introduction of Administration proposals for the amendment of CERCLA in 1985, EPA's implementation of CERCLA went through at least three major changes. Initially, under the administration of EPA Administrator Anne Burford and Assistant Administrator Rita Lavelle, implementation was relatively slow and was accompanied by an attempt to work out voluntary settlement agreements on cleanup. In 1983 the House Energy and Commerce Committee's Investigations Subcommittee challenged EPA's administration of Superfund on a number of grounds including use of the program for political purposes and conflicts of interest. The ensuing political storm led to the resignation of Burford and Lavelle and put pressure on the Administration to strengthen EPA's leadership of the Superfund program.[76]

These pressures led to the appointment of William D. Ruckelshaus as EPA Administrator. Ruckelshaus had established a strong reputation as Administrator of EPA from its inception in 1970 until 1973 and brought with him as Assistant Administrator in charge of Superfund an official from the Office of Emergency Management named Lee Thomas. Under Ruckelshaus and Thomas EPA entered into a period of enforcement of CERCLA which relied heavily on court litigation.[77]

By 1984 Ruckelshaus and Thomas, together with Assistant Attorney General Habicht of the Land and Natural Resources Division at the Department of Justice, had reached the conclusion that EPA should experiment with policies more suited to encouraging voluntary settlements and cleanups. The new approach culminated in promulgation of EPA's Interim CERCLA Settlement Policy on December 5, 1984.[78] During congressional hearings on the Administration's proposals for extension of CERCLA in 1985, considerable concern was expressed about the transaction costs (i.e., legal and administrative expenses) involved in the Superfund program. EPA's §301(a) study had estimated that 30 percent of Superfund spending would be consumed by such transaction costs.[79] In the Senate Environment and Public Works Committee hearings on the Superfund Improvement Act of 1985, there was discussion

63. For Senate floor debate on S. 51, see:

131 Cong. Rec. S11617-S11623 (daily ed. Sept. 17, 1985); 131 Cong. Rec. S11658-S11686 (daily ed. Sept. 18, 1985); 131 Cong. Rec. S11770-S11786 (daily ed. Sept. 19, 1985); 131 Cong. Rec. S11830-S11868 (daily ed. Sept. 20, 1985); 131 Cong. Rec. S11919-S11946 (daily ed. Sept. 23, 1985); 131 Cong. Rec. S11995-S12034 (daily ed. Sept. 24, 1985); and 131 Cong. Rec. S12184-S12209 (daily ed. Sept. 26, 1985).

The House floor debate on H.R. 2817 appears at:

131 Cong. Rec. H11069-H11143 and H11151-H11207 (daily ed. Dec. 5, 1985); 131 Cong. Rec. H11229-H11280 (daily ed. Dec. 6, 1985); and 131 Cong. Rec. H11547-H11672 (daily ed. Dec. 10, 1985).

64. H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. (1986).

65. 132 Cong. Rec. S14943 (daily ed. Oct. 3, 1986).

66. 132 Cong. Rec. H9634 (daily ed. Oct. 8, 1986).

67. President's Statement, *supra* note 51.

68. Section 301(a)(1) Report, *supra* note 53.

69. 40 CFR part 300, ELR Reg. 47441; *see* final rule on NCP amendment, 50 Fed. Reg. 47912 (Nov. 20, 1985).

70. 51 Fed. Reg. 21054 (June 10, 1986) (final and proposed rules).

71. Section 301(a)(1) Report, *supra* note 53.

72. Copies [illegible] EPA's RODs issued in the Superfund program are available from the National Technical Service of the Department of Commerce and from ELR. Abstracts of the RODs are published in ELR Admin. Materials.

73. Environmental Protection Agency, Interim CERCLA Settlement Policy, 50 Fed. Reg. 5034 (1985), ELR Admin. Materials [illegible].

74. Memoran[illegible] from Gene Lucero, Director, Office of Waste Programs Enforcement, EPA, Re: Community Relations Activities at Superfund Enforcement Sites (Nov. [illegible], 1985).

75. For a [illegible] of areas that have [illegible] subject [illegible] and specific cases, *see, e.g.*, Comment, *CERCLA Litigation Update: The Emerging Law of Generator Liability*, 14 ELR 10224 (June 1984); Comment, *CERCLA 1985: A Litigation Update*, 15 ELR 10395 (Dec. 1985); Frank & Atkeson, Superfund Litigation and Cleanup, A BNA Special Report (1985); Ledbetter & Clewett, *Outline of RCRA/CERCLA Enforcement Issues and Holdings*, 11 Chem. Waste Litig. Rep. 474 (1986).

76. *See Burford Resigns From EPA Post Under Fire*, 1983 Cong. Q. Almanac 332 (1983).

77. For a general discussion of the impact of the Burford-Lavelle period on EPA's subsequent implementation of CERCLA, see, e.g., Light, *A Defense Counsel's Perspective on Superfund*, 15 ELR 10203 (July 1985); Mintz, *A Response to Rogers, Three Years of Superfund*, 14 ELR 10036 (Feb. 1984); and Rogers, *Three Years of Superfund*, 13 ELR 10361 (Nov. 1983).

78. Interim CERCLA Settlement Policy, *supra* note [illegible], ELR Admin. Materials [illegible].

79. *Senate Environment Committee Hearings*, *supra* note 62, at [illegible] [illegible] Section 301(a)(1) Report, *supra* note 53.

whether in one case the litigation expenses would actually exceed the expenditure on cleanup.[80]

It was clear that EPA needed a new approach to its Superfund assignment. For a variety of reasons, sometimes because Superfund cases involve groundwater pollution which requires a long period of cleanup and monitoring and sometimes because EPA's implementation policies have fluctuated and its experience in cleanups has been limited, EPA had cleaned up less than 15 NPL sites by September 30, 1985, almost five years after passage of CERCLA.[81] During thi[illegible]riod the average cleanup cost per site escalated from [illegible] million to $8.3 million.[82]

In April 1985 the co[illegible]essional Office of Technology Assessment (OTA) published a report entitled *Superfund Strategy.*[83] OTA contended that EPA was displaying excessive optimism about the number of toxic waste sites that would require cleanup and about the effectiveness of current cleanup technologies. While EPA estimated that the NPL would eventually not exceed 2,000 sites, OTA estimated that 10,000 or more sites might require cleanup by Superfund.[84] OTA characterized EPA's current "remedial cleanups" as temporary and likely to cause trouble in the future.[85] OTA estimated that the eventual Superfund costs might run to $100 billion and require a 50-year program.[86] OTA recommended a two-part strategy: (1) in the near-term, identify and assess NPL sites, taking care of near-term threats and developing institutional capabilities and technology for a long-term permanent cleanup program; and (2) undertake more extensive site studies and permanent cleanups over the longer term as they become technically feasible.[87] The OTA report's emphasis on permanent and alternative cleanup methods was to be one of the most significant inputs to the 1986 Superfund amendments.

Once the Administration had submitted its proposals and testimony in 1985, the Senate acted more quickly than the House. The Senate Environment and Public Works Committee report generally endorsed most of the Administration proposals. The Senate Finance Committee proposed a new Superfund excise tax[88] as an alternative to the petroleum and chemical feedstocks tax to help fund the bulk of the next five years of Superfund.[89] This laid the foundation for a later duel with the Administration over tax policy. Senate floor action added a considerable number of amendments to the committees' proposals, but little controversy. A victim compensation pilot program was rejected.[90]

The House proceedings took considerably longer than the Senate's. After prolonged negotiations, a compromise among the five House committees on their various proposals was filed as H.R. 3852 on December 4, 1985, the day before the start of floor debate and shortly before adjournment. House floor debate was relatively short with many amendments put forward to make the committee's proposals more rigorous. Representative Frank (D-Mass.) submitted an amendment to create a federal cause of action where the release of a hazardous substance caused damage. This was rejected 261 to 162,[91] a wider margin than the 208 to 200 vote on this issue the previous year.[92]

The six-month conference on the Senate[93] and House bills[94] involved 19 senators and 53 House representatives from 11 committees.[95] Senator Stafford (R-Vt.), chair of the Senate Environment and Public Works Committee, headed the Senate delegation, and Representative Dingell (D-Mich.), chair of the Hous[illegible] Energy and Commerce Committee, chaired the Hou[illegible] delegation. EPA Administrator Thomas, at the request of the conferees and because of his three-year personal involvement with the Superfund program, attended many conference meetings, expressing concern that the integrity of the program be preserved.

The Conference Committee reached agreement on CERCLA's substantive amendments and an $8.5 bi[illegible]on funding level July 31, 1986.[96] Resolution of the diffe[illegible] between the House Ways and Means Committee an[illegible] [illegible]e Senate Finance Committee on the source of Superfund replenishment was delayed, however, because of their work on general tax reform legislation. Once they did focus on the funding issue, agreement among the conferees came relatively fast.

But at this point a new peril to SARA's passage was perceived: pocket veto. White House representatives had left no doubt abo[illegible]t the strength of their opposition to any broad-based tax such as the Superfund excise tax as a new revenue source for Superfund and the Administration's willingness to impose a veto. The Conference Report was

80. *See Senate Environment Committee Hearings, supra* note 62, at 58. The case is United States v. Conservation Chemical Co., which has spawned a half dozen opinions. *See, e.g.*, 628 F. Supp. 391 (W.D. Mo. 1986) (proposed preliminary argument approved); 619 F. Supp. 162, 16 ELR 20193 (W.D. Mo. 1985) (special master's recommendations on liability adopted); 14 ELR 20809 (W.D. July 20, 1984) (trial bifurcated and special master appointed); 589 F. Supp. 59, 14 ELR 20207 (W.D. Mo. 1984) (ruling on nature of liability); 523 F. Supp. 125, 12 ELR 20238 (W.D. Mo. 1981) (ruling on adjacent owners).

81. Senate Finance Committee Report at 12.

82. Senate Environment Committee Report at 2.

83. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, SUPERFUND STRATEGY (1985).

84. *Id.* at 3.

85. *Id.*

86. *Id.*

87. *Id.* at 3-4.

88. "[T]he committee is of the view that the cleanup of abandoned hazardous waste sites is a broad societal problem extending beyond the chemical and petroleum industries. Thus, the committee recommended a new excise tax on [illegible] manufacturing sectors of the economy." Senate Finance Committee Report at [illegible].

89. The depressed state of the United States petroleum industry and the sensitivity of the nation's chemical industry to the effect of Superfund taxes on chemical feedstocks to its international competitive position produced a very different attitude to the funding of Superfund in 1985-86 than had been the case in 1980. The issue of whether a new general tax for Superfund purposes was necessary or violated the "polluter pays" principle vexed debate abo[illegible]t SARA to the moment of President Reagan's signing statemen[illegible].

90. 131 CONG. REC. S12003-04 (daily ed. Sept. 24, 1985).

91. 131 CONG. REC. H11585-86 (daily ed. Dec. 10, 1985).

92. *See supra* note 59 and accompanying text.

93. S. 51, 99th Cong., 1st Sess., 131 CONG. REC. S359 (daily ed. Jan. 3, 1985). The Senate passed S. 51 as H.R. 200[illegible], September 26, 1985, 131 CONG. REC. S12184 (daily ed. Sept. 26, 1985).

94. H.R. 2817, 99th Cong., 1st Sess., 131 CONG. REC. H4659 (daily ed. June 20, 1985). The House passed H.R. 2817 on December 10, 1985, 131 CONG. REC. H11547 (daily ed. Dec. 10, 1985). For a discussion of the evolution of H.R. 2817 and its key provisions, see [illegible] *CERCLA Amendments: The House Subcommittee Bill*, 15 ELR [illegible] (July 1985).

95. *See* 132 CONG. REC. S1204 (daily ed. Feb. 7, 1986) (list of Senate conferees) and 132 CONG. REC. H370 (daily ed. [illegible], 1986) (list of House conferees).

96. 132 CONG. REC. [illegible]938 (daily ed. Aug. 1, 1986).

not filed until October 3, 1986, when Congress was expected to adjourn almost any day. Under these circumstances, it would be possible for the President to withhold his signature and kill the legislation.

For two weeks Congress and the White House played a classic Washington chess game over the final passage of SARA. Both houses passed the Conference Report promptly by overwhelming margins.[97] To avoid a pocket veto, Congress made a credible threat to remain in session for an additional week or two, despite the urgency for the entire House and many senators of turning to reelection campaigns. An impressive bipartisan array of congressional, industry, and environmentalist representatives pressed for Presidential signature of SARA.[98] Perhaps more importantly, key Republican congressional candidates said veto of SARA would damage their reelection prospects. To help the President accept the new law's environmental tax, Senator Dole (R-Kan.), the majority leader, Senator Stafford, and 48 other senators provided the President a written assurance that they would "support [his] vetoing of either a general purpose broad-based tax, or an increase in the amount of this special purpose tax to provide funding for the Superfund program." [99] In the end, President Reagan signed SARA, stating that his "overriding concern has been the continuation of our progress to clean up hazardous waste sites that endanger the health and safety of our citizens."[100] And so SARA came into being, progressing through three years of conflict and uncertainty to enactment at the last minute as a political "must."

SARA: A Preliminary Assessment

One searches in vain in the legislative history of SARA to find any consensus as to what the legislative and executive branches intended to produce. The immensely detailed final result is, on the surface, (i) a very substantial reauthorization of the Superfund hazardous waste cleanup program; (ii) a potentially very expensive set of cleanup provisions; and (iii) a complex network of other requirements that pose a long-term challenge to the talents of EPA, the PRPs, the states, affected communities, the health sciences professions, and the hazardous waste cleanup industry. The interaction between EPA and Congress, between the House and Senate, and among congressional committees during the process was usually highly disjointed or confrontational. Many unresolved conflicts lie beneath SARA's ambitious goals. Within the last weeks before SARA was signed, the House and Senate were still competing to write different legislative histories of key provisions,[101] and President Reagan's veto threat had Congress and EPA both expecting the worst until the day SARA was signed. With signature accomplished aboard Air Force One as the President travelled west on October 17, 1986, SARA came into effect with no speeches, no sponsors in attendance, and no explanations.[102]

In February 1985 the Administration sought only a five-year reauthorization of Superfund at a $5.36 billion level, with modest amendments.[103] But before the year was over the 60 pages of the Administration's proposed amendments had grown more than seven times to over 450 pages in H.R. 3852, the compromise bill agreed to by the five House committees involved in Superfund reauthorization. SARA itself is set out in a Conference Committee Report[104] of 347 pages which addresses over 40 amendment topics. Congress clearly took over the Superfund amendment process and wrote EPA a very detailed set of instructions.

For the practitioner, SARA is likely to make CERCLA, which was already a complex law, with extensive administrative[105] and judicial[106] elaboration, into even more of a specialized area of practice. Indeed, SARA, rather than directly addressing a central issue such as the strict, joint and several standard of liability in statutory language, makes the judicial opinions on this subject part of its legislative history.[107] SARA also makes knowledge of other federal and state environmental laws essential. For example, the practitioner interpreting SARA needs to be familiar with RCRA[108] to determine what groundwater cleanup and off-site disposal rules will be applied under the SARA amendments, what substances will be included in the definition of hazardous substances, and what prospect

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97. Both houses passed SARA by veto-proof margins. In the Senate the vote was 88-8. 132 Cong. Rec. S14943 (daily ed. Oct. 3, 1986). In the House it was 386-27. 132 Cong. Rec. H9634 (daily ed. Oct. 8, 1986).

98. *See, e.g., Mr. President Please Sign Superfund,* Washington Post, Oct. 10, 1986, at A24.

99. President's Statement, *supra* note 51.

100. *Id.*

101. 132 Cong. Rec. S14895-S14943 (daily ed. Oct. 3, 1986) (Senate debate on Conference Report); 132 Cong. Rec. H9561-H9634 (daily ed. Oct. 8, 1986) (House debate on Conference Report). These conflicting statements sharply illustrate the ambiguities of legislative history.

102. *Reagan Signs Superfund Bill,* Washington Post, Oct. 18, 1986, at A1.

103. *See* H.R. 1342, 99th Cong., 1st Sess. 131 Cong. Rec. H944 (daily ed. Feb. 28, 1985); S. 494, 99th Cong., 1st Sess., 131 Cong. Rec. S1823 (daily ed. Feb. 22, 1985).

104. Superfund Amendments and Reauthorization Act of 1986, H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. (1986).

105. *See, e.g.,* EPA Interim CERCLA Settlement Policy, 50 Fed. Reg. 5034 (1985), ELR Admin. Materials 30001; Memorandum from Gene A. Lucero, Director, Office of Waste Programs, EPA, Re: Community Relations Activities at Superfund Enforcement Sites (Aug. 28, 1985); Memorandum from Gene A. Lucero, Director, Office of Waste Programs Enforcement, EPA, to Director, Office of Emergency and Remedial Response, Region II, *et al.*, Re: Timely Initiation of Responsible Party Searches, Issuance of Notice Letters, and Release of Information (Oct. 9, 1985), ELR Admin. Materials 30066; Memorandum from J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, EPA, to Regional Administrators, Regions I-X, Re: CERCLA Compliance with Other Environmental Statutes (Oct. 2, 1985), ELR Admin. Materials 30066; Memorandum from Lee M. Thomas, Acting Assistant Administrator for Solid Waste and Emergency Response, EPA, to Regional Administrators, Regions I-X, *et al.*, Re: Guidance Memorandum on Use and Issuance of Administrative Orders Under §106(a) of CERCLA (Sept. 8, 1985), ELR Admin. Materials 300[illegible]; Memorandum from Lee M. Thomas, Assistant Administrator for Solid Waste and Emergency Response, EPA, to Regional Administrators, Regions I-X, Re: Participation of Potentially Responsible Parties in Development of Remedial Investigations and Feasibility Studies Under CERCLA (Mar. 20, 1984), ELR Admin. Materials 30063.

106. *See, e.g.,* Comment, *CERCLA Litigation Update: The Emerging Law of Generator Liability,* 14 ELR 10224 (June 1984); Comment, *CERCLA 1985: A Litigation Update,* 15 ELR 10395 (Dec. 1985); Frank & Atkeson, Superfund: Litigation and Cleanup, A BNA Special Report (1985); Light, *A Defense Counsel's Perspective on Superfund,* 15 ELR 10203 (July 1985); Ledbetter & Clewett, *Outline of RCRA/CERCLA Enforcement Issues and Holdings,* 11 Chem. Waste Litig. Rep. 474 (1986).

107. 131 Cong. Rec. H11069 (daily ed. Dec. 5, 1985) (statement of Rep. Dingell); 132 Cong. Rec. H9563 (daily ed. Oct. 8, 1986) (statement of Rep. Dingell).

108. 42 U.S.C. §§6901-6987, ELR Stat. 42001.

there is that a cleanup or citizen suit can utilize RCRA rather than CERCLA procedures. In addition to RCRA, the new SARA cleanup provisions borrow standards and criteria from the FWPCA,[109] SDWA,[110] the Toxic Substances Control Act,[111] and the Clean Air Act,[112] as well as more stringent state rules. State siting, permit, and environmental impact statement requirements must also be considered. To these environmental laws, SARA adds references to the law of bankruptcy, insurance, indemnity, and real estate.

SARA's detailed new cleanup requirements, addressed to inherently difficult multi-million dollar engineering and technology problems, substantially limit the discretion of an agency which reportedly has achieved cleanup of no more than 15 sites in the program's first five years.[113] EPA continued to express concern during the SARA legislative process that the new amendments not make CERCLA unworkable. During the Senate floor debate in September 1985, Senator Stafford released a letter from EPA Administrator Thomas on this topic.[114] In this letter Administrator Thomas objected to a proposed victims' assistance demonstration program, citizen suits, expansion of the Fund replenishment above $5.3 billion for five years, and a mandatory cleanup schedule for federal facilities, citing these provisions as examples of features that would greatly compound EPA's problems. All of these features, however, remain in SARA, except the victims' assistance program, which was subsequently deleted on the Senate floor.[115] EPA's position now, following passage of SARA, is that SARA has not made the Superfund program unworkable. However, as will be seen in the following discussion of the new cleanup standards and state and public participation, the final verdict on this issue is in the control of many other parties besides EPA.

At the same time, there are important aspects of SARA that work toward greater coherence in EPA's implementation of Superfund. Amendments to tack a federal cause of action for toxic torts or a victims' compensation program on to CERCLA were defeated.[116] EPA was given an opportunity to build strong administrative records behind its RODs and the power to postpone challenges to its cleanup decisions until after implementation of its remedy.[117] In the area of settlement procedures EPA was given discretion to use all the innovations proposed without being compelled to justify its handling of settlements in court.[118] And the replenishment of the Superfund at a much higher level of $8.5 billion greatly increased EPA's leverage.

109. 33 U.S.C. §§1251-1376, ELR STAT. 42101.

110. 42 U.S.C. §§300f-300j-11, ELR STAT. 41101.

111. 15 U.S.C. §§2601-2629, ELR STAT. 41335.

112. 42 U.S.C. §§7401-7642, ELR STAT. 42201.

113. Senate Finance Committee Report at 12.

114. 131 CONG. REC. S11940-41 (daily ed. Sept. 23, 1985) (statement of Sen. Simpson).

115. 131 CONG. REC. S12003-04 (daily ed. Sept. 24, 1985).

116. 131 CONG. REC. H11574-86 (daily ed. Dec. 10, 1985); 131 CONG. REC. S12004 (daily ed. Sept. 24, 1985); 130 CONG. REC. H8847 (daily ed. Aug. 8, 1984). *See also supra* text at notes 59, 91-92.

117. *See* SARA §113(c), CERCLA §§113(h)-(*l*), 42 U.S.C. §9613(h)-(*l*), ELR STAT. 44042.

118. *See generally infra* text at II.M. (annotated section on settlements).

Major Amendments

Among SARA's many provisions, seven areas of amendment can be identified that are likely to have the greatest impact on how EPA operates the Superfund program in the future. These areas include: (i) cleanup standards; (ii) Superfund replenishment; (iii) settlement provisions; (iv) state participation; (v) public participation; (vi) health-related authorities; and (vii) the new federal facilities cleanup program. Any assessment of the effects of SARA turns largely on one's assessment of the effect of the new provisions in these areas.

☐ *Cleanup Standards.*[119] Establishment of detailed new mandatory cleanup standards in CERCLA §121 is by far the most important change made by SARA. In light of EPA's extremely limited experience with completed cleanups, there was very little hard data on cleanup costs for EPA to use or for Congress to review in determining appropriate cleanup levels. OTA's assertions that the current cleanup technology accepted by EPA would produce recurrent problems[120] and the refusal by many House members to give EPA much discretion on standard setting[121] produced a strong preference for "permanent" cleanup methods and "national" cleanup standards based on the requirement that all legally applicable or relevant and appropriate federal (or more stringent state) environmental standards be met. Some of these standards from the SDWA, for example, could require total elimination of certain substances in the cleanup process. An analysis by an outside economic consultant for submission to the conferees evaluating the House proposed cleanup requirements, particularly with respect to permanent cleanups, projected a 2.6 to 5.5-fold increase in cleanup costs.[122]

There was no way the conferees could satisfactorily test such assertions about drastic increased costs of the cleanup standards under consideration. The proponents of the new standards could point to six internal waiver provisions in SARA[123] which were intended to give some flexibility so long as human health and the environment were protected. But §121(d), the new CERCLA omnibus cleanup standards

119. *See generally infra* text at I.F. (annotated section on cleanup standards).

120. OTA SUPERFUND STRATEGY, *supra* note 83, at 3.

121. An explanation for congressional assumption of EPA's regulatory role with respect to the CERCLA amendments of 1986 is set out in an article by Representative James J. Florio (D-N.J.), *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. REG. 351 (1986). Representative Florio argues that in RCRA and CERCLA, "Congress itself has had to assume the role of regulator, making some of the detailed technical and administrative determinations typically left to the implementing agency" because "Congress is no longer confident that the Environmental Protection Agency (EPA) will exercise such discretion as intended by Congress." *Id.* at 351 (citations omitted). Florio comments, "Complex and costly scientific and technical decisions are intricate enough when handled by a regulatory agency. When these decisions are thrown into the overtly political process of legislating, sensible decision-making becomes much more difficult." *Id.* at 382.

122. PUTNAM, HAYES AND BARTLETT, INC., COST IMPLICATIONS OF CHANGES IN SUPERFUND CLEANUP STANDARDS (Mar. 1986).

123. SARA §121(a), CERCLA §121(d)(4), 42 U.S.C. §9621(d)(4), ELR STAT. 44056.

124. CERCLA §104(c)(4), 42 U.S.C. §9604(c)(4), ELR STAT. 44012.

section, incorporated so many other laws that were themselves in the process of change that few, if any, of the Conference Committee members could have had a clear idea as to what the new standards would mean in practice.

CERCLA as written in 1980 did not contain any detailed statutory standards for cleanups. Section 104(c)(4) provided that EPA should select appropriate remedial actions "which are to the extent practicable in accordance with the national contingency plan and which provide for that cost-effective response which provides a balance between the need for the protection of public health and welfare and the environment."[124] The current NCP policy on cleanup refers to that remedy "that effectively mitigates and minimizes threats to and provides adequate protection of public health and welfare and the environment."[125] With stated exceptions, "this will require selection of a remedy that attains or exceeds applicable or relevant and appropriate Federal public health and environmental requirements that have been identified for the specific site."[126]

The April 1985 OTA study[127] was influential, particularly in the House, in supporting strong requirements for permanent remedies. The Administration had proposed that the permanence of a remedy be made one relevant factor in the analysis of cost-effectiveness; the Senate bill provided that permanent solutions should be preferred. The House bill required EPA to select a permanent solution, where such a solution was feasible and achievable, to the maximum extent practicable. If there were no feasible and achievable permanent solution, the House bill provided that EPA must require action adequate to protect human health and the environment and put the site on an "interim" cleanup category on the NPL. EPA could later require further action if new permanent solutions became available and the interim solution was not fully effective in protection of health and the environment.

The Senate Environment Committee had taken a similar approach as EPA in requiring cleanup standards adequate to protect health and the environment and in utilizing relevant standards under other federal legislation. The House Commerce Committee went further and required treatment to the level of control specified in relevant federal legislation and RCRA level treatment at off-site disposal sites. EPA was required to consider more stringent applicable state sta[illegible]ds and explain why an inconsistent remedy [illegible]: the state could apply its more stringent stan[illegible]ay the extra cost. The House Public Works [illegible] bill was similar and added special treatment standards for dioxins and a "value engineering" review requirement on the standards applied to cleanup sites costing over $4 million. On the floor, the House inserted considerably more restrictive requirements concerning application of state environmental and siting standards. The states would not be required to pay for the extra cost of applying their more stringent standards. As explained by Representative Eckart (D-Ohio), the compromise the House committees adopted would require state involvement in the initiation, development, and selection of all cleanup actions.[128]

The Conference Committee wrote a §121 on cleanup standards that substantially revised both the Senate and House versions. It basically requires that remedial actions assure protection of human health and the environment; that they be, to the extent practicable, consistent with the NCP; that they be cost-effective; and that they give preference to permanent treatment to the maximum extent practicable.

The final §121 cleanup standards make all "legally applicable" or "relevant and appropriate" federal standards and all more stringent state standards applicable to on-site cleanups. Where the remedial action involves transfer of hazardous substances off-site, they may only be transferred to facilities operating in compliance with RCRA, other federal laws, and applicable state requirements.

The waiver clause adopted in CERCLA §121(d)(4) contains what could be one of the principal battlegrounds in the new CERCLA. If it is correct that the new permanent cleanup standards are more than twice as expensive as the present standards, PRPs may feel driven to explore every avenue, including litigation, to find more economical solutions. They will find multiple grounds for contesting the application of the new cleanup standards, either arguing that a waiver is appropriate, that the outcome is not cost-effective, or that §121 should be interpreted differently. The result could be a significant dropoff in voluntary settlements on cleanups and a possible return by EPA to placing principal reliance on its own cleanups under §104, drawing on the greatly enlarged Superfund, followed up by Justice Department §107 cost recovery actions. EPA's resort to the Fund also will make available the otherwise unavailable "Fund balancing" waiver authority, enabling EPA to waive §121 cleanup standards if the cost to the Fund is disproportionate to needed use of the Fund for other sites.

However, if EPA can build administrative records for its RODs that will hold up under the arbitrary and capricious test set out in SARA §113, PRPs are likely to find that litigation is usually unproductive. EPA's resort to the Fund, because of SARA's preenforcement review limitations,[129] will shield EPA from court challenges to the remedial action selected until years later when a §107 cost recovery action is eventually brought. And since EPA and the Department of Justice treat their CERCLA litigation expenses at a site as reimbursable response costs also to be paid by PRPs,[130] they would not be deterred from this course by the Department's litigation expenses under CERCLA §107.

☐ *Fund Replenishment.*[131] SARA's second major feature is the very substantial $8.5 billion five-year replenishment of Superfund. The 1986 amendments provide this sum from a combination of (i) $2.7 billion in petroleum taxes, imposed on imported petroleum at a somewhat higher rate than on domestic; (ii) $1.3 billion in chemical feedstock taxes and a tax on imported chemical derivatives; (iii) $2.5

125. 40 C.F.R. §300.68(i), ELR Reg. 47463.

126. *Id.*

127. OTA Superfund Strategy, *supra* note 83.

128. 131 Cong. Rec. H11072 (daily ed. Dec. 5, 1985) (statement of Rep. Eckart).

129. SARA §113(e), CERCLA §§113(h)-(*i*), 42 U.S.C. §9613(h)-(*i*), ELR Stat. 44042.

130. *See* United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 579 F. Supp. 823, 827, 14 ELR 20212, 20223 (W.D. Mo. 1984); Memorandum from Courtney M. Price, Special Counsel for Enforcement, EPA, to Enforcement Counsel, *et al.*, Re: Guidance on Pursuing Cost Recovery Actions Under CERCLA (Aug. 26, 1983).

131. *See generally infra* text at III.A (annotated section on Superfund replenishment).

billion in a new "environmental tax" on corporations; and (iv) the balance from general revenues, recoveries, and interest. The use of a new general environmental tax on industry to fund Superfund was the basis for the Administration's veto threat to SARA. The Senate Finance Committee argued that rather than representing a retreat from the "polluter pays" principle, a broader tax was appropriate because "the cleanup of abandoned hazardous waste sites is a broad societal problem extending beyond the chemical and petroleum industries."[132]

EPA maintained during the legislative debate on SARA that an $8.5 billion level of funding was more than it could effectively use. As noted above, however,[133] if PRP resistance to agreement on application of the costly new standards should become widespread, it is quite possible that EPA will find a use for much greater amounts from the Fund to carry out its own cleanups under §104, leaving it to the Justice Department to sue for cost recovery later under §107. It should also be noted that, although SARA terminates use of the Fund to pay natural resources damages, many new uses of the Fund for health assessments, an expanded ATSDR program, increased assumption of state costs, and other new expenses will probably become sizeable.

Although EPA has seemingly ample funds in the new replenishment for an accelerated pace of cleanups, it should be remembered that EPA cannot enter into a Fund-financed cleanup of a private site unless it has state agreement to fund 10 percent of the costs, that it cannot handle a state-operated site unless the state agrees to cover 50 percent of the costs, and that the states must agree to pay operation and maintenance costs at all sites where the Fund is used. Although EPA has repeatedly changed its policies to ameliorate the impact of the state cost-sharing requirements, and the SARA amendments go further in this respect, it is likely that the new augmented Superfund program and the more expensive cleanup standards will find some states unprepared to meet their cost contribution requirements. Where this is the case, EPA's pace of cleanup activity under CERCLA §104 will be slowed even though it has increased resources in the Superfund.

☐ *Settlement Provisions.*[134] Although the Senate-proposed mandatory settlement procedures were virtually all made optional in conference, SARA's settlement provisions are still another important feature of the new law. The 1980 text of CERCLA had virtually no language to guide or promote voluntary settlement of EPA claims on PRPs for cleanup costs. There was very little language relevant to contribution among PRPs, no language on the Fund's payment of the "orphan shares" of unknown or unavailable PRPs (known as "mixed funding") or on settlement of de minimis shares, and no language authorizing releases. Given EPA's need at the outset to make its claims for strict and joint and several liability credible, the agency initially invested little effort in encouraging PRPs to undertake voluntary cleanups. After a round of settlements during the Burford-Lavelle era that were later attacked as "sweetheart deals," EPA and the Justice Department moved to an era of hard-line enforcement by lawsuit.[135] Given the uncertainty of court interpretation of the new law, the usually large numbers of PRPs involved at many sites, and the potential amounts of money at stake, the prevailing pattern in CERCLA enforcement became protracted mass litigation. Cases took years to resolve in the courts, giving rise to concern that in many cases the parties would spend more on lawyers than they did on cleanups.[136]

By 1984 EPA was again moving to a policy of encouraging voluntary settlements. It indicated that under certain circumstances PRPs might participate in preparing the RI/FS study necessary to select a remedy and later liberalized these conditions. It decided that no CERCLA §104 cleanup would be finally settled until the RI/FS was prepared, mapping the scope of the problem and setting out the alternative solutions to be considered with their estimated costs. This decision gave PRPs more time to organize their position and a chance to participate in the RI/FS, and gave all parties to a settlement much more information on which to base any decision. On December 5, 1984, EPA issued its Interim CERCLA Settlement Policy,[137] which is still EPA's basic framework for settlements and which basically is affirmed in SARA.

The 1984 EPA settlement policy is not as explicit as the SARA amendments and tends to speak by inference. For example, while reaffirming the principle of strict and joint and several liability and the goal of 100 percent coverage of costs by PRPs, it also says that "[t]he Agency will consider settlement proposals for cleanups of less than 100% of cleanup activities or cleanup costs"[138] and that "[w]here the Federal government accepts less than 100% of cleanup costs and no financially viable responsible parties remain, Superfund monies may be used to make up the difference."[139] Because of the lack of clarity in CERCLA, the EPA policy statement expresses a willingness in certain cases to shield settlements from later contribution claims by offering "contribution protection" covenants in certain cases. It espouses the principle of furnishing PRPs with more of EPA's data on volume, sources, and character of releases but does not commit EPA to supply all the data that might be relevant to a settlement.

Senators Domenici (R-N.M.), Simpson, and Bentsen (D-Tex.) introduced a package of settlement amendments during Senate floor debate on Superfund, and the amendments, rather than being debated, were accepted by the floor managers.[140] These amendments built on EPA's settlement policy and proposed to add "sweeteners" to accelerate the settlement process: (i) to facilitate settlements, EPA should circulate a "nonbinding preliminary allocation of responsibility" among PRPs, as well as information on settlements at other facilities and the technical information EPA expected to use in evaluating settlement proposals: (ii) settlement offers by PRPs representing 50 percent or more of the shares allocated by EPA might be made, with the possibility that the PRP group could ask

132. Senate Finance Committee Report at 13.

133. *See supra* text following note 128.

134. *See generally infra* text at II.M. (annotated section on settlements).

135. *See supra* note 77 and accompanying text.

136. *See supra* note 80 and accompanying text.

137. EPA Interim CERCLA Settlement Policy, *supra* note 73.

138. *Id.* at 5035, ELR ADMIN. MATERIALS at 35002.

139. *Id.*

140. 131 CONG. REC. S12004-6 (daily ed. Sept. 24, 1985) (statement of Sen. Domenici).

a federal district court to compel EPA to accept the offer if rejection were deemed "unreasonable"; and (iii) if the PRP offer included everything but "orphan shares," the Fund should contribute a 10 percent bonus to the amount of the offer. The Senate settlement amendments also contained explicit provisions on settlements with de minimis parties and the use of mixed funding. Contribution problems were resolved by a detailed statutory provision. In addition, EPA was to be given explicit authority for releases of liability, which must be approved by the court after opportunity for comment by all interested parties.

The House settlement provisions lacked the Senate's nonbinding preliminary allocation of responsibility, court review of EPA's refusal to accept a settlement offer, and provision for a "bonus" contribution from the Fund to mixed funding. Various environmental groups campaigned successfully during conference to eliminate the mandatory Senate settlement provisions and ultimately achieved a result much closer to the House provisions.

The new settlement provisions inserted by SARA in CERCLA §122 contain explicit authority for mixed funding and de minimis settlements. Statutory rules on contribution were also adopted. All §106 settlements are to be embodied in consent decrees with full opportunity for public comment beforehand. EPA is given the option in "special notice procedures" to notify all PRPs of the identity of all known PRPs, the nature and volume of the releases they are responsible for, and a ranking of the hazardous substances at a facility. In addition, EPA is to develop "guidelines for preparing nonbinding preliminary allocations of responsibility." Use of the Senate's proposed nonbinding preliminary allocation of responsibility is left up to EPA.

> When it would expedite settlements under this section and remedial action, the President may, after completion of the remedial investigation and feasibility study, provide a nonbinding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the facility.[141]

Instead of the Senate provision allowing PRPs representing over 50 percent of the allocations at a site to force EPA to a court review of their settlement offer, SARA provides that, where PRPs have made a "substantial offer" which EPA rejects, EPA must give a written explanation, but its rejection is not subject to judicial review. The Senate provision for a 10 percent bonus from the Fund to a PRP settlement offer covering all known PRPs was dropped in conference.

Releases are to take the form of covenants not to sue. There are special arrangements for covenants not to sue covering transport and secure off-site disposal of the hazardous substances involved where EPA has rejected an on-site remedy consistent with the NCP. The federal natural resource trustees are also notified of possible settlements so that their covenant not to sue can be obtained.

It is to be noted that, while the new CERCLA settlement provisions elaborate some useful provisions to facilitate settlements, from the point of view of PRPs they contain very little that is obligatory on EPA. EPA is free to find that a nonbinding preliminary allocation of responsibility should not be used at a particular site and to freely reject any settlement offer. It is possible that for a time PRPs themselves will be uncertain as to the utility of these provisions and perhaps, as suggested earlier, will focus on testing what the new CERCLA standards mean in litigation. In such a situation, EPA and other groups interested in promoting alternative dispute resolution will face a real challenge to demonstrate the new CERCLA §122 settlement procedures can produce useful results.

☐ *State Participation.*[142] Another of SARA's important features is the much greater role it gives to the states in Superfund implementation. The limited provisions dealing with state participation in the original law appeared to leave Superfund much more of a federal program than RCRA. Although states were free to clean up sites on their own, if they wished to share in Superfund they were subject to significant cost-sharing requirements and increasingly detailed EPA regulation of the cleanup activities. Until SARA, CERCLA preempted state taxation used for the same purposes as Superfund taxes, contained no requirements for state review in connection with EPA cleanups, and gave the states only a very informal relationship to EPA's voluntary settlement procedures. The 1986 amendments change all this and make the states henceforth EPA's partner at each stage of cleanup or settlement. Meantime, in EPA's Superfund operations state environmental concerns have become a key element in listing of sites on the NPL, and EPA's decision to run much more of the Superfund program out of its ten regional offices has facilitated greater state involvement.

The Administration's initial proposal in early 1985 to increase the state cost share in Superfund cleanups at private sites from 10 to 20 percent was promptly rejected by the Senate and House. Instead, the cost-sharing rules were relaxed in favor of the states. It was made clear that the costs of restoring surface and groundwater resources would be classified as a remedial expense, subject to a 10 percent state contribution, rather than as "operations and maintenance costs," which are completely a state responsibility after the first year. The states were given expanded credit for their 1978-80 expenditures on cleanups toward their share of Superfund costs, and the requirement of a 50 percent state contribution for cleanup of sites owned by a state at the time of disposal was limited to sites *operated* by a state or by a state contractor at the time of disposal.

The new cleanup standards in CERCLA §121 give the states a strong voice both on what standards apply and how EPA works out these standards with PRPs. State standards which are more stringent than federal standards must be applied in on-site cleanups. Off-site disposal must comply with all applicable state requirements. EPA may not grant a waiver without giving the relevant state a chance to review the data. A state has standing to enforce federal and state standards with respect to any cleanup by action in federal court. If the state cannot show that CERCLA mandates the cleanup standard it seeks, it may still compel application of this standard by advancing the extra cost. States participate in each stage of EPA's process of identifying NPL sites and the appropriate cleanup remedy.

141. SARA §122(a), CERCLA §122(e)(3)(A), 42 U.S.C. §9622(e)(3)(A), ELR STAT. 44060.

142. *See generally infra* text at I.C. (annotated section on federal-state cost sharing), I.I. (annotated section on cleanup standards), and II.M. (annotated section on settlements).

EPA must notify the relevant state of any settlement negotiations with PRPs and obtain that state's comment on both any proposed settlement and the resulting consent decree.

In only one respect does SARA place a greater burden upon the states. This burden arises from the requirement that within three years the states must provide assurances to EPA that they have sufficient treatment and disposal facilities in compliance with RCRA to meet the state's need for 20 years.[143] EPA is required to suspend Superfund remedial operations in any state that does not meet this requirement. In actual practice, the requirement may be helpful in strengthening the hand of a governor seeking a deadline with which to confront a dilatory legislature.

☐ *Public Participation.*[144] A fifth major area addressed in SARA is public participation. This includes a feature new to CERCLA, citizen suits.[145] Although CERCLA in 1980 did not contain explicit public participation requirements with respect to choice of cleanup remedies or approval of settlements, criticism of the Superfund program during its administration by EPA Administrator Anne Burford and Assistant Administrator Rita Lavelle, followed up by lawsuits brought by the Environmental Defense Fund and New Jersey,[146] led EPA to adopt public participation policies for remedial action at NPL sites. The NCP was amended to require that response actions be subject to public comment.[147] Where EPA took short-term action to abate a threat to public health, welfare, or the environment, a spokesperson would be appointed to inform the community and respond to inquiries.[148] For longer term remedial action a community relations plan would be required.[149] Opportunities for public comment were also required on settlement agreements and consent decrees.[150]

In §109 of H.R. 1342, the Administration-sponsored Superfund amendments, it was proposed that these administrative policies on public participation be made statutory requirements; this suggestion was adopted by both the Senate and House. Under SARA the public must be given a chance to comment on both a proposed remedial action and on the consent order settling a case. EPA must respond to these comments. In addition, SARA adds other public participation features which increase the possibility of multiple challenges to EPA's Superfund decisions and place a new emphasis on detailed investigation of any health risk that the public may be concerned about:

(i) SARA includes provisions to make technical assistance grants to Superfund site community groups to fund their development of data to challenge proposed selections of remedy.[151]

(ii) SARA establishes a citizen suit provision in CERCLA.[152] The 1984 RCRA amendments had adopted a very broad citizen suit provision[153] that could also be applied to Superfund sites if, as was likely, the substances were classified as solid or hazardous waste. SARA adds citizen suit provisions authorizing suits for alleged violation of CERCLA standards, regulations, requirements, or orders; and against EPA or other federal agencies for failure to perform nondiscretionary duties under CERCLA. Frequent comments in the Senate and House floor debates[154] about use of the new citizen suits clause indicate that it may play a key role in several areas, including enforcing schedules and challenging cleanup decisions.

(iii) SARA authorizes private persons to petition EPA to have risk assessments done on any site.[155] In addition, in a far-reaching provision, SARA authorizes private parties to petition the ATSDR to do health assessments[156] of the health risks present at specific Superfund sites, regardless of whether such sites have been placed on the NPL. This latter provision appears to have the potential to trigger serious health questions about a site and could produce demands for EPA regulatory responses at an early stage.

(iv) The community right-to-know and emergency planning provisions[157] adopted in response to the Bhopal mass chemical poisoning episode in India in December 1984 contain elaborate provisions likely to sensitize the public to risks from the presence of hazardous substances in communities. They also contain requirements for emergency planning, some of which will stimulate further community or state review of what Superfund risks are present in a community and how they are being dealt with.

☐ *Health-Related Authorities.*[158] Another feature of major importance in SARA is the expansion of health risk expertise to be brought to bear on Superfund sites. The ATSDR provisions in CERCLA §104(i), largely unused in the original version of CERCLA, have been greatly expanded in SARA. ATSDR is given broad authority to do toxicity profiles, testing on hazardous substances, and health assessments at Superfund sites. Such assessments must be done at all NPL sites and at other sites on the request of EPA or a state. As noted in connection with public participation, the public may also petition for such health

143. *See generally infra* text at I.E. (annotated section on state assurance of adequate treatment and disposal capacity).

144. *See generally infra* text at I.J. (annotated section on public participation).

145. SARA §310, CERCLA §310, 42 U.S.C. §9659, ELR STAT. 44072. *See generally infra* text at II.I. (annotated section on citizen suits).

146. Environmental Defense Fund v. Environmental Protection Agency, No. 82-2234 (D.C. Cir. 1982); New Jersey v. Environmental Protection Agency, No. 82-2238 (D.C. Cir. 1982). These cases eventually resulted in a settlement on Feb. 1, 1984.

147. 40 CFR §300.67, ELR REG. 47461.

148. *Id.*

149. *Id.*

150. *See, e.g.,* Memorandum from Gene A. [illegible], Director, Office of Waste Programs Enforcement, EPA, to Regional Administrators, Regions I-X, *et al.,* Re: Model CERCLA §106 Consent Order for an RI/FS (Jan. 31, 1985).

151. SARA §117, CERCLA §117(e), 42 U.S.C. §9617(e), ELR STAT. 44045.

152. SARA §206, CERCLA §310, 42 U.S.C. §9659, ELR STAT. 44072.

153. RCRA §7002, 42 U.S.C. §6972, ELR STAT. 42034.

154. *See, e.g.,* 132 CONG. REC. H9587 (daily ed. Oct. 8, 1986) (statement of Rep. Florio); 132 CONG. REC. S14897 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).

155. SARA §105(b), CERCLA §105(d), 42 U.S.C. §9605(d), ELR STAT. 44022.

156. SARA §110, CERCLA §104(i)(6)(B), 42 U.S.C. §9604(i)(6)(B), ELR STAT. 44018.

157. SARA, Pub. L. No. 99-499, §§300-330, 100 Stat. 1613 (Emergency Planning and Community Right-To-Know). For a discussion of these provisions and of other initiatives in the areas of emergency planning, see Montgomery, *Reducing the Risk of Chemical Accidents: The Post-Bhopal Era,* 16 ELR 10300 (Oct. 1986).

158. *See generally infra* at I.I. (annotated section on health-related authorities).

assessments.[159] ATSDR is also required to list 200 or more hazardous substances with toxicity profiles on each. If the health assessments result in ATSDR findings of "significant risk to human health," EPA is required to eliminate or substantially mitigate such risk, if necessary by requiring such costly remedies as provision of alternative water supplies or relocation of the population affected.[160] It is also possible that these ATSDR studies will lay the basis for plaintiffs' toxic tort suits.

☐ *Federal Facilities Cleanup Program.*[161] The final major feature in SARA involves cleanups at federal facilities. Even in comparison with the new five-year $8.5 billion federal contribution to Superfund, the additional federal expenditures required by the 1986 amendments for cleanup at federal facilities are likely to be very large. The Department of Defense, for example, has been wrestling with cleanup at one site, the Rocky Mountain Arsenal near Denver, where the Army's suit against one PRP claims $1.8 billion in response costs.[162] These federal expenditures are separate and apart from Superfund because Superfund is not available for federal facility cleanup costs.[163] In the NCP, EPA has previously reached the policy decision that federal waste sites meeting Superfund criteria should be listed on the NPL, even if Superfund monies were not available to clean them up.[164]

In SARA Congress has required a systematic plan for cleanup of federal facilities in accordance with the NCP and CERCLA, with deadlines for assessments, NPL listing, preparation of RI/FS, and selection of remedial action. The Department of Defense, by far the largest federal proprietor of Superfund sites, is required to set up an environment restoration program at its facilities and to arrange for supporting annual appropriations.[165] Both EPA and the relevant state must concur in the remedial action selected at federal facilities.

Summary

As one reviews the five-and-a-half years since the Superfund program was inaugurated in 1981, one observes many EPA changes in course, extremely modest cleanup progress, tremendous transaction costs, and a dawning realization that the cleanup task will be much more technically difficult and expensive than originally anticipated. SARA attempts to give statutory guidance on many of the policy issues involved, to clarify the standards of cleanup to be applied, and to facilitate settlements. At the same time it also multiplies the parties to be consulted and the opportunities for veto through state participation, public participation, and citizen suit provisions. It should be clear that SARA increases the prospects for regulatory and litigation "gridlock" in the Superfund program. In addition, the increased health-related scrutiny of Superfund sites and the provision for ATSDR health assessments may greatly stimulate debate about solutions wherever there is prolonged uncertainty about health risks. They may also stimulate private toxic tort suits against PRPs by residents of the area surrounding a hazardous waste site.

The welter of Superfund litigation to date has helped to clarify some basic principles of the program, but it is very much to be hoped it will not take another four years of litigation to test and clarify the new SARA provisions. There is a need for a great educational effort, great patience, and cooperation by EPA, the PRPs, and affected states and communities to arrive at voluntary solutions. But if this need for voluntary solutions is unmet, and the already extensive Superfund litigation continues or proliferates, SARA has the ingredients for a great many more cases where more is spent on lawyers than on cleanups.

Hopefully, SARA's resolution of debate about the extension of the Superfund and amendment of CERCLA, following three years of congressional hearings, committee negotiations, and floor discussion should open important opportunities for achievement of Superfund goals. EPA, the states, and PRPs now have the challenge of running a better program with more cleanups and less confrontation. The cleanup industry has a glowing opportunity to develop new business and more cost-effective and more permanent cleanup technology. EPA, the Department of Justice, PRPs, and private sector specialists in alternate dispute resolution, mediation, and creative institution building such as Clean Sites, Inc.,[166] have an opportunity to make voluntary settlements and prompt cleanups the pattern rather than the exception. For both government and industry, the Superfund program as reauthorized by SARA, which OTA has predicted will run beyond the year 2000, beyond 2,000 sites, and beyond $20 billion in Fund costs,[167] is a tremendous challenge to the nation's capacity to solve a big and expensive problem involving participation by many parties, complex technological, economic, and health issues, and an unending need for cooperation.

This is an assessment of SARA for the longer term. For the present, a wise political observer has written of the enactment of SARA:

> [T]he Superfund bill marks a major commitment—financed in a balanced way—to clean up the life-threatening residue of the now waning industrial age. It is a symbol that even in this conservative era, government and industry are prepared to meet their obligations to public health, not walk away from them.[168]

159. *See supra* text accompanying notes 156.
160. SARA §110, CERCLA §104(i)(11), 42 U.S.C. §9604(i)(11), ELR Stat. 44020.
161. *See generally infra* at I.O. (annotated section on federal facilities).
162. United States v. Shell Oil Co., 605 F. Supp. 1064, 0000, 15 ELR 20337, 20338 (D. Colo. 1985); *see also* Plaintiff's Complaint, ELR Pend. Lit. 65808, United States v. Shell Oil Co., 605 F. Supp. 1064, 15 ELR 20337 (D. Colo. 1985).
163. CERCLA §111(e)(3), 42 U.S.C. §9611(e)(3), ELR Stat. 44036.
164. 40 C.F.R. §300.66, ELR Reg. 47460.
165. SARA §120, CERCLA §120, 42 U.S.C. §9620, ELR Stat. 44051; SARA §211, 10 U.S.C. §§2701-2707, 2810.
166. Clean Sites, Inc., is an independent, nonprofit, hazardous waste cleanup corporation established by both industry and environmental representatives. *See* Clean Sites, Inc., From Concept to Reality—May 1984 to December 1985 (1986) (first report on activities and finances). For a discussion of the early plans of Clean Sites, see *Clean Sites At Age One . . . An Uneven Start*, Envtl. F., Mar. 1985, at 27.
167. OTA Superfund Strategy, *supra* note 83 at 3.
168. Broder, *The 99th Congress: Deceptively Productive*, Washington Post, Oct. 22, 1986, at A25.

CERCLA As Amended: A Section-by-Section Commentary

I. RESPONSE ISSUES

A. Scope of Superfund Program

(i) Primary Attention to Public Health Threats[1]

The Amendment
The last sentence of §104(a) of SARA, amending CERCLA §104(a)(1), adds a broad directive to give primary attention to those releases which the President deems may present a public health threat.[2]

CERCLA Prior to Amendment
CERCLA §104(a) authorizes EPA to respond to threatened or actual releases of hazardous substances, pollutants, or contaminants which may present an imminent and substantial danger to the public health or welfare or the environment.

Administration Proposal
Section 101 of the Administration's bill, H.R. 1342, focused Superfund response authority on releases of hazardous substances from uncontrolled hazardous waste sites.[3] EPA Administrator Thomas noted that the response authorities in the present law are too sweeping in scope, saying that they "have the potential to dilute our scarce Superfund resources among non-site related releases, situations posing minimal public health threats, and other circumstances."[4]

Senate Action
The Senate Environment Committee Report emphasized that within EPA's broad authority to respond to actual or threatened releases of hazardous substances or contaminants, EPA should place as first priority those threats to public health.[5] This would not, however, preclude response to situations which pose a purely environmental threat.[6] The Senate bill contained a provision nearly identical to that adopted by the Conference Committee.

House Action
The changes made by the House in CERCLA §104 were intended to clarify and strengthen EPA's authority to respond to releases of hazardous substances, pollutants and contaminants.[7] The final House bill provision, which was adopted by the Conference Committee, required that primary attention be devoted to releases which the Administrator deems may present a public health threat.[8]

(ii) Priority for Drinking Water Supplies[9]

The Amendment
SARA §118(a) adds a new CERCLA §118 requiring the President to give high priority to responses to releases of hazardous substances, pollutants, or contaminants which result in the closing of drinking water wells or contamination of a principal drinking water supply.[10] This priority will be applied both for listing purposes and for actions taken pursuant to CERCLA §§104 or 106.

CERCLA Prior to Amendment
No provision.

Administration Proposal
None.

Senate and House Action
The Senate bill contained no similar provision. The Conference Committee adopted the House provision with one slight modification. The House bill placed priority on contamination of a sole or principal drinking water source as designated under the SDWA; the Conference Committee modified this so that the Administrator would not be constrained by existing interpretations of this phrase under the SDWA.[11]

(iii) Prohibition of Response to Various Releases[12]

The Amendment
Section 104(c) of SARA amends CERCLA §104(a) to prohibit Superfund responses for (a) releases of naturally occurring, unaltered substances; (b) releases from products which are part of the structure of, and result in exposure within, residential, business, or community structures; or (c) releases into public or private drinking water supplies resulting from ordinary deterioration of the system.[13] A savings provision allows for response to any hazardous substance release where a public health or environmental emergency exists and no other person has the authority and capability to respond to the emergency in a timely manner.

CERCLA Prior to Amendment
CERCLA §104(a) authorizes EPA to respond to all threatened or actual releases of hazardous substances, pollutants, or contaminants which may present an imminent and substantial danger to the public health or welfare or the environment.

Administration Proposal
The Administration's proposed amendment would not allow EPA

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1. **Legislative History Sources**
   Administration Proposal, H.R. 1342/S. 494, §101(a).
   Senate Environment Committee Report at 15-16.
   Senate Bill, S. 51, §112(a).
   House Commerce Committee Report at 67.
   House Public Works Committee Report at 6-7.
   House Bill, H.R. 2817, §104(a).
   Conference Committee Report at 189.
   SARA §104(a).
2. SARA §104a, CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1), ELR Stat. 44011.
3. EPA Section-by-Section Analysis, House Commerce Committee Report at 127.
4. *Id.* at 121.
5. Senate Environment Committee Report at 16.
6. *Id.*
7. House Commerce Committee Report at 67.
8. The only change made by the Conference Committee was to change "Administrator" to "President" to conform with the other amendments. Conference Committee Report at 189.
9. **Legislative History Sources**
   Administration proposal, H.R. 1342/S. 494, no provision.
   House Bill, H.R. 2817, §118(b).
   Conference Committee Report at 232.
   SARA §118(a).
10. SARA §118(a), CERCLA §118, 42 U.S.C. §9618, ELR Stat. 44046.
11. Conference Committee Report at 232.
12. **Legislative History Sources**
    Administration Proposal, H.R. 1342/S.494, §§101(b), (c), and (d).
    Senate Environment Committee Report at 16-17.
    Senate Debate, 131 Cong. Rec. S11617 (daily ed. Sept. 17, 1985).
    Senate Bill, S. 51, §112(b).
    House Commerce Committee Report at 91-92, 270.
    House Bill, H.R. 2817, §118(a).
    Conference Committee Report at 185, 190.
    SARA §104(c).
13. SARA §104(c), CERCLA §104(a)(3) and (4), 42 U.S.C. §9604(a)(3) and (4), ELR Stat. 44011.

to respond to the following types of releases, absent a determination that the release constituted a major public health or environmental emergency to which no person is authorized or capable of responding: (1) releases from mining activities covered by SMCRA; (2) releases of pesticides registered under FIFRA; (3) releases affecting dwellings or inhabited community structures, or water supply wells when contamination is not caused by a release from a hazardous substance facility; (4) releases of naturally occurring, unaltered substances from locations where they are naturally found; and (5) other releases covered by a federal permit.[14] The Administration's proposal would also prohibit EPA response under CERCLA §104(a) to pollutants and contaminants, permitting response to hazardous substances only.[15]

Senate Action
Although the Senate Environment Committee substantially adopted the Administration provision, it did not exclude responses to releases from mining sites, pesticides, or releases pursuant to a federal permit. The Senate bill followed this pattern and was subsequently adopted by the Conference Committee.[16]

House Action
The House bill adopted the Administration's proposed limitation to CERCLA response authority with some modifications. Section 118(a) provided that EPA may not respond to releases from coal mining sites for which a response is available under SMCRA in addition to those adopted by the Conference Committee in SARA §104(c). This bill included a savings clause which would allow EPA response in these cases if EPA determined that the release constitutes a major public health or environmental emergency. The House bill did not adopt the Administration's proposals which precluded response to pollutants and contaminants or to releases resulting from pesticides registered under FIFRA.

(iv) Provision of Alternative Water Supplies[17]

The Amendment
Section 101(f) of SARA inserts a new definition at CERCLA §101(34) which clarifies that the term "alternative water supplies" includes drinking water and household water supplies.[18]

CERCLA Prior to Amendment
At present CERCLA includes in its definition of removal[19] and remedial action[20] the "provision of alternative water supplies."

Administration Proposal
None.

Senate and House Action
Section 107 of the Senate bill clarified that "alternative water supplies" includes, but is not limited to, drinking water and household water supplies. The Senate Environment Committee was informed that EPA had only used its prior authority to replace drinking water and not household water.[21] The Committee stated that "the replacement of all water, not just that used for drinking, is important for the protection of human health . . . . [P]rudence demands that when the drinking water supplies are replaced, household water supplies should be replaced as well."[22] The House bill had no corresponding provision.

(v) Community Relocation[23]

The Amendment
Section 118(h) of SARA amends the definition of remove or removal to include the costs involved in permanent relocation of residents where cost-effective or necessary to protect public health or welfare.[24] For businesses located in these areas, such costs include the payment of business debt installments running from the date of evacuation until 30 days following permanent relocation. Individuals unemployed as a result of relocation are entitled to assistance as provided in §§407 and 408 of the Disaster Relief Act with funding provided under CERCLA. The Conference Committee added an express limitation restricting the application of this provision to dioxin sites in Missouri.[25]

In a related measure, SARA §110, which addresses health-related authorities, adds a new CERCLA §104(i)(11).[26] This section authorizes the permanent or temporary relocation of individuals when a health assessment results in a finding that exposure to certain substances presents a significant risk to human health.

CERCLA Prior to Amendment
The definition of remove or removal in §101(23) includes only temporary evacuation and housing of threatened individuals not otherwise provided for.

Administration Proposal
None.

Senate and House Action
The Senate Environment Committee, concerned by the difficulties EPA had in responding to the Times Beach, Missouri dioxin episode, proposed to grant detailed authority to EPA to handle community relocation as part of a removal action. This included expanding the definition of removal to include such items as payment of business debt and unemployment compensation. The provision authorized EPA to provide permanent relocation as the most appropriate remedy even when the site is not on the NPL.[27] The Committee stressed the clarifying nature of the amendment, stating that the amendment was not intended to substantially alter the scope or intent of CERCLA.[28] These provisions were incorporated in §105 of the Senate bill. The House amendment contained no comparable provision.

14. House Commerce Committee Report at 128.
15. *Id.* at 127.
16. The Senate Environment Committee listed examples of specific situations which were intended to be covered, as well as examples of some that were not so intended. Senate Environment Committee Report at 16-17.
17. **Legislative History Sources**
Administration Proposal, H.R.1342/S. 494, no provision.
Senate Environment Committee Report at 7-8, 80.
Senate Bill, S. 51, §107
Conference Committee Report at 186.
SARA §101(f).
18. SARA §101(f), CERCLA §101(34), ELR Stat. 44008
19. CERCLA §101(23), 42 U.S.C. §9601(23), ELR Stat. 44007
20. CERCLA §101(24), 42 U.S.C. §9601(24), ELR Stat. 44007
21. Senate Environment Committee Report at 7.
22. *Id.* at 7-8.
23. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Report at 6-7, 79.
Senate Bill, S. 51, §105.
Conference Committee Report at 233-34.
SARA §118(h).
24. SARA §118(h), ELR Stat. 44047, as a note after CERCLA §118.
25. These sites include those at which a decision concerning relocation has already been considered as of the date of enactment, namely Quail Run, Minker Stout-Romaine Creek, Piazza, Castlewood, and Times Beach. Conference Committee Report at 234.
26. SARA §110, CERCLA §104(i)(11), 42 U.S.C. §9604(i)(11), ELR Stat. 44020.
27. Senate Environment Committee Report at 6-7.
28. *Id.*

(vi) Abandonment of Hazardous Waste Receptacles Included as Release[29]

The Amendment
SARA §101(c) amends the definition of release in CERCLA §101(22) to include the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance, pollutant, or contaminant.[30] The use of the word "containing" is intended to cover situations where the receptacles are broken open, currently leaking, or merely lined with residue.

CERCLA Prior to Amendment
According to the Conference Committee, the definition of release under CERCLA §101(22) allows the President to take response action with regard to such receptacles. The new amendment merely confirms and clarifies the President's present authority.[31]

Administration Proposal
None.

Senate and House Action
The Senate bill did not address this provision. The House bill provided the language adopted by the Conference Committee.

B. Authority to Respond to Release and Prepare RI/FS[32]

The Amendment
Section 104(a) of SARA amends CERCLA §104(a)(1)[33] to authorize EPA to allow PRPs to conduct removal or remedial actions and prepare RI/FSs in accordance with §122 on settlements.[34] No preparation of an RI/FS by a PRP shall be authorized unless EPA has determined that the PRP is qualified to conduct it; arranges for a "qualified"[35] person (who is to be experienced and governed by EPA's standards of conduct relating to conflict of interest) to assist EPA in overseeing and reviewing the conduct of the RI/FS; and obtains the PRP's undertaking to pay for the cost of the oversight contract. A PRP performing such roles with respect to cleanup shall not be entitled to a lesser standard of liability or to receive preferential treatment as a response action contractor.

CERCLA Prior to Amendment
CERCLA §§104 and 105 and the NCP contemplate a significant role for private parties in response actions.

Administration Proposal
The Administration sponsored this provision in §101(a) of H.R. 1342 to make clear that the President has discretion to decide when PRPs rather than EPA are authorized to conduct cleanups.[36] It is EPA's understanding that the new provision "is not intended to preclude or discourage responsible parties from conducting cleanup actions without the formal permission of the Federal Government."[37]

Senate Action
The Senate Environment Committee adopted EPA's proposal and rationale and this provision was passed by the Senate.

House Action
The House Commerce Committee endorsed the Administration amendment in its report. The House Public Works Committee proposed to add language that EPA could not permit a PRP to conduct an RI/FS. The issue was debated between representatives of the House Commerce Committee and House Public Works Committee in evolving the compromise bill (H.R. 3852) sent to the floor by all House committees working on the Superfund legislation. According to H.R. 3852, PRPs should be allowed to conduct a remedial investigation "only if the person conducting the investigation or study for the responsible party is qualified to conduct such an investigation or study and is approved by the Administrator, if the Administrator enters into a contract with a qualified, objective person to oversee and review the conduct of such investigation or study, and if the responsible party agrees to reimburse the Fund for any costs incurred by the Administrator under the oversight contract."[38] The compromise proposal was adopted as §104(b) of the House bill.

C. Federal/State Cost Sharing

(i) Cost of restoring ground and surface water as remedial expense[39]

The Amendment
Section 104(i) of SARA amends CERCLA §104(c) to provide that

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29. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.
House Commerce Committee Report at 66.
House Public Works Committee Report at 5-6.
House Bill, H.R. 2817, §101(b).
Conference Committee Report at 184.
SARA §101(c).
30. SARA §101(c), CERCLA §101(22), 42 U.S.C. §9601(22), ELR STAT. 44006.
31. Conference Committee Report at 184.
32. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, §101(a).
Senate Environment Committee Report at 15-16, 85.
Senate Bill, S. 51, §112(a).
House Commerce Committee Report at 67, 127.
House Public Works Committee Report at 8.
House Bill, H.R. 2817, §104(b).
Conference Committee Report at 188-189.
SARA §§104(a), 111(d)(2).
33. SARA §104(a), CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1), ELR STAT. 44011. *See also* SARA §111(d)(2), which adds CERCLA §111(c)(8) referring to contract costs under §104(a)(1). SARA §111(d)(2), 42 U.S.C. §9611(c)(8), ELR STAT. 44035.
34. New CERCLA §122(e)(6) states that whenever the government or a PRP authorized by an administrative order or a consent decree has initiated an RI/FS, no other PRP may undertake any remedial actions at that site unless authorized.
35. The House text referred to a "qualified, objective person." The Conference Report replaced the term "objective" with a discussion of its requirement that a "qualified person" perform the oversight:

> The term "qualified person," refers to someone with the professional qualifications, expertise, and experience necessary to provide additional assurance that the President is conducting meaningful oversight of the remedial investigation and feasibility studies being performed by potentially responsible parties in accordance with section 122. The President retains the principal responsibility to properly oversee the conduct of remedial investigations and feasibility studies and the qualified person is to work for and assist the President. Any such person contracted for or arranged for should be governed by the Agency's standards of ethical conduct relating to conflict of interest.

Conference Committee Report at 189.

36. "This amendment would confirm that if the Federal government determines that a Federal response is needed, the President would have the discretion to determine the appropriate response and to take action; responsible parties would not be authorized to forestall Federal response." EPA Section-by-Section Analysis, House Commerce Committee Report at 127.
37. *Id. See* Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 16 ELR 20754 (9th Cir. 1986).
38. *See* H.R. 3852, 99th Cong., 1st Sess., §104(b), 131 CONG. REC. H10832 (daily ed. Dec. 4, 1985).
39. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Report at 20-21.
Senate Bill, S. 51, §117.
House Commerce Committee Report at 70.
House Bill, H.R. 2817, §104(i).
Conference Committee Report at 193.
SARA §104(i).

costs of restoring ground and surface water to a level that assures protection of human health is to be treated as part of the cost of remedial action and not an operation and maintenance (O&M) cost allocable to a state.[40] The operation of such measures for a period of ten years is also to be treated as part of the remedial action rather than as an expense. As a result, the states will only be responsible for 10 percent of such costs as opposed to 100 percent if they were considered O&M. Activities required to maintain the effectiveness of such measures following the first ten-year period or the completion of the remedial action, whichever is earlier, shall be considered O&M.[41]

CERCLA Prior to Amendment
Under CERCLA §104(c)(3)(A) states are required to assure payment of all future O&M costs. Current EPA policy provides that EPA picks up 90 percent of the first year of O&M; states provide 10 percent in the first year and 100 percent thereafter.[42]

Administration Proposal
None.

Senate Action
The Senate Environment Committee stressed the importance of clarifying the financial obligation of Superfund concerning the cleanup of ground and surface water contamination of NPL sites. The current practice of funding this major aspect of the cleanup on a 90/10 basis was extended from one year to up to five years. The Committee felt that the distinction of remedial versus O&M cost should be based on the degree of cleanup achieved; thus a remedial action would not become O&M until protection of human health and the environment was assured. The five-year limitation and the requirement that expenses be paid exclusively from responsible party cost recoveries limited this idea in some respects but were included to address EPA's concern over having to set aside funds to finance long-term cleanups of contaminated ground and surface water.[43]

The Senate bill followed the Senate Environment Committee recommendations as did the Conference Committee, although the five-year limitation was expanded to ten years.

House Action
The House provision was included to ensure that EPA consider all costs associated with cleanup at a site. Concern was voiced in the House Commerce Committee over the failure to classify long-term cleanup remedies, such as pumping and treating of groundwater, as legitimate remedial action costs. Such failure might allow EPA to look to less expensive, less permanent remedies than might be warranted by the circumstances. States were concerned that they would have to completely finance long-term actions to adequately clean up the site. Accordingly, this provision was included to encourage EPA to consider all costs associated with a site cleanup and to choose permanent cleanup solutions for Superfund sites.[44]

Section 104(i) of the House bill provided that in the case of ground or surface water contamination, completed remedial action should be deemed to be the completion of that treatment, whether onsite or offsite, necessary to restore ground and surface water quality to a level that assures the protection of human health and the environment. Activities required to maintain the effectiveness of such measures following the completion of remedial action would be considered maintenance.

40. SARA §104(i), CERCLA §104(c)(6) and (7), 42 U.S.C. §9604(c)(6) and (7), ELR STAT. 44013.

41. SARA §104(i) also adds CERCLA §104(c)(7) which specifies that once the tax revenue provisions terminate, O&M costs are to be paid from PRP recoveries.

42. Senate Environment Committee Report at 27.

43. *Id.*

44. House Commerce Committee Report at 70.

(ii) Expanded Reimbursements to States[45]

The Amendment
Section 104(h) of SARA amends CERCLA §104(c) to provide that states be credited for amounts expended pursuant to contracts or cooperative agreements for remedial actions at NPL facilities.[46] The credit is limited to reasonable, documented, direct, out-of-pocket expenditures of non-federal funds. Expenses incurred prior to listing will be covered if the facility is later listed, a contract entered into, and the expenses would have been credited had the facility been listed.

The credit fully covers funds expended between January 1, 1978 and December 11, 1980 for cost-eligible response actions and claims for damages compensable under CERCLA §111. After December 11, 1980, 90 percent of state expenses incurred at facilities owned but not operated by a state shall be credited. After the date of enactment, prior approval by the Administrator of expenditures may be required as a condition of granting a credit.

If the credit exceeds the state's cost-share, the state may apply the credit to other NPL facilities in that state. The credit, however, does not entitle the state to direct payment nor to the federal share of costs for that facility. No special funds are required to be earmarked for satisfying these credit provisions.

CERCLA Prior to Amendment
The credit provided to the states under CERCLA §104(c)(3) is limited to non-federal expenditures for response actions and compensable damage claims between January 1, 1978, and December 11, 1980, that are documented, direct, and out-of-pocket.

Administration Proposal
None.

Senate Action
The Senate Environment Committee intended that states be allowed to apply state credits to sites other than where the credit was earned. Under the old law credits were applied only toward work at the specific site but often there might be little work left to be done at the site or the expenditures might exceed the state's share of costs.[47] In addition, states would now be allowed to enter into a contract or cooperative agreement to receive credit for cleanup costs at NPL sites in advance of any obligation of federal funds to these sites. This was hoped to provide an incentive to initiate responses "at the fastest possible pace."[48] These provisions appeared in the Senate bill.

House Action
The House Commerce Committee agreed that there was a need to clarify the cost-sharing relationship between EPA and the states in order to allow states to expend their own monies with the expectation of being reimbursed. Nevertheless, it voiced several concerns, mainly that the credit provisions do not become "gaping loopholes" allowing the states to spend federal funds without strict EPA oversight.[49] The national site priorities must be observed and maintained, so that states do not feed funds into low

45. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Report at 18.
Senate Bill, S. 51, §114
House Commerce Committee Report at 69-70.
House Public Works Committee Report at 9-10.
House Bill, H.R. 2817, §104(g).
Conference Committee Report at 192.
SARA §104(h)

46. SARA §104(h), CERCLA §104(c)(5), 42 U.S.C. §9604(c)(5), ELR STAT. 44013

47. Senate Environment Committee Report at 18.

48. *Id.*

49. House Commerce Committee Report at 69.

priority sites. For these reasons, the credits were restricted to NPL sites covered by contract or cooperative agreements, to non-listed sites which are eventually listed, and to those costs which are reasonable (including administrative costs).[50] Section 104(g) of the House bill was adopted by the Conference Committee, modified only by the deletion of coverage of administrative expenses.

(iii) 50 Percent State Cost Share for Cleanup of State-Operated Sites[51]

The Amendment
Section 104(f) of SARA amends CERCLA §104(c)(3) to specify that the 50 percent or greater state cost share requirement applies to facilities which are operated by a state either directly or through a contractual relationship, but not to facilities merely owned by a state.[52]

CERCLA Prior to Amendment
CERCLA mandates in §104(c)(3)(C) a 10 percent state cost share for response action costs at private facilities and 50 percent at state-owned facilities.

Administration Proposal
The Administration proposed to increase the states' share of response costs at public and private facilities. The state cost share for response at public facilities would be increased from 50 to 75 percent but would be based on operation by the state rather than ownership. The cost share at private facilities was increased from 10 to 20 percent in §117.

Senate Action
Section 115 of the Senate bill would amend CERCLA by imposing the original 50 percent or greater state cost-share of response costs for public facilities on the basis of state operation, rather than state ownership, of the facility at the time of the hazardous substance disposal.[53] The 50 percent cost share would apply to sites owned and operated by the state, sites owned by the state but operated by a private party under contract or lease with the state, and sites owned by private parties but operated by the state.[54] This approach was adopted by the Conference Committee.

House Action
The House Commerce Committee Report specified that the 50 percent minimum state cost share should be applicable only if the facilities were both owned and operated by the state at the time of the hazardous substance disposal.[55] The Committee felt that CERCLA currently fails to provide clear guidelines on the question of privately operated waste disposal facilities which are located on state land and which have become Superfund sites; EPA has misinterpreted this situation as one which requires a 50 percent cleanup contribution from the state. The Committee did not intend a 50 percent contribution where a state did not operate a site directly."

50. *Id.* at 69-70.

51. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, §§107 and 117.
Senate Environment Committee Report at 18-19.
Senate Bill, S. 51, §115.
House Commerce Committee Report at 68-69, 154.
House Public Works Committee Report at 150.
Conference Committee Report at 19[illegible]
SARA §104(f).

52. SARA §104(f), CERCLA §104(c)(3), 42 U.S.C. §9604(c)(3), ELR Stat. 440[illegible]

53. Senate Environment Committee Report at 18-19.

54. *Id.*

55. House Commerce Committee Report at 154.

56. [illegible]

The House Public Works Committee applied the 50 percent cost share to facilities both owned and operated at the time of disposal. However, it withdrew the authority of EPA to increase the 50 percent cost share at public facilities according to the state's degree of responsibility for the hazardous substance disposal.[57]

(iv) Reimbursement to Local Governments[58]

The Amendment
Section 123 of SARA inserts a new §123 in CERCLA which authorizes local governments affected by a hazardous substance release to apply to EPA for reimbursement of expenses incurred in carrying out temporary emergency measures necessary to prevent or mitigate injury to human health or the environment.[59] Measures such as security fencing and response to fires and explosions are authorized. Reimbursement is limited to $25,000 per response, and must be in accordance with rules promulgated by EPA.[60]

CERCLA Prior to Amendment
No provision.

Administration Proposal
None.

Senate and House Action
No comparable provision was included in the Senate bill. The House provision on this subject was modified by the Conference Committee to make a distinction between traditional local emergency services which should continue to be funded locally and those relating to hazardous substance response.

(v) Repeal of Preemption of State Taxation for Superfund Purposes[61]

The Amendment
Section 114(a) of SARA strikes §114(c) of CERCLA and substitutes an unrelated new §114(c).[62] The purpose of this amendment is to repeal the prohibition on state taxation to fund Superfund purposes. As a result, the Supreme Court's recent decision upholding the preemptive effect of CERCLA §114(c) becomes moot.[63]

57. House Public Works Committee Report at 150.

58. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.
House Commerce Committee Report at 51, 103.
House Public Works Committee Report at 68-69.
House Bill, H.R. 2817, §123.
Conference Committee Report at 256.
SARA §123.

59. SARA §123, CERCLA §123, 42 U.S.C. §9623, ELR Stat. 44063.

60. A further monetary limitation is expressed in SARA §111(d)(2), adding CERCLA §111(c)(11). Under this section, not more than 0.1 percent of the Fund may be used for such reimbursement during the five-year period beginning October 1, 1986, ELR Stat. 44036.

61. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, §116.
Senate Environment Committee Report at 59-60.
Senate Bill, S. 51, §147.
House Commerce Committee Report at 83-84.
House Public Works Committee Report at 27.
House Bill, H.R. 2817, §114.
Conference Committee Report at 225.
SARA §114(a).

62. SARA §114(a), CERCLA §114(c), 42 U.S.C. §9614(c), ELR Stat. 44044.

63. Exxon Corp. v. Hunt, 475 U.S. ___, 106 S. Ct. 1103, 16 ELR 20[illegible] (U.S. Mar. [illegible], 1986). See also Comment, *CERCLA Reauthorization: The Wise Demise of §114(c)* and Exxon v. Hunt, 16 ELR 102[illegible] (Oct. 1986).

CERCLA Prior to Amendment
CERCLA §114(c) prohibited states from imposing taxes to fund compensation for claims for any cost of response or damages or for claims which may be compensated under CERCLA. Section 114(c) contained a savings clause authorizing state use of general revenues to create such a compensation fund or the imposition of taxes or fees to pay for equipment and preparations to provide protection from releases of hazardous substances affecting the state.

Administration Proposal
The Administration proposed the repeal of §114(c).

Senate and House Action
The Senate Environment Committee concluded that the conflicting judicial positions on the meaning of CERCLA §114(c) had created a barrier, blocking the creation of state Superfund programs. An amendment deleting CERCLA §114(c) was necessary to allow the states to raise funds to meet their cost-sharing and other duties incident to cleanup. The Senate adopted this proposal to delete preemption of state taxes for Superfund purposes.[64]

The House bill, H.R. 2817, would amend §114(c) to allow states to require contribution to a fund whose purpose is to pay for costs of response or damages.

(vi) Contracts and Cooperative Agreements; Enforcement Costs[65]

The Amendment
The existing CERCLA provisions on cooperation between EPA and the states are clarified by §104(*l*) of SARA, amending CERCLA §104(d)(1).[66] The new language authorizes response actions under a contract or cooperative agreement with a state, political subdivision, or Indian tribe where such an entity applies for a contract or agreement and EPA determines that the entity has the capability to carry out the response. EPA must decide whether it will enter such an agreement within 90 days of a request; the resulting pact may cover one or more separate facilities. The Conference Report states that the activities which may be covered in cooperative agreements include "overall implementation, coordination, enforcement, training, community relations, site inventory and assessment efforts and administration of remedial activities as authorized by this Act."[67]

State expenditures on NPL sites during 1985-86 are eligible retroactively for reimbursement. In addition, the definitions of "respond" and "response" in CERCLA §101(25) are amended to include enforcement activities making such costs, when incurred by the states, reimbursable as "response costs" from Superfund under CERCLA §111(a).[68]

CERCLA Prior to Amendment
CERCLA §104(d) authorizes contracts and cooperative agreements with states and other political subdivisions, subject to the cost-sharing conditions of §104(c)(3).[69] These arrangements may be enforced by federal courts. The federal government may provide technical and legal assistance to the states, and reserves the right to intervene in any related legal proceedings. The law allows several sites related by geography or type of hazard to be treated as a single facility under §104(d) agreements.

EPA has interpreted CERCLA §104(c) to authorize Fund financing of state enforcement costs.[70]

Administration Proposal
The Administration proposed to extend and clarify these provisions and to include agreements with Indian tribes. The suggested language explicitly permitted several sites to be included under a single contract or agreement. In addition, it made enforcement costs reimbursable.

Senate and House Action
The Senate adopted the Administration's suggestions, adding training costs to reimbursable expenses.[71] The House also accepted the Administration's proposal and added the requirement that EPA respond within 90 days to applications for agreements. EPA was to reimburse the states for any state expenditures on NPL sites during 1985-86 for which the federal government was responsible, making the revision retroactive on that point. The Conference Committee adopted the House version.

(vii) Enforcement as Part of Response[72]

The Amendment
SARA §101(e) amends CERCLA §101(25) by modifying the definition of "response" to explicitly include enforcement activities.[73] This clarifies that these costs are recoverable from responsible parties as removal or remedial costs under CERCLA §107 and that state enforcement expenses may be financed from Superfund.

CERCLA Prior to Amendment
The definition of response in CERCLA §101(25) has been interpreted to cover enforcement actions;[74] the amendment clarifies and confirms this interpretation.

Administration Proposal
None.

64. Senate Environmental Committee Report at 59-60.

65. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, §106.
Senate Environment Committee Report at 24-25.
Senate Bill, S. 51, §119.
House Commerce Committee Report at 123, 125, 130.
House Bill, H.R. 2817, §§101(e), 104(j).
Conference Committee Report at 184, 194-95.
SARA §§101(e), 104(*l*).

66. SARA §104(*l*), CERCLA §104(d)(1), 42 U.S.C. §9604(d)(1), ELR Stat. 44614.

67. Conference Committee Report at 195.

68. SARA §101(e), CERCLA §101(25), 42 U.S.C. §9601(25), ELR Stat. 44607.

69. In contracts, EPA gives the state a cooperative agreement [illegible] state does so under EPA oversight. *See* Frank & Atkeson, SUPERFUND: LITIGATION AND CLEANUP, A BNA Special Report at 17 (1985).

70. Memorandum from Lee A. DeHihns, Associate General Counsel, Grants, Contracts, and General Law Division, to Gene A. Lucero, Director, Office of Waste Programs Enforcement, Re: Authority to Use CERCLA to Provide Enforcement Funding Assistance to States (Feb. 12, 1986), *reprinted in* 11 CHEM. WASTE LITIG. REP. 806 (1986).

71. The Senate Environment Committee elaborated on state enforcement costs eligible for reimbursement: "Eligible enforcement costs include, but are not limited to, the costs of information gathering, discovery, expert witnesses and other expenses related to litigation or administrative enforcement, and State oversight of private party responses to the extent such oversight costs are not otherwise provided by those private parties." Senate Environment Committee Report at 25.

72. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.
House Commerce Committee Report at 66-67.
House Public Works Committee Report at 6.
House Bill, H.R. 2817, §101(e).
Conference Committee Report at 185.
SARA §101(e).

73. SARA §101(e), CERCLA §101(25), 42 U.S.C. §9601(25), ELR STAT. 44607.

74. Conference Committee Report at 185; Memorandum from Lee A. DeHihns, Associate General Counsel, Grants, Contracts and General Law Division, to Gene A. Lucero, Director, Office of Waste Programs Enforcement, Re: Authority to Use CERCLA to Provide Enforcement Funding Assistance to States (Feb. 12, 1986), *reprinted in* 11 CHEM. WASTE LITIG. REP. 806 (1986).

Senate and House Action
The Senate bill contained no comparable provision. The House bill provided the language adopted by the Conference Committee.

D. NCP/HRS/NPL

(i) Revision of the NCP[75]

The Amendment
Section 105(b) of SARA adds a new CERCLA §105(b) requiring the NCP to be revised within 18 months of the date of enactment of SARA in order to reflect the changes made by the amendments.[76]

Section 105(a)(5) of SARA provides a new CERCLA §105(a)(10) that mandates the inclusion in the revised NCP of standards and testing procedures for determining the appropriateness of alternative and innovative treatment technologies for authorized response actions.[77]

Section 105(b) of SARA adds a new CERCLA §105(f) dealing with the consideration of qualified minority contractors when awarding contracts.[78] Annual reports to Congress must include a brief description of the current involvement of minority firms and efforts made to encourage their participation.

CERCLA Prior to Amendment
Revision of the NCP as it existed in 1980 was mandated by CERCLA §105 to be done within 180 days after enactment of CERCLA. The last sentence of §105 provides that the President may, from time to time, revise and republish the NCP.

CERCLA §105 provides that the plan shall specify techniques to be employed in responding to releases.

Subparagraph (a) of CERCLA §105 requires that specified roles for private organizations be included in the NCP but does not address minority organizations.

Administration Proposal
None.

Senate and House Action
The Senate Environment Committee noted that revision of the NCP is mandated in order to provide consistency and cohesiveness to response planning and actions for hazardous substance response.[79] Section 126 of the Senate bill allowed the Administrator 12 months in which to revise the NCP. The House Commerce Committee stressed that revising the NCP does not implicitly include a requirement that the Administrator reevaluate any site listed on the NPL before the date of enactment.[80]

(ii) Revision of the Hazard Ranking System (HRS); Special Study Wastes[81]

The Amendment
Section 105(b) of SARA inserts a new CERCLA §105(c) which requires the President to promulgate within 18 months of enactment of SARA amendments to the HRS to assure that the HRS accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review.[82] The HRS amendments will take effect within 24 months of enactment of SARA, with the existing HRS remaining in full force and effect until such time. This substantive standard does not require that a detailed risk assessment be performed as might be done as part of an RI/FS; it only seeks to insure the expeditious identification of candidates for response actions.

Two new criteria are established for purposes of determining priorities among releases in SARA §105(a)(2), amending CERCLA §105(a)(8)(A).[83] The Administrator may now take into account the damage to natural resources which may affect the human food chain and the potential contamination of the ambient air.

The problems surrounding special study wastes are dealt within SARA §105(b), adding CERCLA §105(g),[84] and SARA §125, adding CERCLA §125.[85] For wastes described in RCRA §3001(b)(3)(A)(i),[86] §125 provides that prior to the revision of the HRS, EPA may not add facilities containing such waste to the NPL merely upon an evaluation of volumes of waste and not actual concentrations of the hazardous constituents of such waste. In revising the HRS for such facilities, the Administrator must consider various site-specific characteristics including: quantity, toxicity, and concentrations of hazardous constituents in such waste in comparison to other wastes; the extent and potential of a release of such constituents; and the degree of risk to human health and the environment posed by such constituents.

For other special study wastes found in paragraphs (2), (3)(A)(ii), or (3)(A)(ii) of RCRA §3001(b), CERCLA §105(g) sets out the considerations to be given to potential NPL facilities containing such waste pending revision of the HRS. These considerations include those mentioned above, along with consideration of the extent to which the HRS score was affected by presence of any special study waste. In contrast to the wastes addressed in SARA §125, the President's authority to list or delist these waste sites is not diminished, although consideration of the above factors is mandated prior to listing.

CERCLA Prior to Amendment
CERCLA §105(8)(A) sets out criteria in the HRS for determining priorities among releases or threatened releases for the purpose of taking remedial or removal action.

Administration Proposal
None.

Senate Action
The Senate Environment Committee discussed the criticisms of the current HRS.[87] The purpose of the HRS is to indicate the

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75. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Report at 39-41.
Senate Bill, S. 51, §126.
House Commerce Committee Report at 71-72.
House Public Works Committee Report at 13.
House Bill, H.R. 2817, §105(a) and (e).
Conference Committee Report at 198-201.
SARA §§105(a) and (b).
76. SARA §105(b), CERCLA §105(b), 42 U.S.C. §9605(b), ELR Stat. 44022.
77. SARA §105(a), CERCLA §105(a)(10), 42 U.S.C. §9605(a)(10), ELR Stat. 44022.
78. SARA §105(b), CERCLA §105(f), 42 U.S.C. §9605(f), ELR Stat. 44022.
79. Senate Environment Committee Report at 40.
80. House Commerce Committee Report at 72.
81. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Report at 39-41.
Senate Debate, 131 Cong. Rec. S11680 (daily ed. Sept. 18, 1985) (statement of Sen. Baucus).
Senate Bill, S. 51, §126.
House Commerce Committee Report at 72, 103-104.
House Bill, H.R. 2817, §§105(a) and (e), 125.
Conference Committee Report at 198-202, 257.
SARA §105(a)(2) and (b), §125.
82. SARA §105(b), CERCLA §105(c), ELR Stat. 44022.
83. SARA §105(a)(2), CERCLA §105(a)(8)(A), 42 U.S.C. §9605(a)(8)(A), ELR Stat. 44021.
84. SARA §105(b), CERCLA §105(g), ELR Stat. 44023.
85. SARA §125, CERCLA §125, ELR Stat. 44064.
86. 42 U.S.C. §6921(b)(3)(A)(i), ELR Stat. 42011. These wastes include fly ash, bottom ash, etc., which are generated primarily from the combustion of coal or other fossil fuels.
87. Senate Environment Committee Report at 40-41. The problems with the HRS or so-called "Mitre Model" are also addressed in EPA's implementation report to Congress. See Office of Emergency and Remedial Response, Environmental Protection Agency, Sec-

degree of hazard or risk in order to determine the priority in placing a site on the NPL. The criticisms largely concerned mining sites, where a bias in the ranking criteria may exist. The HRS currently identifies the most hazardous constituent at the site, quantifies the total amount of wastes at the site, and then assumes that all of the waste is comprised of the most hazardous constituent. In the case of mining wastes, where there are trace toxic metals present, this is likely to produce a bias.

The Senate amendment would allow EPA to determine if a bias exists and establish an accurate revised system without interfering with interim use of the HRS. Sites listed prior to the effective date of the new HRS will not be affected nor will listing or ranking of new sites be delayed.[88] EPA has asked the Mitre Corporation, which developed the HRS model, to review the varous criticisms.[89] However, Senator Baucus (D-Mont.), who originally proposed this provision, desired a more systematic, unbiased, and open reassessment of the HRS.[90] To accomplish this, the amendment utilized an informal rulemaking procedure which was intended to assure that EPA solicits, considers, and responds to public comment. Greater accuracy in the HRS will insure that highest priority attention is focused on the sites genuinely posing the greatest danger.[91]

Concern was also voiced regarding the special study wastes provisions. Under the current HRS some high volume, low toxicity waste sites posing low risk may be listed on the NPL in preference to other, potentially more serious sites. The *Eagle-Picher* cases[92] illustrated this problem and several special study waste provisions were proposed in an attempt to correct the problem. The Senate bill provided for special study waste sites to be listed but only after the Administrator made the required specific findings based on facility-specific data as outlined in the bill.

House Action
The House Commerce Committee explained that the HRS review provision will cause EPA to incorporate knowledge gained over the past several years. The Commerce Committee noted that a number of possible biases have been documented, such as the permeability of Louisiana clay which was previously thought to be an impermeable barrier. In addition, the Committee thought that contamination of land areas vulnerable to flooding should be given special consideration.[93]

(iii) Petitions for Hazard Assessments[94]

The Amendment
Section 105(b) of SARA inserts a new subsection (d) in CERCLA §105 which allows a person who may be affected by a release or threatened release of a hazardous substance, pollutant, or contaminant to petition EPA to perform a preliminary assessment of the hazards to the public health or the environment.[95] If this has not previously been done, EPA is given 12 months to do so or provide an explanation of why an assessment is not appropriate. If the threat is confirmed, EPA shall evaluate the release or threatened release under the HRS to determine whether the site should be placed on the NPL. SARA §111(d)(2) inserts CERCLA §111(c)(7)[96] which authorizes use of the Superfund to pay for the hazard assessments.

CERCLA Prior to Amendment
No provision.

Administration Proposal
None.

Senate and House Action
The Senate bill did not include such a provision. The House provision was adopted by the Conference Committee using identical language.

(iv) Amendment of NPL[97]

The Amendments
SARA §105(a)(3) amends CERCLA §105(a)(8)(B) to eliminate the requirement that there be at least 400 sites on the NPL and to provide that states may designate their highest priority facility only once.[98] SARA §105(b) adds a new CERCLA §105(e) which mandates that a new release from a site listed as a "Site Cleaned Up to Date" will immediately restore that site to the NPL without consideration under the HRS.[99]

SARA §118(p) removes the Silver Creek site, a site in Utah located on tailings from noncoal mining operations, from the NPL.[100]

CERCLA Prior to Amendment
CERCLA §105(8)(B) requires that at least 400 sites be listed on the NPL. States are permitted to designate at least one site for inclusion in the top 100 sites on the NPL.

Administration Proposal
This amendment originated in §105 of the Administration's bill. The deletion of the requirement of 400 sites was intended to allow EPA to concentrate on those posing the greatest danger. Allowing only one highest priority designation per state represents congressional ratification of current EPA policy.[101]

Senate and House Action
The Senate Environment Committee stated that removal of the requirement for a minimum number of listed sites would en-

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TION 301(A)(1) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (CERCLA OR SUPERFUND); A REPORT TO CONGRESS ON THE ENVIRONMENTAL PROTECTION AGENCY'S EXPERIENCE WITH IMPLEMENTING SUPERFUND 1-11 (1984) [hereinafter SECTION 301(a)(1) REPORT].

88. Senate Environment Committee Report at 40-41.

89. *Id.*; SECTION 301(a)(1) REPORT, *supra* note 87.

90. 131 CONG. REC. S11680-81 (daily ed. Sept. 18, 1985).

91. Senate Environment Committee Report at 40-41.

92. Eagle-Picher Industries v. United States Environmental Protection Agency, 759 F.2d 922, 15 ELR 20460 (D.C. Cir. 1985) (listing on NPL of various special study waste sites upheld even though RCRA regulation of these wastes was suspended pending completion of studies); Eagle-Picher Industries v. United States Environmental Protection Agency, 759 F.2d 905, 15 ELR 20467 (D.C. Cir. 1985) (challenge to use of HRS in listing special study waste sites rejected).

93. House Commerce Committee Report at 72.

94. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.
House Commerce Committee Report at 72.
House Bill, H.R. 2817, §105(b).
Conference Committee Report at 201.
SARA §§105(b) and 111(d)(2).

95. SARA §105(b), CERCLA §105(d), 42 U.S.C. §9605(d), ELR STAT. 44022.

96. SARA §111(d)(2), CERCLA §111(c)(7), 42 U.S.C. §9611(c)(7), ELR STAT. 44035.

97. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, §105.
Senate Environment Committee Report at 41.
Senate Bill, S. 51, §128.
House Commerce Committee Report at 72-73.
House Public Works Committee Report at 15.
House Bill, H.R. 2817, §105(d).
Conference Committee Report at 201.
SARA §§105(a) and 111(b).

98. SARA §105(a), CERCLA §105(a)(8)(B), 42 U.S.C. §9605(a)(8)(B), ELR STAT. 44021.

99. SARA §105(b), CERCLA §105(e), 42 U.S.C. §9605(e), ELR STAT. 44022.

100. SARA §118(p), ELR STAT. 44049, as a note after CERCLA §118.

101. EPA Section-by-Section Analysis, House Commerce Committee Report at 129.

courage selection of only those facilities which pose "the greatest danger to public health, welfare, or the environment."[102] The Committee proposed that if a state's highest priority facility is successfully cleaned up and deleted from the list, the state should not list another highest priority designation. Such process might circumvent the hazard ranking system under the NCP.[103] The House adopted the same provision as the Senate.

E. State Assurance of Adequate Hazardous Waste Treatment and Disposal Capacity[104]

The Amendment
Section 104(k) of SARA inserts in CERCLA §104(c) a new paragraph requiring states to provide assurances to EPA of the availability of adequate hazardous waste treatment and disposal capacity.[105] If, three years after enactment of SARA, a state cannot assure availability,[106] EPA is required to terminate Superfund remedial (but not removal) operations in that state. The state's capacity must meet four requirements. It must be adequate to handle all hazardous wastes reasonably expected to be generated in the state within the next 20 years and needing treatment or disposal; be either located inside the state or covered by an interstate agreement or regional arrangement; be acceptable to EPA; and be in compliance with RCRA. The reference to "hazardous wastes" in this siting requirement is intended to cover all hazardous wastes generated within the state,[107] and is not limited to Superfund wastes.

CERCLA Prior to Amendment
CERCLA §104(c)(3) requires that each state assure the availability of a RCRA-approved facility to handle any hazardous waste to be moved before remedial action may begin.

Administration Proposal
The Administration recommended a similar proposal, with a two-year deadline, which contained exceptions allowing continued use of Superfund for public health or environmental emergencies.

Senate and House Action
The Senate Environment Committee made this requirement effective after three rather than two years and inserted the requirement that the hazardous waste treatment and disposal capacity be adequate for the next 20 years. This provision was included in the Senate bill.

The House adopted a provision virtually identical to that in the Senate bill.

F. Cleanup Standards[108]

The Amendment
Section 121(a) of SARA inserts a lengthy new CERCLA §121 on cleanup standards.[109] Section 121(b) of SARA establishes the effective date for application of these standards to pending EPA decisions on cleanup of NPL sites.[110]

SARA §121(a): Cleanup Standards
The existing general provisions of CERCLA §104(c)(4) on cleanup are replaced by a cross-reference to the new detailed CERCLA §121 cleanup standards.[111] The basic provisions of §104(c)(4) are echoed in §121(a): remedial actions are to be in accordance with the NCP "to the extent practicable"[112] and provide for "cost effective"[113] responses. A third consideration in CERCLA §104(c)(4), having to do with "Fund balancing" (i.e., preventing disproportionate use of the Fund on one site), has been made a ground for waiver in CERCLA §121(d)(4)(G) but only for Fund-financed cleanups under CERCLA §104.

A new long-term perspective on remedies is introduced in CERCLA §121(a) by the statement that in evaluating the cost-effectiveness of proposed alternative remedial actions EPA "shall take into account the total short- and long-term costs of such ac-

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102. Senate Environment Committee Report at 41.

103. *Id.*

104. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, §108.
Senate Environment Committee Report at 21-24.
Senate Bill, S. 51, §118.
House Commerce Committee Report at 130-31.
House Bill, H.R. 2817, §104(f).
Conference Committee Report at 194.
Senate Debate on Conference Bill, 132 Cong. Rec. S14924-5 (daily ed. Oct. 3, 1986) (statement of Sen. Chafee).
SARA §104(k).

105. SARA §104(k), CERCLA §104(c)(9), ELR Stat. 44013.

106. Senator Chafee, during Senate debate on the Conference Committee Report, outlined the conditions of an acceptable state "assurance." "Merely having enacted . . . legislation, however, will not satisfy the requirement of this section. Each State must provide assurance that their legislative program can work and will be used." 132 Cong. Rec. S14925 (daily ed. Oct. 3, 1986).

107. Conference Committee Report at 194. Senator Chafee explained that wastes that will be recycled are excluded. 132 Cong. Rec. S14924 (daily ed. Oct. 3, 1986).

108. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, §§103, 104.
Senate Environment Committee Report at 19-20, 79, 87-88.
Senate Debate, 131 Cong. Rec. S11784-11786 (daily ed. Sept. 19, 1985) (statement of Sen. Durenberger).
Senate Bill, S. 51, §§106, 116.
House Commerce Committee Report at 66, 95-100, 148, 153, 208-12.
House Public Works Committee Report at 50-51.
House Debate, 131 Cong. Rec. H11072-73 (daily ed. Dec. 5, 1985) (statement of Rep. Eckart); 131 Cong. Rec. H11175 (daily ed. Dec. 5, 1985) (statement of Rep. Wirth).
House Bill, H.R. 2817, §§101, 121.
Conference Committee Report at 184-85, 243-51.
Senate Debate on Conference Committee Report, 132 Cong. Rec. S14910-14911 (daily ed. Oct. 3, 1986) (statement of Sen. Bentsen); 132 Cong. Rec. S14913-14917 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell); 132 Cong. Rec. S14925-14928 (daily ed. Oct. 3, 1986) (statement of Sen. Baucus).
House Debate on Conference Committee Report, 132 Cong. Rec. H9562-64 (daily ed. Oct. 8, 1986) (statement of Rep. Dingell); 132 Cong. Rec. H9565-67 (daily ed. Oct. 8, 1986) (statement of Rep. Lott); 132 Cong. Rec. H9573-74 (daily ed. Oct. 8, 1986) (statement of Rep. Snyder); 132 Cong. Rec. H9576, H9624 (daily ed. Oct. 8, 1986) (statement of Rep. Eckart); 132 Cong. Rec. H9581-83 (daily ed. Oct. 8, 1986) (statement of Rep. Synar); 132 Cong. Rec. H9587 (daily ed. Oct. 8, 1986) (statement of Rep. Florio); 132 Cong. Rec. H9588 (daily ed. Oct. 8, 1986) (statement of Rep. Wirth); 132 Cong. Rec. H9589 (daily ed. oct. 8, 1986) (statement of Rep. Eckart); 132 Cong. Rec. H9596-7 (daily ed. Oct. 8, 1986) (statement of Rep. Studds); 132 Cong. Rec. H9600 (daily ed. Oct. 8, 1986) (statement of Rep. Roe).
SARA §§101(d), 104(g), 121.

109. SARA §121(a), CERCLA §121, 42 U.S.C. §9621, ELR Stat. 44054.

110. SARA §121(b), CERCLA §121, 42 U.S.C. §9621, ELR Stat. 44054.

111. SARA §104(g), CERCLA §104(c)(4), 42 U.S.C. §9604(c)(4), ELR Stat. 44012.

112. "This language is intended to assure that alleged failures to comply with the NCP shall not be available as a defense to any liability asserted in an enforcement proceeding brought under sections 106 or 107." 132 Cong. Rec. S14914 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell).

113. The provision that actions under both §§104 and 106 must be cost-effective is a recognition of EPA's existing policy as embodied in the NCP. The term "cost effective" means that in determining the appropriate level of cleanup the President first determines the appropriate level of environmental and health protection to be achieved and then selects a cost-efficient means of achieving that goal. Only after the President determines, by the selection of applicable or relevant and appropriate requirements, that adequate protection of human health and the environment will be achieved, is it appropriate to consider cost effectiveness. Conference Committee Report at 24[illegible].

tions, including the costs of operation and maintenance for the entire period during which such activities will be required."[114] CERCLA §121(b)(1) states a preference for remedial actions in which treatment "permanently and significantly reduces the volume, toxicity, or mobility of the hazardous substances" and adds that "the offsite transport and disposal of hazardous substances . . . without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available."[115] EPA is required to make an assessment of permanent solutions and alternative treatment technologies that is weighed toward long-term considerations. EPA is also directed in CERCLA §121(b)(1) to "select a remedial action that is protective of human health and the environment, that is cost-effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies, to the maximum extent practicable."[116] EPA is required to publish an explanation if it does not select a remedial action "appropriate for a preference under this subsection," and this explanation will be subject to public comment as part of the RI/FS. EPA is free to experiment in requiring alternative remedial actions even if they have not been "achieved in practice at any other facility or site that has similar characteristics."[117]

Use of a remedial action that leaves any hazardous substances at a site is considered an interim remedy and triggers requirements in CERCLA §121(c) that EPA review the remedial action at such site every five years to assure that human health and the environment are being protected and take such further action under CERCLA §§104 or 106 as is appropriate.[118] Annual reports to Congress are required with respect to all such interim remedy sites.

CERCLA §121(d)(2)(A) elaborates the cleanup standard that must be achieved in onsite remedial actions. Generally, §121(d)(1) requires protection of human health and the environment. CERCLA §121(d)(2)(A) adds that, with respect to any hazardous substance that will remain onsite, any federal or more stringent[119] state cleanup standards that are "legally applicable" or "relevant and appropriate under the circumstances of the release" must be met.[120] This includes a wide range of federal environmental laws[121] as well as more stringent state environmental or facility siting laws[122] which must have been identified to EPA by the state in a timely manner. Where such goals or criteria are relevant and appropriate under the circumstances of the release or threatened release, the remedial action must attain the maximum contaminant level goals established under the SDWA[123] (some of which require zero levels) and water quality criteria established under §§303 or 304 of the FWPCA.[124]

CERCLA §121(d)(2)(C) deals with possible application of very restrictive state disposal standards where EPA has selected a remedial action for onsite disposal that does not permanently and significantly reduce the volume, toxicity, or mobility of the hazardous substance in question and application of the state standard would "effectively result in state-wide prohibition of land disposal of a hazardous substance."[125] The restrictive state disposal standard may be applied, however, where it is of general applicability and was adopted by formal means, was not adopted for the purpose of precluding onsite remedial actions or other land disposal for reasons unrelated to protection of human health and the environment, and the state arranges to pay for the incremental costs.[126]

CERCLA §121(d)(3) provides that in a remedial action hazar-

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114. SARA §121(a), CERCLA §121(a), 42 U.S.C. §9621(a), ELR Stat. 44054.

115. SARA §121(a), CERCLA §121(b)(1), 42 U.S.C. §9621(b)(1), ELR Stat. 44054. Responding to an Administration proposal, SARA §101(d) amends the definitions of "remedy" and "remedial action" in CERCLA §101(24) to explicitly include the offsite transport, storage, and secure disposition of hazardous substances. SARA §101(d), CERCLA §101(24), 42 U.S.C. §9601(24), ELR Stat. 44007. This was done to eliminate what EPA regarded as a statutory bias in CERCLA §101(24) against offsite disposal. This action must be read in conjunction with the new language in CERCLA §121(b) making "offsite transport and disposal of hazardous substances" without treatment which permanently and significantly reduces the volume, toxicity, or mobility of the hazardous substances "the least favored alternative remedial action where practicable treatment technologies are available."

116. SARA §121(a), CERCLA §121(b)(1), 42 U.S.C. §9621(b)(1), ELR Stat. 44054. Note that "[w]here remedies involving permanent solutions and alternative treatment technologies are not practicable, another remedy that is cost-effective and satisfies the other requirements of this section may be chosen." 132 Cong. Rec. S14910 (daily ed. Oct. 3, 1986) (statement of Sen. Bentsen). But note Senator Mitchell's statement that "where remedial actions can be broken into discrete units and treatment is feasible for some but not all units, permanent solutions must be chosen for those units where treatment is feasible." 132 Cong. Rec. S14914 (daily ed. Oct. 3, 1986).

Readers should be aware that the House conferees, during House debate on the Conference Report, vigorously rejected many of the statements made in the Senate's debate on the Conference Report. See, e.g., 132 Cong. Rec. H9562-74 (daily ed. Oct. 8, 1986) (statement of Rep. Dingell) and other statements referred to in Legislative History Sources, *supra* note 108.

117. SARA §121(a), CERCLA §121(b)(1), 42 U.S.C. §9621(b)(1), ELR Stat. 44054.

118. SARA §121(a), CERCLA §121(c), 42 U.S.C. §9621(c), ELR Stat. 44055. The Conference Report states that if "a permanent solution is not to be utilized, the President may not select remedial actions in which hazardous substances and pollutants and contaminants are securely contained in above-ground structures." [illegible] Conference Report at 250.

119. "Where two applicable or relevant and appropriate Federal or State standards, requirements, criteria or limitations pertain to the same situation or to the same hazardous substance, pollutant or contaminant, the more stringent one shall be used in selecting remedial action." 132 Cong. Rec. S14915 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell).

120. SARA §121(a), CERCLA §121(d)(2)(A), 42 U.S.C. §9621(d)(2)(A), ELR Stat. 44055. *See* Senator Mitchell and Senator Chafee's explanation during Senate debate on the Conference Report, 132 Cong. Rec. S14915 (daily ed. Oct. 3, 1986), as well as the comments of the House conferees, *supra* note 108.

121. CERCLA §121(d)(2)(A)(i) specifically refers to TSCA, the SDWA, the FWPCA, the Clean Air Act, the Marine Protection, Research, and Sanctuaries Act, and the Solid Waste Disposal Act. SARA §121(a), CERCLA §121(d)(2)(A)(i), 42 U.S.C. §9621(d)(2)(A)(i), ELR Stat. 44055.

122. "Any substantive objective criteria of State siting laws should be applied to Superfund cleanups in the context of the RI/FS and does not require a siting board review or other administrative process." 132 Cong. Rec. S14910 (daily ed. Oct. 3, 1986) (statement of Sen. Bentsen).

123. SDWA §1412(a)(2), 42 U.S.C. §§300g-l(a)(2), ELR. Stat. 41102. *See also* Senator Bentsen's statements on the floor, asserting that "[r]emedial actions involving water which is not used, nor projected to be used as a drinking water source, need not consider these goals." 132 Cong. Rec. S14910 (daily ed. Oct. 3, 1986).

124. FWPCA §§303, 304, 33 U.S.C. §§1313, 1314, ELR Stat. 42126. CERCLA §121(d)(2)(B) sets out a special rule for applying alternative concentration limits under the FWPCA to those otherwise applicable to hazardous substances leaking from a site. A process for establishing alternative concentration limits for hazardous substances in groundwater may not be used to estabish such standards if the process assumes a point of human contact beyond the boundary of the facility as projected in the RI/FS except where (i) there are known and projected points of entry of such groundwater into surface water; (ii) there will be no statistically significant increase of such hazardous substances downstream; and (iii) the remedial action includes enforceable measures that will preclude human exposure to the contaminated groundwater at any point between the facility boundary and all known and projected points of entry of such groundwater into surface water.

125. SARA §121(a), CERCLA §121(d)(2)(C), ELR Stat. 44055.

126. *Id.* There is a further provision in the special case of state disposal standards which are the subject of a state lawsuit against EPA initiated prior to May 1, 1986; such state standards shall govern remedial actions on the condition that the state assures the availability of an offsite facility for the remedial action.

dous substances can only be transferred to an off-site facility in compliance with RCRA or other applicable federal laws and all applicable state requirements. The hazardous substances may be transferred to a land disposal facility only if EPA determines that the unit to which the hazardous substance is transferred is not releasing any hazardous substance into groundwater or surface water or soil and all releases from other units at the facility involved are being controlled by corrective action approved by EPA under RCRA.

CERCLA §121(d)(4) authorizes waivers in the selection of remedial actions and sets out grounds for waiver of any legally applicable or relevant and appropriate standard, requirement, criteria, or limitation. The grounds for waiver apply where: (a) the remedial action selected is part of a total remedial action that will attain the desired standard when completed: (b) compliance with the requirement proposed would result in greater risk to human health and the environment than alternative options;[127] (c) compliance with the requirement proposed is technically impracticable from an engineering perspective;[128] (d) the remedial action selected will attain a standard that is equivalent to that proposed; (e) the state has not consistently applied its standard in similar circumstances to other remedial actions or the standard is not of general applicability;[129] and (f) in the case of a remedial action to be undertaken solely from the Fund under CERCLA §104,[130] the standard proposed will not provide a balance between the need for protection of public health and welfare and the environment at the facility under consideration and the availability of the Fund for response at other sites.

Under CERCLA §121(e) no federal, state, or local permits are required for remedial action conducted entirely onsite. A state may, however, enforce a consent decree imposing any federal or state standard, requirement, or criteria against a proposed on-site or off-site cleanup in the federal district court for the district where the facility is located. Consent decrees are required to contain stipulated penalties of $25,000 per day for violations of the decree.

CERCLA §121(f) requires EPA to promulgate regulations providing for substantial and meaningful state involvement in the initiation, development, and selection of Superfund remedial actions undertaken in that state. These regulations must include (a) state involvement in decisions as to whether there will be a preliminary assessment and site inspection: (b) state involvement in allocation of responsibility for scoring of a site under the HRS: (c) state concurrence in deleting sites from the NPL; (d) state participation in the long-term planning process for all remedial sites within the state; (e) a reasonable opportunity for the state to review and comment on an RI/FS and all data and technical documents leading to its issuance, the planned remedial action, the engineering design of cleanup, the technical data and reports relating to implementation of the remedy, and any proposed finding or decision to exercise the waiver authority in CERCLA §121(d)(4): (f) notice to the state of negotiations with PRPs regarding the scope of response actions, allowing the state an opportunity to be a party to such negotiations and any settlement: (g) notice to the state of, and an opportunity to comment on, the proposed plan for remedial action: and (h) prompt notice and explanation of each proposed action to the state in which the facility is located. States already have a veto over any use of Superfund for a remedial action because of the requirement in CERCLA §104 that the state involved contribute a percentage of the cost of cleanup.[131]

Where EPA proposes to select a remedial action under a CERCLA §106 consent decree that does not attain a legally applicable or relevant and appropriate standard, the agency must provide an opportunity to the state to concur or not concur. If the state concurs, the state may become a signatory to the consent decree. If the state does not concur and wishes to enforce a particular standard, the state may intervene as a matter of right in the action under CERCLA §106 before entry of the consent decree and seek to have the decree modified. If the court does not agree with the state's challenge, the state may pay the additional costs and have its standard applied. EPA may conclude settlement negotiations with a PRP without state concurrence, but the state must be given a later opportunity to concur or not concur prior to entry of a consent decree.

Similarly, EPA must give the affected state an opportunity to concur or to challenge the selection of remedial action at a federal facility. If the state does not concur, it may challenge the remedial action in a federal district court. State challenges to EPA's selection of remedy in both CERCLA §106 and federal facility cases turn on whether EPA's findings are supported by substantial evidence.[132] This is a different test than the arbitrary and capricious test applied to EPA decisions under CERCLA §113 "and is intended to subject the validity of the remedial action decision challenged by the State to more searching scrutiny by the court."[133] If the state's challenge is successful, the remedial action must conform to the state standard. If the state's challenge is not successful, the state may still, by paying the extra costs, obtain application of the standard it is seeking to the federal facility. CERCLA §121(f)(3)(C) provides that a federal agency may nevertheless take a remedial action "unrelated to or not inconsistent with" applicable cleanup standards.[134]

Although the conferees dropped specific statutory language in both the Senate and House bills about remedial action involving dioxins or dibenzofurans, the Conference Committee Report sets out specific standards to be applied in such cases, e.g., "a destruction and removal efficiency meeting or exceeding 99.9999 per cent."[135]

SARA §121(b): Effective Date

The special effective date rules set out in §121(b) of SARA provide that CERCLA §121 does not apply to remedial action for which the ROD was signed or the consent decree was lodged prior to the enactment of SARA. It does apply, however, to the maximum extent practicable to a remedial action for which the ROD was signed or the consent decree was lodged within the 30-day period following enactment, and applies without qualification to a remedial action for which the ROD is signed or the consent decree is lodged more than 30 days after enactment or where an earlier ROD or consent decree is reopened after enactment to modify or supplement the selection of the remedy.

CERCLA Prior to Amendment

CERCLA has had no detailed statutory cleanup standards. The two provisions on cleanups in §104 give only general guidance. CERCLA §104(a)(1) provides that EPA is authorized to under-

127. "For example, the national priorities list contains a few sites that are major harbors or bays. Dredging such sites in an effort to remove accumulations of hazardous wastes may, in some circumstances, pose greater risks to human health and the environment than employing alternative containment options." 132 Cong. Rec. S14916-7 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell).

128. "In such cases the periodic review provisions of the legislation should be employed to assure that as such technologies are developed, they are employed at the facility. Cost is not an appropriate consideration under this finding." 132 Cong. Rec. S14917 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell).

129. Conference Committee Report at 24[illegible]

130. [illegible] appear to exclude applicability of "Fund balancing" waiver [illegible] cleanups financed in whole or in part by PRPs.

131. CERCLA §104, 42 U.S.C. §9604, ELR Stat. 44011.

132. SARA §121(a), CERCLA §121(f)(2)(B), 42 U.S.C. §9621(f)(2)(B), ELR Stat. 44057; SARA §121(a), CERCLA §121(f)(3)(B), 42 U.S.C. §9621(f)(3)(B), ELR Stat. 44057.

133. 132 Cong. Rec. S14917 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell).

134. SARA §121(a), CERCLA §121(f)(3)(C), 42 U.S.C. §9621(f)(3)(C), ELR Stat. 44057.

135. Conference Committee Report at 250-51.

take response measures "consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment."[136] CERCLA §104(c)(4) directs EPA to select

> appropriate remedial actions determined to be necessary . . . which are to the extent practicable in accordance with the national contingency plan and which provide for that cost-effective response which provides a balance between the need for protection of public health and welfare and the environment at the facility under consideration and the availability of amounts from the Fund . . . to respond to other sites which present or may present a threat to public health or welfare or the environment . . . .[137]

EPA's current policy on these cleanup standards is set out in the NCP.[138]

Administration Proposal

The Administration proposal in §103 of H.R. 1342 would have provided only that in determining whether a remedy is cost-effective EPA may consider the permanence of the remedy.

The Administration also proposed that the definitions of "remedy" and "remedial action" in CERCLA §101(24) explicitly include the off-site transport, storage, or secure disposition of hazardous substances, pollutants, or contaminants. Previously, §101(24) conditioned use of off-site remedies on EPA affirmative determinations that they were more cost-effective, likely to create new capacity to handle hazardous wastes, or necessary to protect public health or the environment. In its analysis supporting the amendment that was published in the House Commerce Committee Report, EPA stated:

> Congress, as reflected in the 1984 amendments to the Resource Conservation and Recovery Act, and EPA have come to recognize the value of treatment and other alternative technologies.
>
> The primary effect of this amendment would be to reduce the proliferation of sites requiring monitoring in perpetuity (by consolidating wastes from many sites into one larger and closely monitored facility), by recognizing the value of permanent offsite remedies, such as treatment.[139]

Senate Action

The Senate substantially supplemented the Administration's proposals. The Senate Environment Committee recommended that in evaluating the cost-effectiveness of alternative remedial actions under CERCLA §104(c)(4) EPA "shall take into account the total short- and long-term costs of such actions, including the cost of operating and maintenance for the entire period during which such activities will be required."[140] In addition, the committee inserted a preference for treatment which "significantly reduces the volume, toxicity, or mobility of the hazardous substance" and specified that "the offsite transport and disposal of hazardous substances without such treatment should be the least favored alternative remedial action."[141] The Senate bill adopted these policy statements on cleanup standards.

House Action

The House Commerce Committee went further than the Senate in its cleanup standard recommendations. In evaluating remedial alternatives, the Committee stated that EPA "shall select that cost-effective remedial action which, to the maximum extent practicable, utilizes such permanent solutions and alternate treatment technologies or resource recovery technologies."[142] With respect to onsite remedial action EPA should be required to apply any applicable standard under laws which are relevant and appropriate under the circumstances. EPA was specifically directed to consider applicable water quality criteria under the FWPCA.

The House Public Works Committee proposed cleanup standards with even more emphasis on permanent cleanup. If a permanent solution was feasible and achievable, EPA, to the maximum extent practicable, must select such permanent solutions. Where EPA determined that a permanent solution was not feasible and achievable, it should require such containment and other interim measures necessary to protect human health and the environment until a permanent solution should become achievable. Wherever it was determined an interim solution should be selected because a permanent solution was not yet feasible and achievable, the site should be put on a special "interim" category on the NPL and reviewed at subsequent intervals of 10 to 15 years to determine whether a permanent solution was yet feasible and achievable. The compromise between the House Commerce Committee and the Public Works Committee provisions on cleanup standards was not explained during the floor debate on the House bill. Representative Eckart (D-Ohio) commented briefly that "under these provisions, the administrator is required to promulgate regulations providing for extensive state involvement in the initiation, development, and selection of all cleanup action."[143]

G. Superfund Program Schedules[144]

The Amendment

SARA §116 inserts a new CERCLA §116 which sets out schedul[es]

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136. CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1), ELR Stat. 44011.

137. CERCLA §104(c)(4), 42 U.S.C. §9604(c)(4), ELR Stat. 44012.

138. 40 C.F.R. part 300, ELR Reg. 47401. The policy on removals is set out in §§300.65(f) and (g). In subsection (f) it is stated that "removal actions shall, to the greatest extent practicable considering the exigencies of the circumstances, attain or exceed applicable or relevant and appropriate federal public health and environmental requirements. Other federal criteria, advisories and guidance and State standards also shall, as appropriate, be considered in formulating the removal action." ELR Reg. 47459. Subsection (g) specifies that removals to offsite facilities shall utilize only those offsite facilities that are "operating under appropriate Federal or State permits or authorization and other legal requirements." ELR Reg. 47459.

The NCP provisions on standards for remedial action appear at NCP §§300.68(f), (h), and (i), ELR Reg. 47462-63. Subsection (f) specifies that a range of alternatives for remedial action are to be developed. These include:

> (i) The alternative of treatment or disposal at offsite facilities;
>
> (ii) Alternatives that attain applicable or relevant and appropriate federal public health and environmental requirements;
>
> (iii) An alternative that exceeds applicable or relevant and appropriate federal public health and environmental requirements;
>
> (iv) An alternative that does not attain applicable or relevant federal public health and environmental requirements but which will reduce the likelihood of present or future threat from the hazardous substances and that provides significant protection to public health and welfare and the environment;
>
> (v) A no action alternative

Subsection (h) calls for an evaluation of innovative or advanced cleanup technology and a detailed cost estimate, including operating and maintenance cost.

Subsection (i) on selection of remedy calls for the selection "of a cost-effective remedial alternative that effectively mitigates and minimizes threats to and provides adequate protection of public health and welfare and the environment." With certain exceptions "this will require selection of a remedy that attains or exceeds applicable or relevant appropriate Federal public health and environmental requirements that have been identified for the specific site."

139. EPA Section-by-Section Analysis, House Commerce Committee Report at 129.

140. Senate Environment Committee Report at 87

141. *Id.*

142. House Commerce Committee Report at 209; see SARA §121(...), CERCLA §121(e), 42 U.S.C. §9621(e), ELR Stat. 44055

143. 131 Cong. Rec. H11073 (daily ed. Dec. 5, 1985).

144. **Legislative History Sources**
Administration Proposal. H.R. 1342 S. 494, no provision
Senate Bill, S. 51, no provision

for implementation of the Superfund program.[145] The new section requires that, to the maximum extent practicable, EPA shall have conducted preliminary assessments of all sites now on the CERCLIS[146] list by January 1, 1988. By the following January 1, site inspections shall have been done at all sites where the preliminary assessment indicated one was necessary.

Within four years of enactment of SARA, all sites on CERCLIS as of the date of enactment requiring evaluation for inclusion on the NPL shall have received such evaluation. Sites added to CERCLIS after enactment of SARA shall receive such an evaluation, if one is necessary, within four years. If the schedules set in §§116 (a) and (b) for preliminary assessments, site inspections, and evaluations are not met, EPA must publish an explanation.

EPA shall also commence RI/FS studies for sites on the NPL either at a rate of 275 within three years of enactment of SARA or, if this rate is not met, at a rate of not less than 175 within four years and an additional 300 within five years, reaching a total of 650 commenced within five years of SARA's enactment.

In addition to those sites at which remedial action has started prior to SARA's enactment, EPA must begin remedial action at NPL sites at a rate not less than 175 sites in the first three-year period and 200 additional sites during the subsequent two-year period. It is anticipated that between 1600 and 2000 sites will be added to the NPL by 1988.[147]

The only apparently mandatory provisions in new CERCLA §116 appear to be §§116(d) and (e). This could limit possible use of a citizen suit to enforce these schedules since citizen suits are limited to enforcing nondiscretionary duties.

CERCLA Prior to Amendment
CERCLA §103(c) requires all past and present owners of hazardous substance sites and all transporters of hazardous substances to notify EPA of the sites.[148] However, CERCLA does not provide for cleanup schedules. CERCLA §105(8)(B) requires that the NPL be revised "no less often than annually."[149]

Administration Proposal
The Administration opposed a schedule.[150]

Senate and House Action
The Senate bill contained no schedule. The House bill contained an accelerated, mandatory schedule for a wide range of cleanup actions.

H. Indian Tribes[151]

The Amendment
Section 207 of SARA amends several sections of CERCLA in order to equate for many purposes the treatment of Indian tribes to that of states under the Superfund program. "Indian Tribe" is defined in SARA §101(f), adding CERCLA §101(36), to mean any Indian tribe, band, nation, or other organized group or community, including any Alaska native village, which is recognized as eligible for the special programs and services by the United States because of their status as Indians.[152] SARA §207(b) amends §104(c)(3)of CERCLA to exempt Indian tribes from having to provide assurances regarding future maintenance and cost-sharing,[153] placing the burden of assuring the availability of a hazardous waste disposal facility upon the President. The President is authorized to enter into cooperative agreements with Indian tribes for CERCLA purposes.

Indian tribes are given authority to act as trustees for natural resource claims on their land rather than relying on federal trustees. SARA §207(e) adds a new CERCLA §126 which applies to treatment of Indian tribes generally.[154] The tribe shall be treated as a state and afforded substantially the same treatment with respect to CERCLA provisions: §103(a) (notification of releases);[155] §104(c)(2) (consultation on remedial actions);[156] §104(e) (access to information);[157] §104(i) (cooperation in establishing and maintaining national registries);[158] and §105 (roles and responsibilities under the NCP and submittal of priorities for remedial action).[159]

In any proposed permanent relocation remedial action, the affected tribal government must concur in the decision and the selection of the alternative land. The President must conduct a survey of the extent of hazardous waste sites on Indian lands and, by 1987, report to Congress on tribal participation in the Superfund program. The statute of limitations on any Indian claim under CERCLA is not deemed to have run before two years after the United States gives written notice to the tribe that it will not present a claim or commence an action or fails to present a claim within the CERCLA time limitations or expiration of the applicable period, whichever is later.

CERCLA Prior to Amendment
CERCLA is presently silent regarding the status of tribal governments and Indian lands although current policy recognizes them as independent sovereigns.

Administration Proposal
The Administration's proposed amendment applied only to tribes for whom land is held in trust. These tribes would have to provide cost-sharing, operation and maintenance, and adequate disposal assurances. The President would be authorized to enter into agreements with Indian tribes and reasonable response costs would be reimbursed from the Fund. Indian tribes would also be notified of releases that affect their lands.

Senate Action
The Senate Environment Committee proposed that the federal government pay all remedial action and maintenance costs on Indian lands from the Fund and be responsible for assuring the availability of a disposal facility. The Senate provision applied

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House Commerce Committee Report at 71, 161-62.
House Public Works Committee Report at 12-13, 158-59.
House Bill, H.R. 2817, §104(m).
Conference Committee Report at 228-229.
Senate Debate on Conference Report, 132 CONG. REC. S14896 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).
SARA §116.

145. SARA §116, CERCLA §116, ELR STAT. 44044.
146. EPA's Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) is a computerized inventory system EPA utilizes to keep track of the total number of hazardous waste sites that may be eligible for some sort of remedial action. The system included about 23,000 sites as of October 1986.
147. Conference Committee Report at 229.
148. CERCLA §103(c), 42 U.S.C. §9603(c), ELR STAT. 44010.
149. CERCLA §105(a)(8)(B), 42 U.S.C. §9605(a)(8)(B) ELR STAT. 44021.
150. 131 CONG. REC. S11940-41 (daily ed. Sept. 23, 1985) (letter of EPA Administrator Lee Thomas to Sen. Stafford).
151. Legislative History Sources
Administration Proposal, [illegible]
Senate Environment Committee Report at 4-6.
Senate Bill, S. 51, §101.
House Commerce Committee Report at 108-09.
House Public Works Committee Report at 84-85.
House Bill, H.R. 2817, §207.
Conference Committee Report at 186, 274-75.
SARA §§101(a), 101(f), and 207.
152. SARA §101(f), CERCLA §101(36), ELR STAT. 44003.
153. SARA §207(b), CERCLA §104(c)(3), ELR STAT. 44012.
154. SARA §207(e), CERCLA §126, ELR STAT. 44064.
155. CERCLA §103(a), 42 U.S.C. §9603(a), ELR STAT. [illegible]
156. CERCLA §104(c)(2), 42 U.S.C. §9604(c)(2), ELR STAT. [illegible]
157. CERCLA §104(e), 42 U.S.C. §9604(e), ELR STAT. [illegible]
158. CERCLA §104(i), 42 U.S.C. §9604(i), ELR STAT. [illegible]
159. CERCLA §105, 42 U.S.C. §9605, ELR STAT. [illegible]

to land or water held by an Indian tribe, by the United States in trust for Indians, by a member of a tribe but subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation (such as non-Indian land within a reservation). If it is determined that a tribe has the capability to respond, the tribe may enter into a contract or cooperative agreement and all expenses will be reimbursed from the Fund.[160] These Senate provisions were all adopted by the Conference Committee.

Two other proposed provisions were based on the tribe's equivalency to a state. First, Indian tribes may initiate actions to recover natural resource damages. Second, a tribe may submit sites for consideration for inclusion on the NPL but is not assured of having at least one included among the one hundred highest priority sites.[161]

House Action
The House bill contained the language adopted in SARA §207 on relocation, the survey of Indian lands, and the statute of limitations. Although the other House subsections were nearly identical to the Senate provisions, primary responsibility for dealing with Indian tribes was placed with the Secretary of the Interior as opposed to the President.

I. Acquisition of Property

(i) General Authority[162]

The Amendment
CERCLA §104(j), added by §104(*o*) of SARA, permits the Superfund to be used to acquire interests in real estate where a response action would constitute a taking of private property.[163] Land may be acquired where it is needed to carry out remedial actions, but only on condition that the state in which it lies take over the property once the remedial action is finished. The statutory language expressly excludes any private right of action to force such an acquisition and exempts government agencies from CERCLA liability on the basis of interests so acquired.

CERCLA Prior to Amendment
The language authorizing use of Superfund monies for "response costs incurred pursuant to section [104]" in CERCLA §111(a)(1) seems to refer to the direct costs of response actions rather than to any acquisition of property which might be incidental to the response. No specific provisions cover the taking of property.[164]

Administration Proposal
None.

Senate and House Action
The Senate bill included no comparable provision. The House amendments introduced new CERCLA §104(j) in essentially the same form in which it now appears.

(ii) Buyout of Love Canal[165]

The Amendment
Section 213 of SARA incorporates congressional findings on Love Canal and outlines a plan for government acquisition of the contaminated areas.[166] Sales by the present owners must be voluntary and the properties are to be bought at their fair market value prior to the emergency. Purchase is conditioned on the eventual assumption of title by New York, which will also contribute 10 percent of the maintenance costs of the site. Superfund money may be used for the cost of purchase, up to a limit of $2.5 million. EPA is also directed to carry out habitability and land-use studies to plan future uses for the affected area.

CERCLA Prior to Amendment
It was Love Canal which sparked passage of CERCLA in 1980: the problem arose prior to the legislation and is not entirely covered by the original law. Funds exist for the purchase of owner-occupied homes under a 1980 agreement between the Federal Emergency Management Agency and the state of New York. The revisions are designed to cover other properties in the area.

Administration Proposal
None.

Senate and House Action
The Senate provision is stated in general terms, though it appears under the heading "Love Canal Property Acquisition": where a hazardous substance emergency has been declared before May 22, 1980, and owner-occupied residences have been acquired as a result, purchase of remaining properties must be made a priority under the NCP. The more elaborate and specific House version is the one the Conference Committee adopted in the final bill.

J. Public Participation[167]

The Amendment
Section 117 of SARA inserts a new CERCLA §117 on public participation.[168] This assures public input on the selection of all plans for cleanup remedies, including those to be carried out by EPA under §104, those called for in an enforcement action under §106, those selected in voluntary settlements with PRPs, and those governing federal facilities. A notice and analysis of the proposed plan sufficient to "provide a reasonable explanation" and to set out "alternative proposals considered" must be published and the public must be given opportunity to comment and to hold a public meeting. Notice of the final plan adopted must also be published, together with a discussion of any significant changes

160. Senate Environment Committee Report at 5.

161. *Id.* at 6. *See also supra* text at I.D. (annotated section on amendment of the NPL).

162. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Bill, S. 51, no provision.
House Bill, H.R. 2817, §104(n).
Conference Committee Report at 197 (referring to §104(*o*) as §104(n): probably renumbered correctly in the text of the statute, with §104(m)(2) becoming §104(n) and the original §104(n) becoming §104(*o*)).
SARA §§104(*o*), 111(d)(2).

163. SARA §104(*o*), CERCLA §104(j), 42 U.S.C. §9604(j), ELR STAT. 44021. *See also* SARA §111(d)(2), CERCLA §111(e)(9), 42 U.S.C. §9611(e)(9), ELR STAT. 44035.

164. However, the Conference Report states: "This provision does not limit the President's existing authority to acquire real property . . . when necessary to carry out response actions authorized by section 104." Conference Committee Report at 15.

165. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Report at 38.
Senate Bill, S. 51, §124.
House Debate, 131 CONG. REC. H11114 (daily ed. Dec. 5, 1985), H11194 (daily ed. Dec. 5, 1985).
House Bill, H.R. 2817, §217.
Conference Committee Report at 280.
SARA §213.

166. SARA §213, CERCLA §312, 42 U.S.C. §9661, ELR STAT. 44077.

167. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, §109.
Senate Environment Committee Report at 37-38, 97.
Senate Bill, S. 51, §§123, 139.
House Commerce Committee Report at 90-91, 131, 201-02.
House Judiciary Committee Report at 26.
House Public Works Committee Report at 65.
House Debate, 131 CONG. REC. H11085 (daily ed. Dec. 5, 1985).
House Bill, H.R. 2817, §117.
Conference Committee Report at 230-32.
SARA §§111, 117.

168. SARA §117, CERCLA §117, 42 U.S.C. §9617, ELR STAT. 44045.

and the reasons for such changes as well as a response to significant comments, criticisms, and new data submitted by the public. If any subsequent remedial action, enforcement action, or settlement differs in significant respects from the final plan, an explanation must be published.

Subject to amounts provided for such purposes in appropriations acts, EPA may make grants to groups affected by a release from a facility on the NPL, up to $50,000 to a recipient, to enable the group to obtain technical assistance to evaluate the hazard presented by the release and the adequacy of the proposed remedy.[169] The recipient must contribute at least 20 percent of the cost of the technical assistance. Both the $50,000 ceiling and 20 percent contribution requirements may be waived. No more than one grant under CERCLA §117(e) may be made for a single facility, but the grant may be renewed to facilitate public participation at all stages of remedial action. Grants are not intended to underwrite legal actions but any information developed may be used in a legal action.[170]

CERCLA Prior to Amendment

CERCLA has no comparable provision. Current EPA policy calls for a strong community relations program in connection with Superfund cleanups.[171] Both removal and remedial actions must allow for a public comment period on the alternative courses of action considered. A settlement agreement must be available for public comment, including a settlement embodied in a consent decree.[172]

Administration Proposal

Section 109 of the Administration-drafted bill, H.R. 1342, proposed to confirm in a single sentence EPA's community involvement policy. EPA's analysis stated that because the requirements of this amendment are already incorporated in the agency's operating guidance, "the amendment itself would not impose any new responsibilities on the Federal government."[173]

Senate Action

The Senate Environment Committee bill expanded the EPA language to require public notice of, and opportunity for comment on, proposed settlements including an opportunity for a public meeting and an analysis of a proposed remedy or settlement "sufficient to provide a reasonable explanation of the proposal and alternative proposals considered."[174] This requirement would be applicable to cleanups implemented by EPA, the states, or by private parties. The Senate Committee went on to say "if the remedial action proceeds to two or more distinct phases and separate studies and alternatives are developed at different times for different phases, the process of notice and opportunity for comment shall apply to each phase."[175] The Senate Committee report also would require EPA to make available "data, studies, reports, and other information on the contents or conditions of the site and its likely effects on health and the environment and any preliminary information on possible remedial actions and feasibility studies."[176]

The Senate bill added a provision entitled, "Technical Assistance Grants,"[177] authorizing EPA to make technical assistance grants to community organizations or groups of individuals potentially affected by a release at any facility on the NPL of up to $75,000 per facility. These grants were to be used to obtain technical assistance in evaluating the hazard and the proposed remedy in response to EPA's requests for comment.

House Action

The House Commerce, the Judiciary, and the Public Works Committees all elaborated on the Senate public participation and technical assistance provisions. The House Commerce Committee proposed that EPA be required to publish an explanation of its reasons if it rejected significant aspects of the public comment upon adopting a final plan and that a similar explanation be filed if the final action was approved in a consent decree rejecting significant aspects of the public comment. The Commerce Committee's proposal for technical assistance required that the recipient group supply 20 percent of the expense of the technical assistance project unless EPA waived the requirement because of the group's financial need. The amount of the grant in the Commerce Committee provision was limited to $25,000 unless EPA allowed a larger sum.

The House Judiciary Committee inserted a statement on the floor concerning the new public participation provisions contained in §117 of the House bill.[178] The House Public Works Committee report proposed detailed provisions for EPA compliance with the new provision.

Section 117 of H.R. 2817, the bill passed by the House, contains the points agreed upon by the three House committees and an authorization for a technical assistance program to affected community groups enabling them to obtain technical assistance to review and assess a proposed remedial action or settlement.

K. Removal Actions[179]

The Amendment

Section 104(e) of SARA increases the flexibility of the CERCLA §104(c) money and time limitations on initial response actions, known as "removals."[180] At present, CERCLA §104(c)(1) requires that initial response actions be limited to $1 million in expenditures and 6 months' duration, unless certain special circumstances are found to exist. These special circumstances include emergencies, risks to health, welfare, or the environment, and lack of a timely alternative remedy. They also include fin-

169. SARA §111(b) adds CERCLA §111(a)(5) to authorize use of Superfund for §117(e) technical assistance grants. SARA §111(b), CERCLA §111(a)(5), 42 U.S.C. §9611(a)(5), ELR STAT. 44034. *See also* Conference Committee Report at 231.

170. Conference Committee Report at 231.

171. NCP, 40 C.F.R. §300.67, ELR REG. 47461.

172. NCP, 40 C.F.R. §300.67(g), ELR REG. 47461.

173. EPA Section-by-Section Analysis, House Commerce Committee Report at 131.

174. Senate Environment Committee Report at 97.

175. *Id.* at 38.

176. *Id.*

177. S. 51, 99th Cong., 1st Sess., §139, 131 CONG. REC. S359 (daily ed. Jan. 3, 1985).

178. 131 CONG. REC. H11085 (daily ed. Dec. 5, 1985).

179. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, §102.
Senate Environment Committee Report at 17-18, 85.
Senate Bill, S. 51, §113.
House Commerce Committee Report at 67-68, 128-29, 153.
House Bill, H.R. 2817, §104(e).
Conference Committee Report at 189-91.
Senate Debate on Conference Report, 132 CONG. REC. S14896 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).
SARA §§104(b), 104(e).

180. SARA §104(e), CERCLA §104(c)(1), 42 U.S.C. §9604(c)(1), ELR STAT. 44012. Senator Stafford, Chairman of the Senate Environment Committee, included this provision in the CERCLA amendments on which he made explanatory comments during Senate consideration of the Conference Report. 132 CONG. REC. S14896 (daily ed. Oct. 3, 1986). He pointed out that labeling a cleanup as a "removal" rather than a "remedial action" exempted it from the public participation provisions of §117 and from the cleanup standards provisions of §121. "The rationale for this selective application is that short term, relatively low-cost activities of great urgency should be free of delays attendant to the requirements of sections 117 and 121." *Id.* He cautioned, however, that "the new, more flexible authority is not to be abused to circumvent the more rigorous and explicit requirements regarding public participation and health standards . . . [W]hile the President is accorded greater flexibility in undertaking removals, the law's fundamental requirement that human health and the environment be protected must nonetheless be satisfied." *Id.*

dings that the state involved has complied with all preconditions relating to its participation in a Superfund cleanup.

SARA §104(c) raises the limits on removals from $1 million and 6 months to $2 million and 12 months, respectively. It also creates authority for continuing a removal action that is "otherwise appropriate and consistent with the long-term remedial action to be taken."[181]

In response to a House initiative, §104(b) of SARA also provides further guidance on removal actions in CERCLA §104(a)(2):

> (2) Removal Action.—Any removal action undertaken by the President under this subsection (or by any other person referred to in section 122) should, to the extent the President deems practicable, contribute to the effective performance of any long term remedial action with respect to the release or threatened release concerned.[182]

This provision is designed to help EPA "avoid wasteful, repetitive, short-term removal actions that do not contribute to the efficient, cost-effective performance of long-term remedial actions."[183]

CERCLA Prior to Amendment

CERCLA §104(c)(1) requires that removals be limited to $1 million in expenditures and six months' duration.

Administration Proposal

The Administration's bill proposed two changes in the limitations on removals in CERCLA §104(c)(1). These changes would have increased the maximum period for a removal action from six months to one year and created an additional ground for waiving the time and financial limitations on a removal action where EPA finds that "continued response action is otherwise appropriate and consistent with permanent remedy."[184] In its analysis, EPA explained[185] that the amendments would give it increased flexibility to quickly initiate appropriate removals.

Senate and House Action

The Senate Environment Committee adopted the Administration's provision which became §113 of the Senate bill.

The House Commerce Committee modified the Administration's proposal in two respects: it increased the $1 million limitation on expenditures to $2 million; and it provided that any removal action "shall contribute to the efficient performance of any long-term remedial action to the maximum extent practicable."[186] These changes were incorporated in §104(a) and (c) of the House bill.

L. Health-Related Authorities[187]

The Amendment

SARA incorporates a group of amendments to CERCLA which greatly expand the law's health-related authorities. The amendments include: (1) §110, which expands the program of the ATSDR in CERCLA §104(i);[188] (ii) §107(b), which amends the list of response costs for which PRPs are liable in CERCLA §107(a) to include health assessments or health effects studies carried out under §104(i);[189] (iii) §111(h), which adds a new §111(m) to CERCLA authorizing ATSDR to draw from the Superfund not less than $50 million in 1987 and 1988, not less than $55 million in 1989, and not less than $60 million in 1990 and 1991;[190] and §111(d)(1), which amends CERCLA §111(c)(4) concerning uses of the Fund for any costs incurred under §§104(i) and 111(m).[191]

The new language inserted in CERCLA §104(i) by SARA §110 incorporates significant new ATSDR authorities proposed in the Senate and House bills. Within six months ATSDR is to prepare a prioritized list of 100 hazardous substances most commonly found at NPL facilities. Within 24 months this list is to be revised and supplemented with another 100 substances. Thereafter, the list is to be annually revised and supplemented.[192]

ATSDR is also to prepare toxicological profiles of the hazardous substances it has listed. These profiles will summarize the toxicological information available on the substances and indicate whether information is available to determine levels of significant human exposure, whether information is available to determine exposure levels which present significant risk, and what toxicological testing is needed to identify the exposure level that may present a significant adverse health risk. Profiles of the first 100 substances listed are to be prepared at a rate of not less than 25 a year. Substances added to the list later are to be profiled within three years of listing.

Third, ATSDR is to consult with EPA, state, and local officials on health issues related to hazardous substances.

ATSDR is to evaluate each hazardous substance it lists to determine the availability of adequate information on the health effects of the substance. If the information is not available, ATSDR, in cooperation with the National Toxicology Program,[193] shall initiate the necessary research. Congress indicated that the costs of such research should be borne by the manufacturers and processors of the substances. Within a year, EPA is to prepare regulations on assessment of the costs of such research against chemical manufacturers and processors under TSCA, against pesticide registrants under FIFRA, and against PRPs under CERCLA.

ATSDR shall perform health assessments on all existing NPL sites by December 10, 1988 and within a year after NPL listing for sites added to the list later. A health assessment includes a preliminary assessment of the potential risk to human health posed by a site and will help determine whether there is a significant risk to human health. If there is, EPA must take the steps

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181. SARA §104(c), CERCLA §104(c)(1), 42 U.S.C. §9604(c)(1), ELR Stat. 44012.
182. SARA §104(b), CERCLA §104(a)(2), 42 U.S.C. §9604(a)(2), ELR Stat. 44011.
183. Conference Committee Report at 190.
184. H.R. 1342, 99th Cong., 1st Sess. §102, 131 Cong. Rec. H944 (daily ed. Feb. 28, 1985).
185. EPA Section-by-Section Analysis, House Commerce Committee Report at 128-29.
186. House Commerce Committee Report at [illegible]
187. Legislative History Sources:
 Administration Proposal: [illegible]
 Senate Environment Committee Report at [illegible]
 Senate Debate, [illegible]
 Senate bill, [illegible]
 House Commerce Committee Report [illegible]
 House Public Works Committee Report [illegible]
 House Debate [illegible]
 House Bill, H.R. 2817, §§111(n), 116.
 Conference Committee Report at 208-14, 217.
 Senate Debate on Conference Committee Report, 132 Cong. Rec. S14897 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).
 SARA §§107(b), 110, 111(h).
188. SARA §110, CERCLA §104(i), 42 U.S.C. §9604(i), ELR Stat. 44017.
189. SARA §107(b), CERCLA §107(a)(4)(D), 42 U.S.C. §9607(a)(4)(D), ELR Stat. 44024.
190. SARA §111(h), CERCLA §111(m), 42 U.S.C. §9611(m), ELR Stat. 44027.
191. SARA §111(d)(1), CERCLA §111(c)(4), 42 U.S.C. §9611(c)(4), ELR Stat. [illegible]
[illegible]
[illegible]

necessary to reduce such exposure and eliminate or substantially mitigate the risk. These steps may include use of any CERCLA authority including, but not limited to, provision of alternative water supplies and permanent or temporary relocation of exposed individuals.[194] Another issue to be decided is whether additional information on risk should be obtained.

ATSDR may also perform health assessments in response to petitions where individuals or physicians provide data on exposure to hazardous substances. If ATSDR does not initiate a health assessment in response to a petition, it must provide a written explanation.

Health assessments at NPL sites are to be completed promptly and, to the maximum extent practicable, before the completion of the RI/FS. States that carry out health assessments shall report the results to ATSDR and EPA. At the completion of each health assessment, ATSDR shall provide EPA and each affected state with the results of the assessment and recommendations for further action.

In light of the result of health assessments, ATSDR may initiate pilot studies to determine the desirability of full-scale epidemiological or other health studies and may conduct such studies if necessary. ATSDR may also consider establishing registries of exposed persons. If ATSDR finds a significant increased risk of adverse health effects, it is required to initiate a health surveillance program for the exposed population.

At two year intervals ATSDR is required to report to EPA and to Congress on its health assessments, epidemiological studies, hazardous substance lists, toxicological profiles, registries of exposed persons, and an overall assessment of its activities. All studies and research under SARA §110, other than health assessments, shall receive peer reviews. No health assessment, study, or petition under the section shall affect or delay authority to act under other provisions of law. ATSDR may carry out its activities directly or through cooperative agreements with the states. ATSDR shall have the same authorities with respect to federal facilities as it has with respect to any non-governmental entity.

CERCLA Prior to Amendment

CERCLA §104(i) establishes the ATSDR in the Public Health Service of the Department of Health and Human Services. The Act authorizes ATSDR to undertake a variety of activities concerning health effects of hazardous substances, including: (i) establishing a national registry of serious diseases and illnesses and a registry of persons exposed to toxic substances; (ii) establishing an inventory of data and studies on the health effects of toxic substances; (iii) establishing a list of areas closed to the public or restricted in use because of contamination; (iv) providing medical care and testing to persons exposed to toxic substances in public health emergencies; and (v) conducting periodic survey and screening programs to determine relationships between exposure to toxic substances and illness.

CERCLA §111(c)(4) authorizes use of Superfund for the costs of any of the studies, registries, and services authorized in §104(i). ATSDR was not activated for some time.[195]

Administration Proposal

The Administration proposal was designed to clarify that the primary purposes of CERCLA's health-related authorities are to support response actions through health assessments and technical assistance relating to health effects of exposure to hazardous substances, to improve ATSDR's ability to make future [illegible] recommendations, and to expand scientific knowledge [illegible] substance effects on health. The Administration's amendment to CERCLA §104 would authorize: (i) provision of health consultations, assessments, and other technical assistance to determine health effects of hazardous substance releases upon request of EPA, state, or local officials; (ii) assistance and consultation for public health care providers in cases of emergencies; (iii) epidemiological studies; and (iv) exposure and risk assessment studies to be conducted at release sites to determine appropriate action for mitigating public health threats.

Senate Action

The Senate bill conferred considerably broader health-related authorities on ATSDR than did the Administration proposal. Most importantly, the Senate provisions created a mandate, financed from Superfund, for the ATSDR to conduct health assessments as to the health risk from hazardous substances at every NPL site. In addition, individuals were allowed to petition ATSDR for health assessments at any site.

On the Senate floor, Senator Kennedy (D-Mass.), referring to the Woburn, Massachusetts, litigation against W.R. Grace Co.,[196] proposed to amend the new CERCLA §111(m) on ATSDR funding by striking the annual limit of $50 million on appropriations to ATSDR and increasing it to $100 million. Senator Stafford (D-Vt.) proposed that the numerical limit be striken altogether. Senator Kennedy agreed to modify his proposal, and it was adopted as modified.[197]

House Action

The House bill proposed a new CERCLA §116 to deal with health-related authorities. It was as extensive as the Senate bill and gave ATSDR the same powers to carry out health assessments, research on health effects, toxicological profiles, and lists of hazardous substances.

Under the House bill, the costs of performing a health assessment could be recovered as a cost of response under CERCLA §107 if the assessment disclosed that a population had been exposed to a release of a hazardous substance. Where the health assessment indicted a potential or observed significant risk to human health, the House bill directed ATSDR to establish a registry of persons exposed to the hazardous substances in question if ATSDR determined that this would be useful. In addition, the House bill required that, if the health assessment showed a significant risk to human health, EPA must take whatever steps may be necessary to abate that risk. These steps might include providing alternate household water supplies or relocating the population.[198] In cases of public health emergencies believed to have been caused by exposure to hazardous substances, the House bill required ATSDR to arrange[199] for medical care and testing of exposed individuals and to offer assistance to local and state health authorities.

The House bill required all studies and research performed other than health assessments to receive peer review. The House bill made clear that the Administrator of ATSDR has the same authority with respect to federal facilities as with respect to any non-governmental entity.

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194. [illegible]

195. [illegible]

196. Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 16 ELR 20577 (D. Mass. 1986). A summary of the complaint from this case appears at ELR Pend. Lit. 65906.

197. 131 Cong. Rec. S11834 (daily ed. Sept. 25, 1985).

198. See supra note 193 and accompanying text.

199. [illegible]

M. Research, Development, and Training[200]

The Amendments
SARA establishes a series of research, training, and demonstration programs for cleanup technology. Most of this is accomplished in SARA §209, which adds new §311 to CERCLA.[201] Two specific research centers and a spill control program are established by SARA §§118(*l*), (n), and (o).[202] Funding and related provisions are found in §§105(a)(5) and 111.[203]

New §311 creates four new programs. First, research and training programs dealing with the handling of hazardous substances and their effects on human health under new §311(a) are to be carried out by the Department of Health and Human Services (HHS) with EPA's assistance. Research is to be conducted on the health effects of hazardous substances, the detection of pollutants, and techniques for cleanup and treatment.[204] The NCP is to include standards for testing the efficacy of treatment methods.[205] The program mandates two types of training. Applied education in the handling of toxic substances, management of facilities, and health hazards is to be provided to persons with related responsibilities, especially state and local environmental agency personnel. In addition, the Fund is authorized to support graduate study in public health and other relevant fields, including the geosciences generally.

Institutions of higher education will be the principal contractors for §311(a) programs. They may then subcontract with other parties, including private-sector firms. Funds are allocated by new CERCLA §111(n)(2), beginning with $3 million in fiscal year FY 1987 and scaling up to $35 million in FY 1991.

Secondly, new CERCLA §311(b) authorizes research and demonstration programs for the testing and evaluation of alternative or innovative technologies, since there is some doubt as to whether current treatment methods are capable of eliminating hazardous substances, as opposed to merely containing or relocating them. Up to $20 million per year may be made available for such projects, exclusive of basic research.[206] Grants, cooperative agreements, and contracts may be made by EPA or HHS with persons, public entities, and nonprofit private entities. EPA must initiate at least ten demonstration projects, which may take place at existing Superfund response sites, in each of FY 1987-1990. Under a technology transfer program, EPA will assemble and maintain a central library of publicly available information about these novel treatment methods, including the results of the demonstration projects.

The new section sets out the process of solicitation and application for demonstration projects in considerable detail. In particular, several funding restrictions are imposed on full-scale field demonstrations. Federal money is available only where private financing is not, but may in any case pay for no more than half of the cost of a demonstration; in addition, the law imposes fixed ceilings of $10 million per year and $3 million per project.

An independent research and demonstration program is to be set up as part of the Defense Environmental Restoration Program.[207]

The third program is incorporated in new CERCLA §311(c), which grants EPA general authority to make grants and contracts for research on health risks.

Fourth, under new CERCLA §311(d) EPA must set up at least five and preferably ten University Hazardous Substance Research Centers at institutions of higher learning for the study of long-term health hazards. The section establishes detailed selection criteria and funding restrictions for the centers. In addition, SARA §§118(*l*), (n), and (o) set up certain special research centers and programs.

To coordinate the agencies' activities, HHS is to set up an Advisory Council, including members from agencies, business, higher education, and the public.[208] With the assistance of this body, HHS will develop a comprehensive plan for carrying out research and training. A report on the plan must be made to Congress within nine months after enactment of the Superfund revisions. EPA must report on research activities generally to this council, as well as to Congress, when it makes its annual budget request.

CERCLA Prior to Amendment
CERCLA did not include provisions for long-term research and development, because it was passed as an emergency measure for what was then viewed as a relatively swift process of cleaning up hazardous substances. Only short-term, site-specific research associated with a §104 response was eligible for fund expenditure.[209]

Administration Proposal
None.

Senate Action
Amendments offered during Senate floor debate provided the outline of a research, training, and demonstration program. Under the Senate bill, EPA and HHS were to conduct research targeted at methods of handling and disposal as well as health effects, pollutant detection, and cleanup and treatment methods. Applied and graduate education were also funded. Research and demonstration programs in alternative or innovative treatment technologies were established, with at least ten sites to be designated within two years. While the Senate bill provided for grant and contract authority, an Advisory Committee, a joint implementation plan, technology transfer and technical assistance grants, the proposal left the detailed structure of the program relatively open.

House Action
The House elaborated on the Senate's program, and it was this form that was largely adopted in conference. Methods of hazardous waste handling and disposal were dropped as research purposes. University research and education programs were located within HHS, while general research, demonstration, and training programs were assigned to EPA. The definition of "alter-

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200. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Debate, 131 Cong. Rec. S11835-37, S11848-49, S11863-65 (daily ed. Sept. 20, 1985).
Senate Bill, S. 51, §§139, 151, 153, 158-59.
House Commerce Committee Report at 87-90.
House Public Works Committee Report at 37-47.
House Bill, H.R. 2817, §§111, 212.
Conference Committee Report at 218, 234-36, 276-78.
SARA §§105(a)(5), 111(d)(2) and (h), 118(*l*), (n), (o), and 209.
Senate Debate on Conference Committee Report, 132 Cong. Rec. S14912 (daily ed. Oct. 3, 1986).
House Debate on Conference Committee Report, 132 Cong. Rec. H9562, H9574, H9603-04, H9610 (daily ed. Oct. 8, 1986).

201. SARA §209, CERCLA §311, 42 U.S.C. §9660, ELR Stat. 44073.

202. SARA §118(*l*), (n), (o), ELR Stat. 44048, as notes after CERCLA §118.

203. SARA §105(a)(5), CERCLA §105(a)(10), 42 U.S.C. §9605(a)(10), ELR Stat. 44022; SARA §111, CERCLA §111, 42 U.S.C. §9611, ELR Stat. 44034.

204. The requirements of §311(a) are not subject to citizen suits. Conference Committee Report at 277.

205. SARA §§105(a)(5) and 111(d)(2), CERCLA §§105(a)(10) and 111(d)(2), ELR Stat. 44022, 44035.

206. SARA §209, CERCLA §311(b)(1), 42 U.S.C. §9661(b)(1), ELR Stat. [illegible]

207. SARA §211(a), adding 10 U.S.C. §2702. See *also infra* text at [illegible] (annotated section on federal facilities).

208. SARA §209, CERCLA §311(a)(5)-(6), 42 U.S.C. §9660(a)(5)-(6), ELR Stat. 44073.

209. CERCLA §§104(e) and [illegible], ELR Stat. 44012, [illegible]; CERCLA §111(c)(3)-(4), ELR Stat. 44035. See House Public Works Committee Report at 37-38.

native or innovative treatment technologies" incorporated the notion of a permanent reduction in toxicity. Demonstration sites for these technologies were to be selected within four years. The details of the process of solicitation and application, along with the various funding restrictions, were provided. Similarly, extensive criteria for selection and funding of the regional research centers were included. The technology transfer program was to make the reulting information available to the public. A detailed memership for the Advisory Council, omitted from the conference version, was set out.

N. Natural Resource Damages[210]

The Amendments

SARA makes a series of CERCLA amendments relating to natural resource damages. Section 104(d) inserts a new provision in CERCLA §104(b) calling upon the President to promptly notify federal and state natural resource trustees of potential damage resulting from releases currently under investigation and to coordinate assessments, investigations, and planning with such trustees.[211]

Section 107(d) inserts a new provision in CERCLA §107(f) requiring the designation of federal and state natural resource trustees.[212] This provision also states that any assessment of natural resource damages prepared in accordance with the natural resource damage regulations promulgated by the Interior Department under CERCLA §301(c)[213] shall have the force of a rebuttable presumption on behalf of the trustee in any proceeding under CERCLA or §311 of the FWPCA. The sums recovered by federal or state trustees are available to replace or restore the damaged natural resources. Recovery may be had for damage assessment costs, but there can be no double recovery for natural resource damages. The natural resource damage regulations are to be revised within six months of enactment of SARA.[214]

Section 111(c) of SARA amends CERCLA §111(b)[215] to provide that exhaustion of administrative and judicial remedies[216] against PRPs is a precondition to recovery of natural resource damage claims from Superfund for claims filed after December 1, 1985. Natural resource claim is defined so as to permit recovery of the costs of natural resource damage assessments from the Fund without regard to this precondition.[217] SARA §111(c)(2) repeals CERCLA §111(h), which dealt with assessment of damages for injury to natural resources.[218]

Section 111(e) amends CERCLA §111(e)(2) to provide that no more Superfund money may be used to pay claims for natural resource damages in any year in which the President determines that all of the Fund is needed for response to threats to public health from releases or threatened releases of hazardous substances.[219]

Section 112(d) inserts a new CERCLA §112(f) that states that Superfund shall make no double payment for the costs of assessment of short-term and long-term injury to natural resources or of restoration or replacement of natural resources.[220]

Section 113(b) inserts a new §113(g) in CERCLA establishing statutes of limitations.[221] For natural resource damages, claims must be brought within three years of discovery of the loss and its connection with the release in question or the promulgation of §301(c) regulations if that is later.[222] The effect of this provision is to reinstate all previous natural resource damage claims going back to December 11, 1980 since promulgation of the §301(c) regulations is not yet complete.[223] For releases from a NPL facility, a federal facility, or any other facility where a CERCLA remedial action is scheduled, a suit for natural resource damages must be brought within three years of completion of the remedial action. For actions filed after the enactment of SARA, the federal or state natural resource trustee must give 60 days advance notice of suit to the President and PRPs. Where the President is diligently proceeding with an RI/FS with respect to a site, the natural resource trustees cannot institute suit until the remedial action has been selected.

Section 122(a) inserts a new CERCLA §122 which deals with settlement of natural resources damage claims under CERCLA §122(j).[224] EPA is required to notify the federal natural resource

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210. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, §113.
Senate Environment Committee Report at 43, 109.
Senate Finance Committee Report at 5.
Senate Bill, S. 51, §134.
House Commerce Committee Report at 73, 78, 105, 169.
House Ways and Means Committee Report at 43, 48.
House Bill, H.R. 2817, §§107(d), 111(e), 122(j).
Conference Committee Report at 190-91, 204-05, 215, 216, 220-21, 221-25, 321.
SARA §§104(d), 107(d), 111(c), (e), 112(c), (d), 113(b), 122(a), 511-516.

211. SARA §104(d), CERCLA §104(b)(2), 42 U.S.C. §9604(b)(2), ELR STAT. 44012.

212. SARA §107(d), CERCLA §107(f)(2), 42 U.S.C. §9607(f)(2), ELR STAT. 44026.

213. Type B (individual assessment) rules were promulgated August 1, 1986. 51 Fed. Reg. 27674 (1986) (to be codified at 43 C.F.R. pt. 11). Type A (generic) rules were proposed July 7, 1986. 51 Fed. Reg 25903 (1986).

214. SARA §107(d), CERCLA §301(c), 42 U.S.C. §9651(c), ELR STAT. 44067. *See also* Conference Committee Report at 205: "The deadline established by these amendments differs from that currently imposed by the court in *New Jersey v. Ruckelshaus*, Civil Action No. 84-1668 (JWB) (D.D.C. N.J. 1984), solely for the purpose of allowing additional time, if necessary, for re-proposal of regulations required by Section 301(c) should those initially submitted by the court be inadequate."

215. SARA §111(c), CERCLA §111(b)(2)(A), 42 U.S.C. §9611(b)(2)(A), ELR STAT. 44035.

216. The Conference Committee Report states that "[w]here, with reasonable diligence, jurisdiction in the Federal courts cannot be obtained over a responsible party likely to be solvent at the time of judgment, a claimant has exhausted all administrative and judicial remedies." Conference Committee Report at 215.

217. SARA §111(c), CERCLA §111(b)(2)(B), 42 U.S.C. §9611(b)(2)(B), ELR STAT. 44035. The Conference Report makes an important clarification in its discussion of amendments to CERCLA §112(a) on claims against the Fund concerning the requirement that the claims be presented to the PRP 60 days before a lawsuit or claim against the Fund is allowed.

> Because of the absence of adequate guidance of the procedure for filing such claims, the failure of Federal or State natural resource trustees to comply with this requirement does not constitute a bar to the trustees from maintaining a claim against the Fund prior to December 11, 1983. The sixty-day presentation requirement has never applied to civil actions, nor is the selection of remedies authorized in section 112(a) irrevocable.

Conference Committee Report at 219.

218. SARA §111(c)(2), repealing CERCLA §111(h), ELR STAT. 44036.

219. SARA §111(e), CERCLA §111(e)(2), 42 U.S.C. §9611(e)(2), ELR STAT. 44036.

220. SARA §112(d), CERCLA §112(f), 42 U.S.C. §9612(f), ELR STAT. 44041. The Confrence Committee Report states, "These amendments are not intended to prohibit different claims or actions for different damages stemming from the same injury to the same natural resource. Nor are the amendments intended to affect the abilities of trustees to initiate or participate as co-claimants or co-plaintiffs where otherwise authorized to do so." Conference Committee Report at 221.

221. SARA §113(b), CERCLA §113(g), 42 U.S.C. §9613(g), ELR STAT. 44041. *See also infra* text at II.F. (annotated section on statutes of limitations).

222. SARA §112(c), CERCLA §112(d)(2), 42 U.S.C. §9612(d)(2), ELR STAT. 44040.

223. 51 Fed. Reg. 25903, *supra* note 213; *see also* Conference Committee Report at 223.

224. SARA §122(a), CERCLA §122(j), 42 U.S.C. §9622(j), ELR STAT. 44063.

trustee whenever settlement negotiations involve a release affecting federal natural resources encourage the trustee's participation in the negotiations. A settlement agreement under §122 may include a covenant not to sue for federal natural resource damages if the trustee agrees. The trustee may agree to such a covenant if the PRP involved agrees to undertake appropriate actions necessary to protect and restore the natural resource involved.

SARA Title V, Part I deletes natural resource damage and assessment claims as a Superfund expenditure purpose.[225]

CERCLA Prior to Amendment[226]

CERCLA §101(16) defines natural resources. CERCLA §107(a)(4)(c) makes natural resource damages a compensable claim against PRPs. CERCLA §107(f) allocates natural resource damage claims between the federal government and the states and rules out any claim where the damages occurred prior to CERCLA's enactment. CERCLA §111(a)(3)(b) and (f) deal with claims for natural resources damages against the Fund. CERCLA §301(c) provides for the issuance of regulations governing the assessment of natural resource damages. The appropriations language applicable to the 1980 Act sets a 15 percent limit on Fund borrowings to pay natural resource assessment and damage claims.

Administration Proposal

In §113 of H.R. 1342, the Administration proposed three groups of new provisions with respect to natural resources claims: federal and state natural resource trustees should be designated; natural resources damage assessments done in accordance with the CERCLA §301(c) regulations should have the force of a rebuttable presumption; and no further natural resource damage claims should be brought against the Fund under CERCLA §111.

Senate Action

The Senate Environment Committee modified the Administration's proposal and added a deadline for promulgation of the damage assessment regulations referred to in CERCLA §301(c). The Senate Environment Committee bill provided that no money in the Fund may be used to pay for natural resource damages in any fiscal year in which EPA determines that all of the Fund is needed for responses to threats to public health. The Senate Environment Committee's recommendations were incorporated in the Senate bill. The Senate Finance Committee recommended no change in the existing 15 percent limitation on Fund borrowing to pay natural resource damage and assessment claims.

House Action

The House Commerce Committee endorsed the proposal to clarify the role of federal and state trustees for natural resource claims. Like the Administration, the House committee recommended that the Fund not be available for payment of natural resource damage claims. The House provisions on natural resources, appearing at §§107(d), 111(e), and 122(j) of H.R. 2817, nevertheless continued some availability of the Fund for natural resource damage claims. Section 111(e) would permit use of the Fund to pay natural resource damages where all administrative and judicial remedies against PRPs under CERCLA §107 have been exhausted and where the damage assessment has been carried out in accordance with Department of the Interior regulations. Section 111(e) also permitted the payment from the Fund of 50 percent of natural resource claims pending as of December 1, 1985. Section 122(j) established procedures for the settlement of natural resource damage claims. The House Ways and Means Committee, however, recommended that no further Superfund expenditures for natural resource damage or assessment claims be made.[227]

O. Federal Facilities[228]

The Amendments

SARA initiates a detailed program for cleanup of federal facilities. The bulk of it is included in SARA §120, adding new §120 to CERCLA, and in SARA §211, establishing the Defense Environmental Restoration Program.[229] Ancillary provisions are found in SARA §111(f), which amends CERCLA §111(e)(3) to permit reimbursement for certain alternative water supplies, and in SARA §107(e), which adds a cross-reference.[230]

The substance of the federal facilities provisions originated in the Senate Environment Committee and on the floor of the Senate. With the Department of Defense (DOD) program added by Senator Wilson's (R-Cal.) amendment in floor debate,[231] the Committee's language passed the Senate and was adopted in much the same form by the House, with differences in scheduling details. The version which emerged from conference combines features of both bills.

The new language makes it clear that federal sites must comply with the same CERCLA rules as private sites, except for the provisions concerning financial responsibility and contracts with state governments. In particular, federal facilities are subject to EPA enforcement actions, the new public participation requirements, and citizen suits.[232] The bill also establishes a detailed timetable for cleanups.[233] EPA is to undertake a preliminary assessment or inspection of any site where a facility is required to submit information under RCRA within 18 months after

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225. SARA, Pub.L. No. 99-499, §§511-516, 100 Stat. 1613. *See also* Conference Committee Report at 321.

226. For discussion of CERCLA's natural resource damage provisions prior to SARA, see, e.g., Breen, *CERCLA's Natural Resource Damage Provisions: What Do We Know So Far?*, 14 ELR 10304 (Aug. 1984); Breen, *Natural Resource Recovery by Federal Agencies: A Roadmap to Avoid Losing Causes of Action*, 13 ELR 10324 (Oct. 1983); Menefee, *Recovery for Natural Resource Damages* [illegible]

227. [illegible]

228. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, §212.
Senate Environment Committee Report at 54, 60-61.
Senate Debate, 131 CONG. REC. S11618 (daily ed. Sept. 17, 1985); 131 CONG. REC. S11831, S11836 (daily ed. Sept. 20, 1985); 131 CONG. REC. S12010-13, S12018-20, S12027 (daily ed. Sept. 24, 1985).
Senate Bill, S. 51, §§102, 140, 148-49, 162.
House Commerce Committee Report at 93-95.
House Public Works Committee Report at 47-50.
House Debate, 131 CONG. REC. H11111, H11122, H11143, H11151-57 (daily ed. Dec. 5, 1985).
House Bill, H.R. 2817, §§101(a)(3), 120, 122, 213.
Conference Committee Report at 216-17, 238-43, 278-79.
SARA §§107(e), 111(f), 120, 211.
Senate Debate on Conference Committee Report, 132 CONG. REC. S14902-03, S14918, S14928 (daily ed. Oct. 3, 1986).
House Debate on Conference Committee Report, 132 CONG. REC. H9563-64, H9581-82, H9588, H9601-03, H9610 (daily ed. Oct. 8, 1986).

229. SARA §120, CERCLA §120, 42 U.S.C. §9620, ELR STAT. 44051; SARA §211, 10 U.S.C. §§2701-2707, 2810. The existing §2701 is renumbered as §2721.

230. SARA §107(e), CERCLA §107(g), ELR STAT. 44026; SARA §111(f), CERCLA §111(e)(3), ELR STAT. 44026.

231. *See* 131 CONG. REC. S12018-20 (daily ed. Sept. 24, 1985).

232. SARA §120(a), CERCLA §120(a), ELR STAT. 44051. *See supra* text at I.J. for discussion of public participation requirements and *infra* at II.I. for discussion of the new citizen suit provision. *See also* Conference Committee Report at 240-41, 252; House Commerce Committee Report at 94-95. The Senate floor debate notes that the new provisions do not cover radioactive materials. 131 CONG. REC. S12027 (daily ed. Sept. 24, 1985) [illegible]

233. [illegible]

passage of SARA. Where indicated by this assessment, sites are to be evaluated for the NPL and included in the list within 30 months from the date of enactment if they meet NPL criteria. The agency to which the installation belongs must then agree to perform an RI/FS within six months (or a year after enactment, if the site is already on the NPL at that time). Once this is completed, the agency has 180 days to enter into an agreement with EPA for remedial action. "Substantial continuous physical onsite remedial action" according to the agreed-upon schedule is to commence within 15 months after the RI/FS.

As between EPA and the responsible agencies, ultimate control remains with EPA, but consultation with states and localities is required in selection of a remedy. A site-specific ROD might serve as a record of such a consultation. EPA is forbidden to delegate its final authority to the agencies affected, whose slowness to act was the original stimulus for the provision.[234] The law does, however, provide for some diffusion of authority. EPA may release an agency from liability if assured that another PRP will complete the remedial action within the allotted time, but this agreement must be entered in court as a consent decree. Since the interagency agreements on responses are enforceable documents, penalties can be assessed against federal agencies for failure to comply.[235]

Several provisions for publicizing information about cleanup of federal facilities reinforce the bill's attempt to prevent agency dilatoriness by means of rigorous oversight. Each agency is required to set up a public docket of government sites containing all information required by RCRA or CERCLA. This Federal Agency Hazardous Waste Compliance Docket directs interested persons to sources where more detailed information about any site may be obtained. Updates are to appear in the Federal Register every six months.[236]

Aside from the Docket, each agency will provide several annual reports. A compliance report to Congress will convey information on interagency agreements, costs and budgets, comments received through the public participation process, and the status of each facility on the docket (as well as other sites where no RI/FS may have been done). A second report will focus on funding: the agency's annual budget request must include not only a statement of the outstanding hazards and their consequences, but also a review of alternative agency funding for the costs of remedial action. In addition, information about effects on adjacent properties must be included with an agency's submission under RCRA.[237]

The revised CERCLA covers DOD sites, where the government is an owner/operator and hence a PRP. However, the President is permitted to exempt certain installations for national security reasons. This presidential power is narrowly constrained. Exemptions may be granted only for a year at a time, and Congress must be notified of the reasons for each case. Exemptions for lack of funding may not be granted unless the department has requested appropriations and Congress has denied the request, to prevent the Administration from manufacturing the need for an exemption by failing to ask for funds.[238]

Over and above the requirements of CERCLA, DOD must undertake a Defense Environmental Restoration Program to restore contaminated facilities, whether or not they are currently in use. The legislation sets aside a budget account to be used for cleanup purposes alone, so that environmental concerns need not compete with other defense purposes; these funds can be used for necessary construction work without going through the cumbersome process normally required to approve military construction projects. In addition, DOD must compile information on treatment and disposal of hazardous material and report to the Department of Health and Human Service, as described in the House bill.[239]

While government agencies will still generally be barred from drawing on Superfund money for cleanups, the new bill introduces one exception. If hazardous substances from a federal facility contaminate groundwater and thus affect other areas, and if at least one other PRP is involved, Superfund money can then be used to pay for alternative water supplies, including municipal expenses.[240]

SARA also requires that notice be given to purchasers of government lands where hazardous materials have been released or stored for a year or more. Such notice will warn buyers of the risks associated with potential uses of the land and establish their knowledge of the pollution in any later lawsuits. Descriptions of the types and amounts of hazardous substances and the times of their disposal must be included in any sales contract for government land and also in the deed. Moreover, the conveyance must include a warranty that the site is now safe and a covenant making the United States responsible for any subsequent remedial action that might be necessary, unless the buyer is itself partially responsible for the pollution. These notice provisions take effect six months after EPA's promulgation of regulations governing the manner of notice; the regulations are to be issued within 18 months of enactment.[241]

A limited grandfather clause exempts certain Department of Energy sites from compliance with the new legislation, on the grounds that a response plan is already under development there.[242]

CERCLA Prior to Amendment

Although federal facilities are not eligible to receive Superfund monies,[243] they are still subject to the requirements of CERCLA. However, cleanup efforts at these installations, most of them belonging to DOD, have progressed extremely slowly.[244]

Administration Proposal

The Administration's proposed revision granted agency heads limited authority to settle claims against federal facilities, but took no steps to ensure that cleanups would take place more quickly or that government would live up to the standards imposed on private parties.

Senate Action

The Senate produced the federal facilities scheme in basically its final form. The original details of scheduling were slightly different. Eighteen months were allowed for the preliminary assessment, but only 20 more months for inclusion on the NPL. An RI/FS was to be completed within 6 months after enactment or inclusion on the NPL, whichever is later. Six months were given to agree on a remedy, which must begin within 12 months after completion of a remedial design. Control was given to EPA, with

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234. SARA §120(a), CERCLA §120(g), 42 U.S.C. §9620(g), ELR STAT. 44053; *see also* Conference Committee Report at 242.

235. SARA §120(a), CERCLA §120(e)(2) and (6), 42 U.S.C. §9620(e)(2) and (6), ELR STAT. 44052, 44053.

236. SARA §120(a), CERCLA §120(c), 42 U.S.C. §9620(c), ELR STAT. 44052.

237. SARA §120(a), CERCLA §120(b), (e)(3), and (e)(5), 42 U.S.C. §9620(b), (e)(3), and (e)(5), ELR STAT. 44052.

238. SARA §120(a), CERCLA §120(i), 42 U.S.C. §9620(i), ELR STAT. 44054.

239. SARA §211, 10 U.S.C. §§2701-2707 and 2810.

240. SARA §111(f), CERCLA §111(e)(3), 42 U.S.C. §9611(e)(3), ELR STAT. 440[illegible].

241. SARA §120(a), CERCLA §120(h), 42 U.S.C. §9620(h), ELR STAT. 44053.

242. SARA §120(b), ELR STAT. 44054, as a note after CERCLA §120.

243. See CERCLA §111(e)(3), 42 U.S.C. §9611(e)(3), ELR STAT. 44036. The original legislation did allow use of the Fund to restore natural resources and for purposes of research, development and information-gathering. *See* CERCLA §111(c), ELR STAT. [illegible]

244. *See* 131 CONG. REC. S12012 (daily ed. Sept. 24, 1985) [illegible] of Sen. [illegible]; [illegible] (daily ed. Sept. [illegible], 1985) (statement of Sen. Kasten); H.[illegible] (daily ed. Dec. 5, 1985) (statement of Rep. [illegible]

provision for settlement of small claims by agency heads and the option of a consent decree with the agency; in addition, §115 of the Senate bill authorized delegation of control where there was a "memorandum of understanding" defining the respective responsibilities of EPA and the agency, similar to the one entered into with DOD in 1983.[245]

The Compliance Docket was set up by the Senate generally as described above, with three-month rather than six-month updates. The annual compliance report and the funding report with the annual budget request appear in the Senate version, although the additional report on adjacent property effects was not present.

The Senate bill made these requirements applicable to DOD along with other agencies, allowing presidential exemptions "in the paramount interest of the United States." The Defense Environmental Restoration Program was outlined in §162 of the bill, which made no change in the United States Code.

The provision making adjacent groundwater remedial action eligible for Fund financing was included in the Senate bill, but the provisions concerning sale of government property were not.

House Action

The House amendments generally followed the Senate version but provided for a faster cleanup schedule. EPA's preliminary assessment was to be made by January 31, 1987. Sites would then be placed on the NPL within 12 months, with an RI/FS to be initiated within 6 months after that or a year after the amendment. The agency then had 180 days to agree on a remedy, with substantial action beginning within 15 months after the RI/FS.

As in the Senate bill, EPA retained ultimate control over responses. The bill did provide, however, for local input. In the Senate bill state and local involvement was built into selection of a remedy. The House bill involved states somewhat differently: they could become "coordinator[s]" of federal cleanups within their territories, while state laws would govern cleanups at any site not on the NPL.[246] In neither case would a formal contract or cooperative agreement with the state be necessary. The House also included EPA's origin[illegible] settlement authority for small claims.

The Federal Agency Hazardous Waste Compliance Docket took essentially the same form in the House as in the Senate bill. While the House declined to add the second agency report which the Senate required with budget requests, merely instructing agencies to request adequate funding for cleanups, it did stipulate that the RCRA filing must report any effects on adjacent properties.

In the House bill "national security" became the explicit criterion for the presidential exemption power. The Defense Environmental Restoration Program was set up via a new chapter in Title 10 of the United States Code. In addition, the House bill commissioned DOD to carry out research and development on hazardous waste treatment and disposal and to transmit information to the Department of Health and Human Services on specialized hazardous substances not covered by other environmental protection acts.

The provisions on notice to buyers of government land and the special grandfather clause originated in the House bill.

II. ENFORCEMENT AND LEGAL ISSUES

A. Judicial Review[247]

The Amendments

Section 113(c) of SARA inserts a series of provisions in CERCLA on preenforcement review.[248] These are accompanied by the amendment in §106 of SARA to CERCLA §106(b)(2) on petitions and claims for reimbursement of response costs.[249]

Under new CERCLA §113(h), no court has jurisdiction to review challenges to response actions taken under CERCLA §104 or to orders issued under CERCLA §106(a). Exceptions are provided for government actions (or actions by other parties acting under the NCP) to recover response costs under CERCLA §107, to enforce a CERCLA §106(a) order or levy a penalty for its violation, or to compel a remedial action; reimbursement actions after compliance with a CERCLA §106(a) cleanup order; and citizen suits under new CERCLA §310. No review of a removal order may be had under this last provision where a remedial action is planned, but remedial actions carried out in several distinct stages are subject to citizen suit review at the end of each stage.[250]

The ban on judicial review does not apply where diversity jurisdiction exists or where state law, such as the common law of nuisance, provides grounds for challenging the adequacy of a remedy.[251] PRPs who resist an EPA order so as to force a court test of the specific remedy applied can remain immune to punitive damages if they do so in good faith.[252]

The purpose of these rather convoluted provisions is to ensure that cleanups will be accomplished without being delayed by litigation brought by PRPs before the cleanup is finished. Suits for cost recovery or reimbursement must be brought after the cleanup is complete; suits to enforce an EPA order or penalize its violation might have to be brought prior to cleanup, but this would occur only if a PRP refused to cooperate altogether, risking a penalty for noncompliance rather than following EPA's orders and seeking to recover the costs later. Actions to enforce EPA access, among others, may be brought prior to completion of

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245. This provision was dropped in the bill produced in conference.

246. The Senate version prevailed in the conference bill on this matter.

247. Legislative History Sources
Administration Proposal, H.R. 1342, S. 494, §207.
Senate Environment Committee Report at 57-59, 62.
Senate Debate, 131 Cong. Rec. S11854-58 (daily ed. Sept. 20, 1985).
Senate Bill, S. 51, §144(b)-(c).
House Commerce Committee Report at 80-83, 122, 138-40.
House Judiciary Committee Report at 21-25.
House Public Works Committee Report at 25-27.
House Bill, H.R. 2817, §113(c)-(d).
Conference Committee Report at 202-03, 221-25.
SARA §§113(c), 106(3).
Senate Debate on Conference Committee Report, 132 Cong. Rec. S14898-900, S14917-18, S14928-29 (daily ed. Oct. 3, 1986).
House Debate on Conference Committee Report, 132 Cong. Rec. H9582-83, H9587, H9600, H9624 (daily ed. Oct. 8, 1986).

248. SARA §113(c), CERCLA §113(h)-(*l*), 42 U.S.C. §9613(h)-(*l*), ELR Stat. 44042.

249. SARA §106(3), CERCLA §106(b)(2), 42 U.S.C. §9606(b)(2), ELR Stat. 44023.

250. *See infra* text accompanying notes 253-256.

251. The sole purpose of the diversity exception is to permit actions under state law to be heard in federal court when the parties are residents of different states. *See* 132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986) (statements of Sens. Thurmond and Simpson); 132 Cong. Rec. H9582 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman). The state law clause includes not only private actions under state common or statutory law, but also challenges to the adequacy of a remedy under new CERCLA §121(f) where the projected cleanup fails to satisfy state standards. *Id.* In the Senate debate, Sen. Stafford speaks at some length about the virtues of nuisance actions. According to the Conference Committee Report, SARA is intended to have no effect on the rights of persons to bring such actions. *See* 132 Cong. Rec. S14899-900 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford); Conference Committee Report at 224. *See generally* Comment, *Hazardous Waste and the Common Law: Will New Jersey Clear the Way for Victims to Recover?*, 15 ELR 10321 (Oct. 1985) (discussing current toxic tort cases); Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 ELR 10292 (Oct. 1986) (arguing that public nuisance actions may be useful for state environmental litigators).

252. The good faith defense has been read into the current statute by some courts. *See, e.g.*, Wagner Seed Co. v. Daggett, 800 F.2d 310, 316-17, 16 ELR 21001 (2d Cir. 1986); United States v. Reilly Tar & Chemical Corp., 606 F. Supp. 412, 418-21, 15 ELR 20348, 20351-52 (D. Minn. 1985). *But see* Aminoil, Inc. v. United States Environmental Protection Agency, 599 F. Supp. 69, 73-74, 14 ELR 20801, 20802 (C.D. Cal. 1984). *See generally* [illegible] [illegible] A BNA Special Report [illegible] 70-71 (1985). The new bill makes the defense explicit in CERCLA §106(b)(2).

the response, but in none of these may the selection of the response action itself be questioned.[253]

The matter of citizen suits and state law nuisance actions is more complex. The language of the statute says nothing to change the timing of state law actions; for citizen suits it seems to contemplate only suits brought after a given stage of cleanup is complete.[254] But the debates on the Conference Committee Report saw strenuous conflict over both topics. Senator Stafford (R-Vt.), supported in the House by Representatives Florio (D-N.J.) and Roe (D-N.J.), argued that it was essential to leave these two kinds of actions open to permit concerned citizens to challenge a response action before it gets under way, so as to prevent unlawful government action (e.g., merely capping a site where incineration is possible). In order to prevent delays but also preserve citizens' challenges, courts would then have to distinguish between "real" citizen suits, which could challenge the choice of remedy, and suits brought by PRPs themselves under the same provision, which could not challenge the choice of remedy until it had been carried out. Senator Stafford's suggested criterion was whether after-the-fact monetary relief would be adequate for the plaintiff.[255] Other senators, however, offered different conceptions of how new CERCLA §113(h) affected citizen suits and nuisance actions.[256] In the subsequent House debate, where many representatives complained about attempts to rewrite the legislative history of the bill by means of floor statements, Representative Glickman challenged Senator Stafford directly and claimed that the intent of the conferees was to permit citizen and state law suits only after a stage of cleanup was complete, except in the case of a state's challenge under new CERCLA §121(f).[257] The only clear conclusion from these contradictory statements is that the first court decisions interpreting the language on preenforcement review will be eagerly awaited.

Under new CERCLA §113(j) and (k), review is limited to the administrative record except where applicable principles of administrative law allow the consideration of supplemental materials. EPA's selection of a response is to be upheld unless arbitrary and capricious. If the court finds that the selection of the response action was arbitrary and capricious, it is to award EPA only those response costs or damages and other relief that are consistent with the NCP.[258] New CERCLA §113(*l*) requires notice to EPA and the Attorney General whenever any court action under CERCLA is brought by a plaintiff other than the United States.

EPA is directed under new CERCLA §113(k)(2) to issue regulations governing the development of the administrative record for both removal actions and remedial actions. These regulations shall include (i) notice to affected persons accompanied by a brief analysis of the recommended plan and of alternative plans considered; (ii) a reasonable opportunity to comment; (iii) an opportunity for a public meeting in the affected area; (iv) a response by EPA to each of the significant comments made; and (v) EPA's statement of the basis and purpose of the selected action. The development of an administrative record and the selection of a response action under CERCLA shall not include an adjudicatory hearing.

New CERCLA §106(b)(2), inserted by SARA §106(3), describes the procedures for reimbursement once a PRP complies with EPA's order. After cleanup is completed, the PRP has 60 days to petition EPA for reimbursement. If EPA denies this petition, the PRP may file a court action demanding payment within the next 30 days. The petitioner must show by a preponderance of the evidence either that it is not liable at all, or that EPA's order was unlawful (for example, because the cleanup method ordered was unreasonable). The arbitrary and capricious standard will be applied. A successful PRP may recover any reasonable expenses in excess of what a reasonable cleanup would have cost, along with legal costs and attorneys fees.

CERCLA Prior to Amendment

Although CERCLA contains no provision on the subject, EPA has consistently maintained that PRPs are not entitled to challenge its decisions on cleanup methods in court until the agency brings an action against them under CERCLA. The courts have consistently sustained EPA's position.[259]

Administration Proposal

The Administration proposed that no court should have jurisdiction to review a challenge to a response action selected under CERCLA §104, an order issued under CERCLA §104,[260] or an order issued under CERCLA §106(a), other than in actions to enforce a CERCLA §106(a) order, for reimbursement under CERCLA §106(b), or for response cost reimbursement under CERCLA §107. Judicial review was to be limited to the administrative record and objections raised with reasonable specificity during the period for public comment. The government proposed that its decisions be upheld unless found to be arbitrary and capricious or otherwise not in accordance with law.

The Administration also proposed that a person complying with a cleanup order with which it disagreed might subsequently petition for reimbursement from the Fund. If such petition were denied, the petitioners could obtain review in a district court and receive an award for all response costs found to exceed what was necessary or cost-effective.

Senate Action

The Senate Environment Committee generally followed the government's proposal. During floor debate Senator Stafford, together with Senator Thurmond, Chairman of the Judiciary Committee, offered a group of amendments including one af-

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253. *See* 132 CONG. REC. S14928-29 (daily ed. Oct. 3, 1986) (statements of Sens. Thurmond and Simpson).

254. Note the use of the past tense and the reference to actions "taken" or "secured" in new CERCLA §113(h)(4); *see also* Conference Committee Report at 224.

255. *See* 132 CONG. REC. S14898-900 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford); 132 CONG. REC. H9587, H9600 (daily ed. Oct. 8, 1986) (statements of Reps. Florio and Roe).

256. Senator Mitchell claimed that citizen suits could be brought only when a stage of cleanup was complete, but that nuisance actions could be brought at any time. Senator Thurmond, with the assent of Senator Simpson, suggested that in either case an action could be initiated only when a stage of the response defined by a ROD had been finished. See 132 CONG. REC. S149[illegible], S14929 (daily ed. Oct. 3, 1986).

257. 132 CONG. REC. H9582-83 (daily ed. Oct. 8, 1986).

258. It is not clear whether the court is to determine de novo which expenditures are consistent with the NCP or whether this matter would be remanded to EPA for a determination.

259. *See* Wagner Seed Co. v. Daggett, 800 F.2d 310, 16 ELR 21001; Barnes v. United States District Court, 16 ELR 21004 (9th Cir. Aug. 16, 1986); Wheaton Industries v. United States Environmental Protection Agency, 781 F.2d 354, 16 ELR 20260 (3d Cir. 1986); Lone Pine Steering Committee v. Environmental Protection Agency, 777 F.2d 882, 16 ELR 20009 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1970 (1986); J.V. Peters & Co. v. Administrator, 767 F.2d 263, 15 ELR 20646 (6th Cir. 1985); United States v. United Nuclear Corp., 610 F. Supp. 527, 15 ELR 20442 (D.N.M. 1985); Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 15 ELR 20977 (D. Kan. 1985); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 16 ELR 20763 (D.N.H. 1985); Solid-State Circuits, Inc. v. United States Environmental Protection Agency, No. 85-3101 CV-S-2 (W.D. Mo. Nov. 1, 1985); *But see*, Industrial Park Development Co. v. Environmental Protection Agency, 604 F. Supp. 1136, 15 ELR 20573 (E.D. Pa. 1985). *See generally* Comment, *Preenforcement Review Under CERCLA: Potentially Responsible Parties Seek an Early Day in Court*, 16 ELR 10093 (Apr. 1986).

260. The corresponding reference in the Senate and House bills is to §104(b) orders; it disappears entirely in the conference bill. Section 104(b) deals with EPA's authority to investigate releases and plan appropriate responses. Any orders that might be issued in pursuit of such investigations appear to be open to challenge under the final version of the statute, although selection of a response action may not be debated in such an action. See 132 CONG. REC. S14929 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond).

fecting the proposed provisions on preenforcement review. This amendment changed the proposed arbitrary and capricious standard of review to a test of whether the response action was justified under the criteria set forth in the NCP, including the requirement that the selected action be cost-effective.[261]

House Action
The House bill named additional types of litigation in which review of a response action would be permitted. These included citizen suits, PRP petitions for review of consent decrees, and actions by the government for injunctive relief. The House bill retained the arbitrary and capricious standard for court review.

B. Limitation of Liability

(i) State and Local Government[262]

The Amendment
Section 107(c) of SARA amends CERCLA §107(d) to ensure that state and local governments may respond to emergencies posed by the release or threatened release of hazardous substances by other persons without becoming liable as responsible parties.[263] Unless gross negligence or intentional misconduct is involved, the government is immune from liability. Under SARA §119, adding CERCLA §119(a)(4), government employees receive an additional limited exemption from liability, equivalent to that afforded response action contractors.[264] In addition, SARA §101(b) changes the definition of owner or operator in CERCLA §101(20)[265] to exempt state and local governments from liability for property they have acquired involuntarily (e.g., by bankruptcy, foreclosure, tax delinquency, or abandonment), unless they have themselves caused the release.[266] Instead, the former owner or operator will normally be the PRP. If governments have caused the release they will be "subject to the provisions of CERCLA, both procedurally and substantively, as any non-governmental entity, including liability under section 107 and contribution under section 113."[267]

CERCLA Prior to Amendment
CERCLA provides in §107(d) that no person will become lia for actions taken in accordance with the NCP, unless the acti is the result of gross negligence or intentional misconduct. E emergency responses not explicitly approved under the NCP m implicate the responding government, since excavation of haz dous materials renders the responder a generator of hazardc waste under RCRA.[268] Moreover, the definition of owner operator, which makes present owners responsible for any clean made necessary by former owners, leaves open the possibility tl governments, as receivers of last resort for the properties defunct PRPs, may be left liable for all their cleanup costs well.[269]

Administration Proposal
None.

Senate and House Action
The Senate Environment Committee proposed the limitation liability, which was passed by the Senate in basically its final fo without the explicit exclusion of state-caused pollution from t exemption. The House passed similar language rendering respon actions immune, but extended the exemption to federal as w as state and local agencies and to their employees and agen The House did not address the issue of involuntarily acquir property.

(ii) Innocent Landowners[270]

The Amendment
Section 101(f) of SARA introduces a definition of "contractu relationship" in CERCLA §101(35), which relieves landowne who acquired a property unaware of the presence of hazardo materials there from liability.[271]

This new definition works in tandem with CERCLA §107(b)(: which establishes a defense to liability when the cleanup is ma necessary by a party not contractually connected with the defe dant. Two factors are required if one is to take advantage of t defense. First, the party wishing to be excused must not have co ducted, permitted, or contributed to the release of the hazardo

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261. The Senate bill also included a provision expanding the time and the possible fora available for judicial review of EPA regulations. *See* S. 51, 99th Cong., 1st Sess., §143, 131 CONG. REC. S359 (daily ed. Jan. 3, 1985); *see also* Senate Environment Committee Report at 55-57. This provision was not included in SARA.

262. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Report at 42.
Senate Debate, 131 CONG. REC. S11619 (daily ed. Sept. 17, 1985).
Senate Bill, S. 51, §133.
House Commerce Committee Report at 73.
House Public Works Committee Report at 67-68.
House Debate 131 CONG. REC. H11170-71 (daily ed. Dec. 5, 1985).
House Bill, H.R. 2817, §107(c)(2).
Conference Committee Report at 185-86, 203-04.
SARA §101(b), 107(c).

263. SARA §107(c), CERCLA §107(d), 42 U.S.C.§9607(d), ELR STAT. 44025.

264. SARA §119, CERCLA §119(a)(4), 42 U.S.C. §9619(a)(4), ELR STAT. 44049. *See also infra* text at II.C. (annotated section on response action contractors).

265. SARA §101(b), CERCLA §101(20), 42 U.S.C. §9601(20), ELR STAT. 44006.

266. The same result appears to follow from the new, restricted definition of the contractual relationships by which landowner liability generally may accrue. *See* SARA §101(f), CERCLA §101(35)(A)(ii), 42 U.S.C. §9601(35)(A)(ii), ELR STAT. 44006.

267. Conference Committee Report at 186. This language seems explicitly to abrogate the states' Eleventh Amendment immunity [illegible]

held liable. *See* United States v. Union Gas Co., 792 F.2d 372, ELR 20818 (3d Cir. 1986). This issue is not directly addressed the legislative history sources for SARA §101(b) although n CERCLA §310(a)(1) does specify that citizen suits against states a authorized to the extent permitted by the Eleventh Amendment. S *infra* text at II.I. (annotated section on citizen suits).

268. William Hedeman, Director of EPA's Office of Emergency a Remedial Response, told the District of Columbia Bar Associati in March 1985, that "[a]lmost every atempt to clean up hazardc waste involves excavation, and each time a party excavates haz dous waste, that party becomes a generator of hazardous waste un RCRA and must fulfill the requirements of that statute." FR AND ATKESON, SUPERFUND LITIGATION AND CLEANUP, A BN SPECIAL REPORT 52 (1985).

269. *Cf.* Midlantic National Bank v. New Jersey Department of E vironmental Protection, 106 S. Ct. 755, 16 ELR 20278 (1986) (trus in bankruptcy could not abandon contaminated property); Uni States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 16 El 20557 (D. Md. 1986) (bank held liable for cleanup expenses on p perty acquired by foreclosure); United States v. Mirabile, 15 E 20994 (E.D. Pa. 1985) (settled Oct. 2, 1985) (secured creditors polluter may be liable if actively participated in management

270. Legislative History Source
Administration Proposal, H.R. 1342/S. 494, no provisio
Senate, S. 51, no provision.
House Debate [illegible]
House Bill, [illegible]
Conference Committee Report at [illegible]
SARA [illegible]

271. SARA [illegible]

substances; rather, it must have exercised due care with regard to the substances concerned, including precautions against the foreseeable acts of others. Second, it must have had neither actual nor constructive knowledge of the pollution at the time the property was acquired, after appropriate inquiry, taking into account any special expertise of the defendant and the like. Acquisition by involuntary means, such as escheat or bequest, will have the same effect as acquisition without knowledge.[272] **However, if the defendant actually comes to know of the toxic substances at any time while in control of the site, and then sells the property, it remains responsible for cleanup costs unless it discloses the facts to any subsequent transferee.**[273]

CERCLA Prior to Amendment

Both present and former owners and operators are potentially liable for hazardous substances disposed of at their facilities under CERCLA §§107(a)(1) and (2). But the extent to which ownership or control alone confers irrebuttable responsibility is unclear. The case law distinguishes present and past PRPs by holding the latter liable only if they owned or operated the facility at the time the pollution occurred, while current owners and operators are apparently liable for any past disposals.[274] Thus while congressional debate on the amendments reflects some confusion on the subject, it seems clear that current owners or operators may have to pay for cleanups regardless of whether they had any relationship to the responsible parties, or any knowledge of the presence of toxic substances on the property when they acquired it.[275]

At the same time, CERCLA §107(b)(3) specifically removes liability from defendants unrelated by contract to polluters, as long as the defendants themselves have taken due care with regard to the substance in question. This provision would seem sufficient to excuse parties who are truly innocent of past pollution on their properties. But the situation appears to have been uncertain enough to cloud the financial position of current owners and operators by raising the specter of large potential liabilities.

Administration Proposal

None.

Senate and House Action

There was no Senate action on this point. The landowner provision originated in a House amendment added in floor debate by Rep. Frank, emerging in H.R. 2817 as a separate paragraph, §107(m), rather than as an amendment to the definitions. This version was simpler than that adopted in conference, but had basically the same structure: causation and knowledge conditions were required to render innocent a party that had no "management oversight" at the time of the release and hence no ability to prevent it. According to this House provision, the defendant would have to prove nonresponsibility by a preponderance of the evidence.

(iii) Methane Gas Operator[276]

The Amendment

Section 124(a) of SARA adds a new §124 to CERCLA, exempting the operators of methane recovery systems at hazardous substance sites from CERCLA liability.[277] Specifically, they are not owners or operators under CERCLA §101(20); they are not deemed to have arranged for disposal or treatment of any hazardous substance under CERCLA §107; and they are not subject to CERCLA §106 liability. The exemption is not, however, absolute. Methane operators remain liable for any pollution "primarily caused" by their activities; and a PRP otherwise liable will not be immunized for that liability merely by virtue of being a methane operator as well.

Section 124(b) of SARA declares a methane operator not to be a waste handler for purposes of RCRA.[278] This exclusion is also qualified. If products of the methane operation have the characteristics described in RCRA §3001[279] (such as toxicity, persistence, flammability, and corrosiveness), or if EPA issues appropriate regulations under that subtitle, then the effluent may be treated as hazardous waste and regulated under RCRA and CERCLA.

CERCLA Prior to Amendment

CERCLA makes no provision for operations to recover methane from landfills. Thus, despite the usefulness of preventing the natural escape of the gas and of capturing it as an energy source, there was reason to fear that parties who might otherwise have been interested in such operations would be inhibited by the threat of CERCLA liability as an owner or operator at the site.

Administration Proposal

None.

Senate and House Action

Both bills sought to relieve methane operators of liability, but they did so in slightly different fashions. The Senate legislation changed the definition of owner/operator to exclude methane operators. The exemption applied only, however, to releases unrelated to the recovery operation; the methane operator remained liable if it was also the owner or operator of the landfill site itself, or if the release was caused by the methane recovery work. The House bill, on the other hand, left the definition of owner/operator unchanged, but introduced a special exemption in a new section, releasing methane recovery operators from liability under §§106 and 107 for any damages due to release from the gas operation or from response and remedial costs, including natural resources damages, under federal or state laws. The operator remained responsible, however, for negligence. Thus the House version actually introduced a fault standard for methane operators, while the Senate merely imposed a causation requirement. The conference followed the Senate on this point.

Both bills incorporated the RCRA exclusion found in the con-

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272. Insofar as this last provision immunizes government entities acquiring sites involuntarily, it overlaps the separate exemption for state and local governments found in SARA §101(b).

273. This innocent-party exemption is distinct from the de minimis provision for EPA settlements with innocent landowners that applies to parties who have contributed to pollution in amounts small enough to justify absolving them of response costs. *See* SARA §122, CERCLA §122(g), 42 U.S.C. §9622(g), ELR STAT. 44061; Senate Bill, S. 51, §131, amending CERCLA §106(e); House Bill, H.R. 2817, §122, adding CERCLA §122(g). *See generally infra* text at II.M. (annotated section on settlements). The House floor debate included arguments on both sides over whether the de minimis provision would suffice to exempt entirely innocent parties and thus make SARA §101(f) unnecessary. *See* 131 CONG. REC. H11157-61 (daily ed. Dec. 5, 1985).

274. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 15 ELR 20358 (2d Cir. 1985); United States v. Cauffman, 15 ELR 2016[illegible] (C.D. Cal. Oct. 23, 1984); United States v. [illegible] Co., 14 ELR 20698 (D.S.[illegible] June 15, 1984). *But see* U.S. v. Mirabile, 15 ELR 20992 (E.D. Pa. Sept. [illegible] 1985) [illegible] owners with no contractual relationship [illegible] may be exempt from liability under CERCLA §107(b)(3).

275. *See* 131 CONG. REC. H11158-59 (daily ed. Dec. 5, 1985) (statement of Reps. [illegible], Frank [illegible] and Moakley).

276. Legislative History Sources
Administration Proposal, H.R. 1342, S. 494, no provision
Senate Debate, 131 CONG. REC. S11778-79 (daily ed. Sept. 19, 1985)
Senate Bill, S. 51, §102
House Commerce Committee Report at 103.
House Public Works Committee Report at 69-71.
House Bill, H.R. 2817, §124.
Conference Committee Report at 256-57
SARA §124(a), (b).

277. SARA §124(a), CERCLA §124, 42 U.S.C. §9624, ELR STAT. 44[illegible]

278. SARA §124(b), ELR STAT. 44064, as a note to CERCLA §124.

279. 42 U.S.C. §6921, ELR STAT. 420[illegible].

ference bill. The House bill added the proviso that free liquid condensates from the methane operation should not be returned to the landfill, lest they spread further.

C. Response Action Contractors: Limitation of Liability and EPA Indemnification[280]

The Amendment

Section 119 of SARA inserts a new §119 in CERCLA which frees cleanup contractors (response action contractors) from liability under CERCLA and any other federal law and authorizes EPA to make available limited indemnities covering their cleanup work where insurance is not available on reasonable terms.[281] CERCLA §119(a)(2) removes this immunity where the conduct of the response action contractor is negligent, grossly negligent, or constitutes intentional misconduct. In addition, the response action contractor remains vulnerable to claims under state law.[282] State or local government employees providing response action services have the same limited exemption from federal liability as response action contractors.

EPA is authorized to indemnify response action contractors for liability and the expenses of litigation or settlement arising out of the contractor's negligence, but not gross negligence or intentional misconduct. The federal government will not as a general rule directly represent response action contractors in claims subject to indemnification, but it retains control of the defense and settlement of such claims.[283] Indemnification of response action contractors is available to contractors working for EPA, for any other federal agency, for any state or political subdivision, or for any PRP[284] carrying out any settlement agreement under CERCLA §122 or cleanup order under CERCLA §106. According to the Conference Committee Report, "[i]ndemnification may not be provided . . . for liability arising out of the application of a standard of strict liability."[285] The issue of protection of response action contractors from strict liability under state law, therefore, is a matter for the states to deal with as they choose.

Amounts paid by the government under an indemnification agreement are to be treated as response costs incurred pursuant to §104, for which the PRP is ultimately liable under CERCLA §107. To assure payment even if the Superfund is fully committed, the Conference Committee provision authorizes appropriations to the extent that the Fund is unavailable to pay.

EPA must first determine that the liability covered by the indemnification agreement could not be covered by insurance at fair and reasonable prices,[286] that such insurance is not generally available to the contractor's competitors, that the response action contractor has made diligent efforts to obtain insurance, and that the response action contractor will search for insurance for each additional site covered by the indemnification agreement if the agreement covers multiple sites. The indemnification agreement must have a deductible provision and a ceiling on the amount of indemnification available.[287] Indemnification only covers liability resulting from a release of a hazardous substance caused by response action activities.

In the case of indemnification agreements with contractors performing cleanups for a PRP, EPA must first set the amount the PRP can indemnify the contractor, taking into account the PRP's total net assets and resources. Thereafter EPA may provide an indemnity only if the PRP is incapable of providing an adequate indemnity. EPA must require that the response action contractor exhaust all claims for indemnification against PRPs and pay the amount of the deductible in its indemnification contract with EPA before EPA makes payment on its indemnity.

The work eligible for coverage by the indemnification includes any remedial action at a NPL site or any removal action at any site with respect to release of a hazardous substance and any evaluation, planning, engineering, surveying and mapping, design, construction, equipment or other ancillary services. The indemnification authority is applicable to work of response action contractors at federal facilities, claims in such cases being paid by the federal agencies involved.[288] The indemnification provision is not applicable to cleanup services of contractors working at RCRA facilities. It is available to persons working for the cleanup contractor if their hiring is approved by EPA as well as to persons conducting field demonstrations of threshold quantities of hazardous chemicals under §311(b).

The provision requires the Comptroller General to conduct a study evaluating the response action contractor indemnification program and to submit a report to Congress by September 30, 1989.

Response action contractors providing program management, architectural and engineering, surveying and mapping, and related services to federal agencies must be selected competitively in accordance with Title IX of the Federal Property Administrative Services Act of 1949[289] and are subject to the requirements of otherwise applicable federal selection procedures when their contracts are negotiated by federal agencies.

CERCLA Prior to Amendment

CERCLA §107(d) exempts any person from liability, other than in cases of gross negligence or intentional misconduct, for damages resulting from the rendering of care, assistance, or advice in accordance with the NCP or at the direction of the on scene coordinator during any incident creating a danger to public health, welfare, or the environment. CERCLA §107(e)(1) provides that no indemnification agreement will screen any person from liability who may be responsible for a release, but nothin

280. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Hearings at 116-35.
Senate Environment Committee Report at 42, 101.
Senate Debate, 131 CONG. REC. S11859-11860 (daily ed. Sept. 20, 1985) (statement of Sen. Bentsen).
Senate Bill, S. 51, §§104, 152.
House Commerce Committee Report at 92-93, 302.
House Judiciary Committee Report at 8-9, 26-29.
House Public Works Committee Report at 66-68.
House Debate, 131 CONG. REC. H11085 (daily ed. Dec. 5, 1985); 131 CONG. REC. H11170-71 (daily ed. Dec. 5, 1985) (statement of Rep. Andrews).
House Bill, H.R. 2817, §119.
Conference Committee Report at 236-38.
Senate Debate on Conference Committee Report, 132 CONG. REC. S14901 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).
SARA §119.

281. SARA §119. CERCLA §119, 42 U.S.C. §9619, ELR STAT. 44049.

282. "The retention of contractor liability under State law for either negligence or strict liability was deliberate. . . . [T]his Senator and others believed that changes in the State liability schemes would reduce contractors' incentives to exercise the greatest care and maintain quality . . . ." 132 CONG. REC. S14901 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).

283. Conference Committee Report at 238.

284. Under CERCLA §119(d) a PRP may not be considered a response action contractor with respect to a release for which it is potentially liable under §107. Nor may a PRP raise the third-party defense in §107(b)(3) where the release resulted from the acts or omissions of a response action contractor. SARA §119, CERCLA §119(d), 42 U.S.C. §9619(d), ELR STAT. [illegible]

285. Conference Committee Report at 237.

286. "A price is to be judged unfair and unreasonable only if the cos of insurance are markedly disproportionate to the risk being assume by the insurer . . . ." 132 CONG. REC. S14901 (daily ed. Oct. 3, 198 (statement of Sen. Stafford).

287. "The President shall not set limits and deductibles for indemnific tion . . . so that they are at such unreasonable levels so as to ma the indemnification agreement worthless." Conference Committ Report at 237.

288. 132 CONG. REC. S14902 (daily ed. Oct. 3, 1986) [illegible]

289. Ch. 288, [illegible] 40, 41, & 44 U.S.C.)

in CERCLA §107(e) bars obtaining insurance or an indemnification agreement to cover such liability. In short, under CERCLA §107 the government can recover against a PRP, but that PRP may employ insurance or indemnity agreements to provide reimbursement for such CERCLA §107 liability.

There is no current provision explicitly authorizing EPA indemnities. EPA has on occasion used Superfund to back agreements to indemnify entities involved in Superfund cleanups. It has entered into an indemnity agreement with Clean Sites, Inc. (CSI) covering multiple sites, granting CSI up to $5 million indemnity coverage for claims arising out of CSI cleanup-related work at each designated site.[290] EPA has also furnished indemnity agreements to various remedial action contractors working for the government as an interim measure to offset liability risks associated with Superfund cleanups.[291] These EPA indemnifications apply to EPA-approved remedial action contractors and their subcontractors working under the Superfund cleanup program for EPA, another federal agency, or a state. The contractor must make a reasonable attempt to obtain adequate insurance and/or PRP indemnification, and EPA must determine that liability insurance or PRP indemnification is not available, is not adequate to set off the contractor's liability risk, and/or is not reasonably priced.

EPA's policy has been to offer an EPA indemnification only as a supplement or substitute for insurance or a PRP indemnification, to include coverage limits and deductibles, and only to cover liability related to releases of hazardous substances resulting from the contractor's Superfund cleanup activities.

Administration Proposal
None.

Senate Action
The Senate Environment Committee initiated this proposal by directing that EPA, in its own cleanup operations or in arranging for state-supervised response actions funded by the Fund, provide cleanup contractors with an indemnification for damages arising out of cleanup to the extent that insurance was not available and such damages had not arisen from negligence, recklessness, or intentional misconduct. The Committee limited the indemnification to coverage of strict liability only. The costs of such indemnification were to be considered response costs, collectible against PRPs ultimately under a CERCLA §107 action.

House Action
The House bill authorized EPA to indemnify response action contractors against negligence in carrying out response actions (excluding, however, liability caused by gross negligence or intentional misconduct). This indemnification was to be available to a broader group of response action contractors including those doing work either for EPA, another federal agency, a state, or PRPs. EPA must determine that the liability to be covered could not be covered by available and reasonably priced insurance, that the response action contractor had diligently sought insurance for each site covered by the indemnity, and that appropriate deductibles and limits were utilized. If the response action contractor to be indemnified was hired by a PRP, that PRP must share in the indemnification.

The House Judiciary Committee raised legal questions about EPA's existing indemnifications without statutory authorization because of possible lack of authority to overcome the Anti-deficiency Act,[292] the possibility that they would not be available for PRP response contractors, and that the funding to pay indemnifications might be lacking if Superfund had been used up in the meantime.

D. Civil and Criminal Penalties[293]

The Amendment
SARA §109 increases both civil and criminal penalties for Superfund violations and introduces administrative procedures for assessment of fines and damages.[294] The result is considerable enforcement flexibility for EPA: enforcement may be by informal administrative process, formal administrative process, or judicial action (but not, according to the Conference Committee Report, by all three).

The maximum penalties available under the amendments include:

(1) ***Failure to notify*** of a release: fines set according to the uniform criminal code[295] and a prison term of up to three years (five years for subsequent violations), plus Class I or II civil penalties as discussed below.

(2) ***Falsification or destruction of records:*** same as (1).[296]

(3) ***Violation of EPA orders:*** a fine of $25,000 per day, possibly trebled as punitive damages.[297]

(4) ***False claims*** submitted for reimbursement from the Fund: uniform criminal code fines and three (or five) years in prison.[298]

(5) ***Failure to meet financial responsibility conditions:*** Class I or II civil penalties.[299]

(6) ***Denial of access or information*** for EPA investigations: $25,000 per day of violation.[300]

(7) ***Falsifying or refusing to provide emergency information:*** same as (1).[301]

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290. Clean Sites, Inc., is an independent hazardous waste cleanup firm organized by industry and environmental representatives. For a description of CSI and this indemnity, see Senate Environment Committee Hearings at 116-35.

291. *EPA Supports Discretionary Indemnification of Superfund Contractors*, Pesticide & Toxic Chemical News, Apr. 16, 1986, at [illegible]

292. [illegible] 34 Stat. 49 (current version at 31 U.S.C. §§1341, 42, 1349-51, [illegible]).

293. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, §§201, 211.
Senate Environment Committee Report at 8.
Senate Bill, S. 51, §§109, 155.
House Commerce Committee Report at 76-77, 122, 124, 135, 140.
House Public Works Committee Report at 18-20.
House Bill, H.R. 2817, §109.
Conference Committee Report at 207-08, 216, 219.
SARA §§104(m), 109, 111(d)(2), 122(a).

294. *See infra* notes 294-305 for specific sections amended. Related provisions are enacted in §§104(m) and 111(d)(2) of SARA. SARA §104(m), CERCLA §104(e)(5)(B), 42 U.S.C. §9604(e)(5)(B), ELR Stat. 44015; SARA §111(d)(2), CERCLA §111(e)(13), 42 U.S.C. §9611(e)(13), ELR Stat. 44036.

295. The revised language invokes the uniform criminal code provision of 18 U.S.C. §3623 "or 3571 if applicable." *See* Conference Committee Report at 207; SARA §109(a)(1), CERCLA §103(b), 42 U.S.C. §9603(b), ELR Stat. 44009; SARA §109(c), CERCLA §109(a)(1)(A), (b)(1), (c)(1), ELR Stat. 44031. Due to recodification of the Criminal Procedure section of the code, §3571 will contain the fine provisions effective November 1, 1986; until that date, they will be found in §3623. Some substantive changes are also made. The report of the House Committee on Public Works suggests that the House's goal was to set maximum fines of $25,000 for individuals and $500,000 for organizations. *See* House Public Works Committee Report at 19. These figures seem to assume that an individual's infraction would be a misdemeanor not resulting in the loss of human life, but that an organization might commit a felony or fatal misdemeanor. According to §3571, an individual guilty of a felony or fatal misdemeanor may be fined up to $250,000, while for an organization committing a nonfatal misdemeanor the maximum amount is $100,000.

296. SARA §109(a)(2), CERCLA §103(d)(2), 42 U.S.C. §9603(d)(2), ELR Stat. 44010; SARA §109(c), CERCLA §109(a)(1)(B), (b)(2), (c)(2), 42 U.S.C. §9609(a)(1)(B), (b)(2), (c)(2), ELR Stat. 44031.

297. SARA §109(b), CERCLA §106(b), 42 U.S.C. §9606(b), ELR Stat. 44023.

298. SARA §109(a)(3), CERCLA §112(b)(1), 42 U.S.C. §9612(b)(1), ELR Stat. 44038.

299. SARA §109(c), CERCLA §109(a)(1)(C), (b)(3), (c)(3), 42 U.S.C. §9609(a)(1)(C), (b)(3), (c)(3), ELR Stat. 44031.

300. SARA §104(m), CERCLA §104(e)(5)(B), 42 U.S.C. §9604(e)(5)(B), ELR Stat. 44015; SARA §122(a), CERCLA §122(a), 42 U.S.C. §9622(a), ELR Stat. 44063.

301. *See* SARA, Pub. L. No. 99-499, §325(c), 100 Stat. 1613, [illegible]

(8) *Violation of orders enforcing agreements or consent decrees* concerning §104(b) actions or those reached under new §§120 or 122: Class I or II civil penalties.[302]

The revised CERCLA §109 establishes two tiers of civil penalties.[303] Class I administrative penalties of $25,000 *per violation* are assessed by EPA under informal procedures. Class II penalties amounting to **$25,000** *per day* of continuing violation ($75,000 per day for subsequent violations) require a formal administrative hearing according to §554 of the Administrative Procedure Act (APA). An alternate judicial route may also be followed to impose a Class II penalty by bringing an action in district court.[304]

In addition, the new legislation provides that expert witnesses for civil or criminal actions may be procured by either competitive or noncompetitive procedures, at EPA's discretion. A reward of up to $10,000, payable from the Fund, is authorized for information leading to the conviction of violators.[305]

CERCLA Prior to Amendment

The present law contains an array of penalties for violating CERCLA. In most cases these are criminal penalties, with fines up to $5,000, $10,000, or $20,000, and a prison term of at most one year.

(1) *Failure to notify* EPA of a hazardous substance release results in a fine of up to $10,000 and a jail term of up to one year.[306] The PRP is granted use immunity for the information, so that data properly tendered cannot be used against the PRP in a criminal prosecution. The same terms apply to parties who fail to notify EPA that a potentially hazardous site exists, although in this case a knowing failure to report also deprives a PRP of any §107 defenses to later liability.

(2) *Falsification or destruction of records* relating to hazardous materials renders a PRP liable to a $20,000 fine and/or one year in prison.[307]

(3) *Violation of an EPA order* may be fined at a rate of $5,000 per day of noncompliance. In addition, where this violation necessitates remedial money from the Fund, punitive damages may be assessed, from one to three times the amount of the Fund expense.[308]

(4) *False claims* against the Fund, i.e., claims accompanied by false information, bear a separate fine of up to $5,000 and a maximum prison term of one year.[309]

(5) *Financial responsibility rules* set forth in §108 of CERCLA must be complied with on pain of a civil penalty of up to $10,000 per day of violation.[310] No criminal penalties are provided.

Administration Proposal

The Administration suggested increases in certain penalties, but did not propose administrative enforcement. Fines for failures to notify and falsification of records were increased to $25,00 and those for violations of CERCLA §106 orders were raised t $10,000 per day. A civil penalty with a maximum of $10,000 wa also provided for failures to notify, but could only be impose by means of a court suit.

Senate and House Action

Both versions increased the penalties, though the House bill wa more severe and more thorough than the Senate's. The Hous bill in several cases proposed use of the independent fine provi sions in Title 18 of the United States Code to increase the sanc tions, rather than introducing new standards of its own. In ad dition, the House expanded the scope of penalties for failure t notify and violations of EPA orders and added civil penaltie to the criminal liability for failure to notify and falsification o records. An administrative enforcement mechanism was introduc ed by both bills.

(1) *Failure to notify.* The Senate bill raised the fine to $25,00 and the potential prison term to two years ($50,000 and five year on a second conviction). The House applied the general crimin provisions of 18 U.S.C. §§3623 and 3571 for fines and raised th prison term to three years. In addition, each bill applied civ penalties. The House version set these at $25,000 per day of non notification, and expanded the coverage of the provision explicitl to include falsification of information in giving notice. The Senat bill started civil penalties at $10,000 for the first violation, risin to $25,000, $50,000, and $75,000 on successive convictions.

(2) *Falsification or destruction of records.* Both bills amende CERCLA §103(d)(2). The Senate legislation raised the fine t $25,000 and left the prison term unchanged. According to th House, the standards of 18 U.S.C. §§3623 and 3571 were to b applied for the fine, while up to three years' imprisonment coul be imposed. The House also added a civil penalty of up to $25,00 per day.

(3) *Violation of an EPA order.* The Senate merely raised th fine here to $10,000. The House bill set the ceiling for fines a $25,000, and applied the same rate to failures to respond to EP orders demanding access to records (where the triple punitiv damages would not be relevant, since there is no damage requir ing remedial expenditures). However, the House bill also excus ed PRPs from liability where they had reasonable grounds fo refusal to comply.

(4) *False claims.* The Senate bill made no changes in CERCL §112(b)(1). As if to compensate, the House bill appears to hav changed it twice. Section 109(e)(3) of the House amendments rais ed the fine from $5,000 to $25,000 for falsifying information i a claim. But §109(f) of the House bill struck the clause definin the penalties altogether and replaced it: the new language refer red to 18 U.S.C. §3623 and 3571 for the fine and allowed a priso term of three years. Presumably the latter section was designe to supplant the former, since it changed the imprisonment penalt to three years, as usual in the House bill, as well as changing th fine provision. Probably the change in House bill §109(e)(3) wa left in the text by mistake.

(5) *Failure to meet financial responsibility conditions.* Here th Senate bill made no changes. The House bill raised the civil pena ty to $25,000 per day of violation.

(6) *Denial of access or information.* Parties who refuse to com ply with EPA orders for information about hazardous substance on their property, or to permit EPA agents to enter for in vestigative or remedial purposes, were subject to a new civil pena ty: $10,000 in the Senate version, $25,000 *per day* in the Hous bill.

(7) *Falsifying or refusing to provide emergency informatio* The new legislation required PRPs to file a variety of inform tion for purposes of local emergency planning and [illegible] in the event of a release. Failure to comply with this requirement or falsification of the data provided, resulted in a maximum civ penalty of $25,000 per day of violation in the Senate version; [illegible] House assigned a penalty of $20,000 [illegible]

specific penalties for violations of the community right-to-know provisions may also be found in §325.

302. SARA §109(c), CERCLA §109(a)(1)(D)-(E), (b)(4)-(5), (c)(4)-(5), 42 U.S.C. §9609(a)(1)(D)-(E), (b)(4)-(5), (c)(4)-(5), ELR Stat. 44031.

303. SARA §109(c), CERCLA §109(a), (b), 42 U.S.C. §9609(a), (b), ELR Stat. 44031.

304. SARA §109(c), CERCLA §109(c), 42 U.S.C. §9609(c), ELR Stat. 44032.

305. SARA §109(c), CERCLA §109(d), (e), 42 U.S.C. §9609(d), (e), ELR Stat. 44032. Expenditure of Superfund money for the reward is authorized by SARA §111(d)(2), CERCLA §111(c)(13), 42 U.S.C. §9611(c)(13), ELR Stat. 44036.

306. CERCLA §103(b), 42 U.S.C. §9603(b), ELR Stat. 44009.

307. CERCLA §103(d)(2), 42 U.S.C. §9603(d)(2), ELR Stat. 44010.

308. CERCLA §106(b), 42 U.S.C. §9606(b), ELR Stat. 44023. *See also* the penalty for release of confidential information in CERCLA §104(e)(2)(B), 42 U.S.C. §9604(e)(2)(B), ELR Stat. 4401[illegible]

309. CERCLA §112(b)(1), 42 U.S.C. §9612(b)(1), ELR Stat. [illegible]

310. CERCLA §109, 42 U.S.C. §9609, ELR Stat. [illegible]

311. [illegible] U.S.C. §2615, ELR Stat. 41[illegible]

CERCLA §§311(b)-(c) or 314, $10,000 for violations of CERCLA §§311(a) or 313(b).

The Senate and House amendments also introduced the procedural innovation of administrative enforcement for certain penalties. The Senate version permitted EPA to impose civil liability for failure to notify under CERCLA §103(b)(3); the PRP had to be granted notice and a hearing, and EPA's decision was subject to judicial review. The process was informal, not subject to the requirements of §§554 and 556 of the APA. The House set up a different procedure for a different class of actions: any civil penalty *except* under CERCLA §103(b) was to be imposed according to the requirements of §16 of TSCA[311] which requires a formal adjudicative hearing under §554 of the APA.

The Senate bill specifically provided for procurement of expert witnesses for civil or criminal actions by either competitive or noncompetitive procedures. The House bill offered the $10,000 reward for information on violators.

E. EPA Access and Information Gathering[312]

The Amendment

Section 104(m) and (n) of SARA, amending CERCLA §104(e), clarify EPA's investigatory powers and right to enter on private property.[313] CERCLA had merely imposed obligations on PRPs without granting corresponding rights to agencies. The amended language explicitly authorizes EPA and its state analogues to compel information and to examine the records of PRPs; to enter on private property, including other sites adjacent to disposal areas, wherever this may be necessary to determine a remedy or to execute it; and to inspect those sites, taking samples of materials, containers, and labelling.

The new legislation also specifies the machinery of enforcement. EPA issues an administrative order, which is enforced by requesting the Attorney General to bring a civil action to compel compliance. The order is to be upheld unless arbitary and capricious, an abuse of discretion, or otherwise not in accordance with law. Unreasonable failure to comply will earn a civil penalty of up to $25,000 per day. Other lawful procedures for gaining entry are not foreclosed, in order, for example, to allow EPA to move more quickly through an ex parte hearing if urgent action should be necessary.

Detailed specifications are introduced for the trade secrets exception already present in CERCLA §104(e)(2). A party claiming protection of this kind must show that the confidentiality of the information has been guarded with due care; it is not otherwise required to be disclosed; and disclosure would substantially harm the party's competitive position. In addition, trade secret protection cannot be used to shield the basic information that EPA must have to determine a response. This information includes the substance's chemical identity and physical properties, the potential health hazards and routes of exposure, and the location of any waste stream, along with any geologic or monitoring data about the site.[314]

CERCLA Prior to Amendment

The current version of CERCLA contains provisions in §§104(b) and (e) designed to enable EPA to get the information required to determine where responses are necessary. EPA is permitted to enter a PRP's property, not only to gain that information, but also to carry out the response. Any persons having control over a hazardous substance must cooperate with EPA and with state environmental agencies. They must provide information on request about such substances, allow EPA to read and copy all records pertaining to them, and permit EPA to enter sites to inspect them and take samples. The results of such an investigation are open to the public, except where the provider of information shows that confidential trade secrets are involved. In such cases a penalty is provided to ensure that confidential information is kept secure.

However, this grant of investigative power to EPA is not automatically effective. CERCLA contains no mechanism for enforcing access or compliance; in fact, it does not explicitly grant EPA the authority to carry out the entry which it commands a PRP to permit. While EPA's requests for access and information have generally been granted,[315] in at least one major case a court has refused to enforce EPA entry for lack of explicit statutory authority. In *Outboard Marine Corp. v. Thomas,*[316] a district court granted EPA a warrant for entry and investigation, styled a "search warrant," at an uncontaminated location next to a site where EPA had already determined a response was necessary.[317] EPA wished to survey the uncontaminated site, set markers for later permanent construction there, and test its soil for load-bearing capacity.[318] It was unclear whether the permanence of the installation or the fact that it was on property other than the contaminated land played any part in the Seventh Circuit's reversal of the court below, but the opinion appeared primarily to distinguish between entry for information alone and entry to start a response action. The court held that EPA had no clear authority for the latter and declined to infer it from the general authority to respond granted by CERCLA §§104(a) and (b), emphasizing that "[o]nly Congress, not we, can supply that power."[319]

Administration Proposal

The Administration's suggestions included the basic provisions of the final law concerning the right to access and the procedure for gaining it, including the arbitrary and capricious standard. An additional subparagraph requiring proper security clearance for access to classified information survived into both houses' versions but was removed from the conference bill.

Senate and House Action

The Senate adopted the Administration's proposal and added expanded language on security clearance; the trade secrets language which eventually appeared, with modifications, in §104(n) of the amendments; and the proviso that basic chemical information could not be kept confidential. The House bill restated EPA's provisions in somewhat more elaborate terms, without adding the Senate's expansions. The conference bill used the House language for the fundamental provisions, but added the Senate material on trade secrets and chemical information and retained

312. Legislative History Sources
  Administration Proposal, H.R. 1342/S. 494, §203.
  Senate Environment Committee Report at 25-26.
  Senate Bill, S. 51, §120.
  House Commerce Committee Report at 70-71, 122, 124, 136-37.
  House Bill, H.R. 2817, §104(k).
  Conference Committee Report at 195-97.
  SARA §104(m), (n)

313. SARA §104(m), (n); CERCLA §104(e), 42 U.S.C. §9604(e), ELR Stat. 44014.

314. *Cf.* 132 Cong. Rec. S14907-08 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford) (discussing trade secret provisions in §322 of amended legislation)

315. *See, e.g.*, United States v. United Nuclear Corp., 610 F. Supp. 527, 15 ELR 20442 (D.N.M. 1985); United States v. Standard Equipment, Inc., No. C83-620M (W.D. Wash. May 13, 1983); United States v. Western Processing Co., No. C83-252M (W.D. Wash. July 1, 1983); *cf.* Bunker Limited Partnership v. United States, 16 ELR 20757 (D. Idaho Dec. 6, 1985) (administrative warrant analogous to administrative subpoena).

316. Outboard Marine Corp. v. Thomas, 610 F. Supp. 1234, 15 ELR 20900, *rev'd* 773 F.2d 883, 15 ELR 21094 (7th Cir. 1985), *cert. granted*, 107 S. Ct. 58 (1986).

317. 610 F. Supp. 1234, 15 ELR 20900.

318. Outboard Marine Corp. v. Thomas, 773 F.2d at 885-86, 15 ELR at 21094-95.

319. 773 F.2d at 890, 15 ELR at 21097.

the Senate's reservations concerning arbitrary and capricious actions, which had been omitted in the House bill.[320]

F. Statutes of Limitations[321]

The Amendment

SARA addresses several statutes of limitations questions, both federal and state. The federal statutes of limitations are found in SARA §112(c) or §113(b), amending CERCLA §112(d)[322] and adding §113(g).[323]

Under CERCLA §112(d), actions for recovery of costs against the Fund must be brought within six years of the date of completion of all response action. Claims for recovery of natural resource damages must be made within three years after the date of the discovery of the loss or the date on which §301(c) final regulations[324] are promulgated, whichever is later.

New CERCLA §113(g) governs the period in which civil actions may be brought. Actions for natural resource damages must be brought within three years after the date of discovery of the loss and its connection with the release or the date on which §301(c) final regulations are promulgated, whichever is later. For NPL sites, federal facilities, and facilities at which a remedial action is scheduled, the action must be commenced within three years after the completion of the remedial action. In such cases, however, after enactment of the amendments no action may be commenced prior to 60 days after the PRP is given notice of intention to file suit or before selection of the remedial action.

Civil cost recovery actions are further divided into removal and remedial actions. Claims for removal action costs must be brought within three years after completion of the removal action or within six years if EPA has granted a waiver for continued response action under CERCLA §104(c)(1)(C). Remedial action cost claims must be made within six years of initiation of any on-site construction. If the remedial action is initiated within three years after completion of the removal action, the claim for removal action costs may be merged with the removal action claim. In any case, the court will enter a declaratory judgment on liability for response costs or damages that will be binding in all future actions.

Contribution actions for response costs or damages must be commenced within three years following the date of judgment in any action for recovery of costs or damages under this Act, or the date of a CERCLA §122(g) or (h) administrative order, or entry of a judicially approved settlement.

Actions based on rights subrogated by reason of payment of claim may be brought no later than three years after payment of the claim. Actions to recover indemnification payments from a PRP must be brought within three years of payment. Minors and incompetents are excluded from the running of all statutes of limitations until the minor becomes of age, the incompetent becomes competent, or a legal representative is duly appointed.

SARA §203 adds a new CERCLA §309[325] that deals with the commencement date for state statutes of limitations in hazardous substances cases. Even though state law remains generally applicable, if a state statute commences earlier than the new federally required commencement date, the federal date will govern. The federal commencement date is when the plaintiff knew, or reasonably should have known, that the personal injury or property damages were caused or contributed to by the hazardous substance, pollutant, or contaminant concerned.

CERCLA Prior to Amendment

CERCLA §112(d) contains a three-year limitation on Fund claims for damages and cost reimbursement. This section has also been interpreted to apply to civil actions for natural resource damages but not for cost recovery.[326] The statute runs from the date of discovery of the loss.

Administration Proposal

EPA recognized the need for filing cost recovery actions in a timely fashion and thus recommended a six-year statute of limitations. The intent of this section was to assure that evidence concerning liability and response costs is fresh, to replenish the Fund, and to provide some measure of finality to affected responsible parties.

The Administration's six-year statute followed a clear line of cases involving the parallel provisions in §311 of the FWPCA.[327] The statute runs from the completion of the response action, which is deemed to be the point when all operation and maintenance activities funded by the federal government have ceased. Yet, because response actions typically continue for a number of years, the government could commence an action at any time after costs have been incurred. The three-year statute for damage actions, contribution actions, and subrogated rights was also established here.

Senate Action

The Senate bill added a new section to cover both civil actions and claims against the Fund. Claims for costs of response were limited to six years after the date of completion of the response action. Natural resource damage claims were to be brought within six years after promulgation of §301(c) final regulations or three years after the date of discovery, whichever was later.

House Action

The House Judiciary Committee recognized that the natural resources damage assessment at NPL sites should, whenever possible, take place while the RI/FS is underway. It also recognized that the planning of any restoration or rehabilitation efforts should, whenever possible, be integrated with the planning of the remedial action. The limitation period running from completion of the remedial action will allow integration of cost recovery and natural resource damage actions.

The Judiciary Committee amendment contemplated that in the initial action, the court would enter a declaratory judgment which

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320. Section 204 of the Administration's proposal introduced a separate provision for administrative orders compelling PRPs to perform RI/FS, included in §125 of the Senate bill. S. 51, 99th Cong., 1st Sess., adding CERCLA §104(*l*), 131 CONG. REC. S359 (daily ed. Jan. 3, 1985). This language was omitted from SARA.

321. **Legislative History Sources**
Administration Proposal, H.R. 1342/S.494, §206.
Senate Environment Committee Report at 54-55.
Senate Bill, S. 51, §142.
House Commerce Committee Report at 78-79, 105-06.
House Judiciary Committee Report at 20-21.
House Public Works Committee Report at 24-25, 75.
House Debate, 131 CONG. REC. H11083-84 (daily ed. Dec. 5, 1985).
House Bill, H.R. 2817, §§112, 113(b), and 203.
Conference Committee Report at 220-25, 261.
SARA §§112(c), 113(b), and 203.

322. SARA §112(c), CERCLA §112(d), 42 U.S.C. §9612(d), ELR STAT. 44040.

323. SARA §113(b), CERCLA §113(g), 42 U.S.C. §9613(g), ELR STAT. 44041.

324. CERCLA §301(c) requires the President to promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance. Some regulations were promulgated March 1, 1986, 51 Fed. Reg. 27674 (1986) (to be codified at 43 C.F.R. pt. 11) (individual assessment rules). [illegible] July 7, 1986, 51 Fed. Reg. 25903 (1986).

325. SARA §203, CERCLA §309, 42 U.S.C. §9658, ELR STAT. 44071.

326. *See* United States v. Mottolo, 605 F. Supp. 898, 15 ELR 20444 (D.N.H. 1985).

327. *See, e.g.*, United States v. Healy Tibbitts Construction Co., 607 F. Supp. 540 (N.D. Cal. 1985); United States v. Water Quality Assurance Syndicate, 613 F. Supp. 239, 15 ELR 20957 (S.D.N.Y. 1985); United States v. C&R Trucking Co., 537 F. Supp. 1080, 12 ELR 20966 (N.D. W. Va. 1982).

will be binding in future cost recovery actions. This would conserve judicial time and resources. If it is commenced within three years of the completion of a removal action, the remedial costs may then be added to the removal costs in one action. The final action must be commenced within three years of the completion of all response action. The alternative of a single, phased trial remained.[328]

The federally required commencement date for the running of state statutes of limitations was established in response to a study done by an independent group pursuant to CERCLA §301(e) concerning victim compensation.[329] The study identified the problem of state statutes commencing at the time of injury rather than when the party discovers an injury was caused by a hazardous substance or pollutant. In cases of long latency diseases, such as cancer, this is critical since the disease may not become apparent until after the statute has run.[330] Thus the commencement date for state statutes was mandated to be the date the plaintiff knew, or reasonably should have known, that the personal injury was caused or contributed to by the hazardous substance, pollutant, or contaminant concerned. Special rules were noted for minors and incompetents. The majority of the House provisions were adopted by the Conference Committee.

G. Financial Responsibility[331]

The Amendment

Section 108 of SARA supplements the existing provisions in CERCLA §108 on the proof of financial responsibility to be required from owners and operators of vessels and from other PRPs and on the handling of claims against their guarantors and insurers.[332] SARA §108(a) supplements CERCLA §108(b)(2) to describe ways in which the financial responsibility of those involved with the production, transportation, treatment, storage, or disposal of hazardous substances can be evidenced. The regulations to institute this requirement could have been issued at any time since December 11, 1985; the Conference Committee decided, however, not to set any deadline. It did provide that, when issued, the regulations should be phased in "as quickly as can reasonably be achieved but in no event more than four years."[333]

SARA §§108(c) and (d) rewrite the provisions of CERCLA §§108(c) and (d) on direct claims against guarantors of PRPs and on the limitation of their liability.

CERCLA Prior to Amendment

CERCLA §108 requires handlers of hazardous substances to have proof of financial responsibility. CERCLA §108(a) establishes financial responsibility requirements for owners and operators of vessels carrying hazardous substances. Section 108(b) has potentially much broader requirements for the issuance of financial responsibility regulations for various classes of facilities engaged in the production, transportation, treatment, storage, or disposal of hazardous substances; these requirements, however, have not yet been implemented.

Administration Proposal

None.

Senate Action

The Senate Environment Committee proposed to broaden CERCLA §108(b) by allowing direct actions against financial responsibility guarantors, including insurance companies, by those injured in hazardous substance releases. Financial responsibility under CERCLA §108(b) could be established by insurance, guarantees, surety bonds, letters of credit, or qualification as a self-insurer. EPA would be authorized to specify insurance policy or other contractual terms, conditions, or defenses which might be used as evidence of financial responsibility. A direct suit against the guarantor of financial responsibility for claims under CERCLA §§107 or 111 would be permitted where the owner or operator of a hazardous substance site was bankrupt or where the claimant could not obtain jurisdiction over the owner or operator in federal courts. The guarantor's liability would be limited to the aggregate amount set in the evidence of financial responsibility, except that the guarantor would continue to be subject to any other state or federal statutory, contractual, or common law liability of a guarantor to the owner or operator including, but not limited to, the liability of such guarantor for bad faith in negotiating or failing to negotiate settlement of a claim. The Senate Environment Committee explained that

> a major goal of the financial responsibility requirements is to enlist insurers to provide additional policing and incentives to monitor the behavior of their insureds. The preservation of an insurer's policy, terms, and conditions vis-a-vis its insured may assist in meeting this objective. It is often policy terms and conditions, as well as inspection and ratemaking that form the basis of the insurer's ability to influence the insured to act carefully and responsibly.[334]

The Senate bill adopted these provisions.

House Action

The House Commerce Committee report recommended a similar provision to that adopted by the Senate. The House Public Works Committee added a deadline on EPA's issuance of financial responsibility regulations under CERCLA §108(b). In the provision adopted by the House, this deadline was set as not later than one year after the date of the submission of the GAO insurability study called for under new CERCLA §301(g)[335] to Congress. The House bill provided that the financial responsibility regulations were to be phased in as quickly as can be achieved but in no event in more than four years.

H. Contribution[336]

The Amendment

Section 113(b) of SARA creates a new CERCLA §113(f) that gives

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328. House Judiciary Committee Report at 21.

329. SUPERFUND SECTION 301(E) STUDY GROUP, INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, A REPORT TO CONGRESS IN COMPLIANCE WITH SECTION 301(e) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (P.L. 96-510), Serial No. 97-12, pts. 1 and 2, printed for the use of the Senate Committee on Environment and Public Works, 97th Cong., 2d Sess. (Sept. 1982). For a discussion of the study's recommendations, see Grad, *Remedies for Injuries Caused By Hazardous Wastes: The Report and Recommendations of the Superfund 301(e) Study Group*, 14 ELR 10105 (Mar. 1984).

330. House Commerce Committee Report at 105.

331. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Report at 47.
Senate Bill, S. 51, §137.
House Commerce Committee Report at 75-77, 174-75.
House Public Works Committee Report at 18.
House Bill, H.R. 2817, §108(a).
Conference Committee Report at 206-07.
SARA §108.

332. SARA §108(b)-(d), CERCLA §108, 42 U.S.C. §9608(b)-(d), ELR Stat. 44030.

333. SARA §[illegible], CERCLA §108(b)(3), 42 U.S.C. §9608(b)(3), ELR Stat. 44[illegible].

334. Senate Environment Committee Report at 47.

335. SARA §208, CERCLA §301(g), 42 U.S.C. §9651(g), ELR Stat. 44069. See *also infra* text at IV.C.(1) (annotated section on GAO study of insurance issues).

336. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, §202
Senate Environment Committee Report at 43-45, 103-04

and the reasons for such changes as well as a response to significant comments, criticisms, and new data submitted by the public. If any subsequent remedial action, enforcement action, or settlement differs in significant respects from the final plan, an explanation must be published.

Subject to amounts provided for such purposes in appropriations acts, EPA may make grants to groups affected by a release from a facility on the NPL, up to $50,000 to a recipient, to enable the group to obtain technical assistance to evaluate the hazard presented by the release and the adequacy of the proposed remedy.[169] The recipient must contribute at least 20 percent of the cost of the technical assistance. Both the $50,000 ceiling and 20 percent contribution requirements may be waived. No more than one grant under CERCLA §117(e) may be made for a single facility, but the grant may be renewed to facilitate public participation at all stages of remedial action. Grants are not intended to underwrite legal actions but any information developed may be used in a legal action."[170]

CERCLA Prior to Amendment

CERCLA has no comparable provision. Current EPA policy calls for a strong community relations program in connection with Superfund cleanups.[171] Both removal and remedial actions must allow for a public comment period on the alternative courses of action considered. A settlement agreement must be available for public comment, including a settlement embodied in a consent decree.[172]

Administration Proposal

Section 109 of the Administration-drafted bill, H.R. 1342, proposed to confirm in a single sentence EPA's community involvement policy. EPA's analysis stated that because the requirements of this amendment are already incorporated in the agency's operating guidance, "the amendment itself would not impose any new responsibilities on the Federal government."[173]

Senate Action

The Senate Environment Committee bill expanded the EPA language to require public notice of, and opportunity for comment on, proposed settlements including an opportunity for a public meeting and an analysis of a proposed remedy or settlement "sufficient to provide a reasonable explanation of the proposal and alternative proposals considered."[174] This requirement would be applicable to cleanups implemented by EPA, the states, or by private parties. The Senate Committee went on to say "if the remedial action proceeds to two or more distinct phases and separate studies and alternatives are developed at different times for different phases, the process of notice and opportunity for comment shall apply to each phase."[175] The Senate Committee report also would require EPA to make available "data, studies, reports, and other information on the contents or conditions of the site and its likely effects on health and the environment and any preliminary information on possible remedial actions and feasibility studies."[176]

The Senate bill added a provision entitled, "Technical Assistance Grants,"[177] authorizing EPA to make technical assistance grants to community organizations or groups of individuals potentially affected by a release at any facility on the NPL of up to $75,000 per facility. These grants were to be used to obtain technical assistance in evaluating the hazard and the proposed remedy in response to EPA's requests for comment.

House Action

The House Commerce, the Judiciary, and the Public Works Committees all elaborated on the Senate public participation and technical assistance provisions. The House Commerce Committee proposed that EPA be required to publish an explanation of its reasons if it rejected significant aspects of the public comment upon adopting a final plan and that a similar explanation be filed if the final action was approved in a consent decree rejecting significant aspects of the public comment. The Commerce Committee's proposal for technical assistance required that the recipient group supply 20 percent of the expense of the technical assistance project unless EPA waived the requirement because of the group's financial need. The amount of the grant in the Commerce Committee provision was limited to $25,000 unless EPA allowed a larger sum.

The House Judiciary Committee inserted a statement on the floor concerning the new public participation provisions contained in §117 of the House bill.[178] The House Public Works Committee report proposed detailed provisions for EPA compliance with the new provision.

Section 117 of H.R. 2817, the bill passed by the House, contains the points agreed upon by the three House committees and an authorization for a technical assistance program to affected community groups enabling them to obtain technical assistance to review and assess a proposed remedial action or settlement.

K. Removal Actions[179]

The Amendment

Section 104(e) of SARA increases the flexibility of the CERCLA §104(c) money and time limitations on initial response actions, known as "removals."[180] At present, CERCLA §104(c)(1) requires that initial response actions be limited to $1 million in expenditures and 6 months' duration, unless certain special circumstances are found to exist. These special circumstances include emergencies, risks to health, welfare, or the environment, and lack of a timely alternative remedy. They also include fin-

169. SARA §111(b) adds CERCLA §111(a)(5) to authorize use of Superfund for §117(e) technical assistance grants. SARA §111(b), CERCLA §111(a)(5), 42 U.S.C. §9611(a)(5), ELR Stat. 44034. *See also* Conference Committee Report at 231.

170. Conference Committee Report at 231.

171. NCP, 40 C.F.R. §300.67, ELR Reg. 47461.

172. NCP, 40 C.F.R. §300.67(g), ELR Reg. 47461.

173. EPA Section-by-Section Analysis, House Commerce Committee Report at 131.

174. Senate Environment Committee Report at 97.

175. *Id.* at 38.

176. *Id.*

177. S. 51, 99th Cong., 1st Sess., §139, 131 Cong. Rec. S359 (daily ed. Jan. 3, 1985).

178. 131 Cong. Rec. H11085 (daily ed. Dec. 5, 1985).

179. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, §102.
Senate Environment Committee Report at 17-18, 85.
Senate Bill, S. 51, §113.
House Commerce Committee Report at 67-68, 128-29, 153.
House Bill, H.R. 2817, §104(e).
Conference Committee Report at 189-91.
Senate Debate on Conference Report, 132 Cong. Rec. S14896 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).
SARA §§104(b), 104(e).

180. SARA §104(e), CERCLA §104(c)(1), 42 U.S.C. §9604(c)(1), ELR Stat. 44012. Senator Stafford, Chairman of the Senate Environment Committee, included this provision in the CERCLA amendments on which he made explanatory comments during Senate consideration of the Conference Report. 132 Cong. Rec. S14896 (daily ed. Oct. 3, 1986). He pointed out that labeling a cleanup as a "removal" rather than a "remedial action" exempted it from the public participation provisions of §117 and from the cleanup standards provisions of §121. "The rationale for this selective application is that short term, relatively low-cost activities of great urgency should be free of delays attendant to the requirements of sections 117 and 121." *Id.* He cautioned, however, that "the new, more flexible authority is not to be abused to circumvent the more rigorous and explicit requirements regarding public participation and health standards . . . [W]hile the President is accorded greater flexibility in undertaking removals, the law's fundamental requirement that human health and the environment be protected must nonetheless be satisfied." *Id.*

PRPs an explicit right to contribution from other PRPs.[337] Contribution may be sought by a PRP from any other PRP, during or following any civil action under CERCLA §106 or under §107(a). In resolving contribution claims, a court may allocate response costs among liable parties using equitable factors as it determines are appropriate. An action for contribution may be brought even though there has been no civil action under CERCLA §§106 or 107.

Any person who has settled CERCLA claims with the United States or a state shall not be liable for contribution to other PRPs regarding matters addressed in the settlement, whether or not the settlement is in a consent decree or administrative order. Absent agreement to such effect, a settlement does not discharge related claims against other PRPs, but their liability is reduced by the amount of the settlement. The contribution claim against non-settling PRPs by a PRP that has settled with the United States or a state is subordinated to the claims of the United States or a state and is governed by federal law. A contribution action must be brought within three years of the date of judgment, administrative order, or consent order under CERCLA for the response costs or damages for which contribution is sought.

In anticipation of a possible challenge,[338] SARA §122 (b) inserts a new provision on separability in CERCLA §308.[339] This section states that, if the provision for contribution protection for those whose settlements are in administrative orders rather than consent decrees is held to be an unconstitutional taking in violation of the Fifth Amendment, compensation for the amount of such taking may not be obtained from the United States. Instead, the CERCLA §113(f) limitation on the right to obtain contribution shall be treated as invalid.

CERCLA Prior to Amendment

Although CERCLA has lacked an explicit reference to a right of contribution among PRPs held liable under §107, courts have found such a right to contribution under federal law.[340]

EPA's Interim Settlement Policy[341] sets out EPA's current practice on contribution. Lack of clear statutory guidance on how rights of contribution were to be handled compelled EPA to develop a "contribution protection" clause for use in settlements. To encourage settlements, EPA has been willing to agree to reduce the amount a non-settling party owes the government by the amount the settling party might be held liable for in a contribution action by a non-settling party.

Administration Proposal

Section 202 of the Administration proposal recommended explicit provisions on contribution: (i) contribution actions should be brought only *after* entry of a judgment or settlement with respect to response cost liability under CERCLA §107 or an enforcement order under §106; (ii) the separate action for contribution should be governed by the provisions of CERCLA §113 and federal law; (iii) a party that has settled its liability to the United States or a state in a judicially approved, good faith settlement should not be liable for claims for contribution from non-settling parties;[342] and (iv) nothing in these provisions should affect or modify the rights of the United States or a state or a person that has settled with the United States from seeking contribution against non-settling PRPs. In such a contribution action the rights of a state or a settling party should be subordinate to the rights of the United States.

Senate Action

The Senate Environment and Public Works Committee adopted a proposal similar to the Administration's and stated that contribution claims would be resolved pursuant to federal common law.[343] On the floor of the Senate, Senator Stafford (R-Vt.) and other senators sponsored amendments to permit contribution actions to be brought both *during*[344] or following civil actions under §§106 or 107, although trial of contribution issues might be postponed, and to direct the court to allocate response costs among PRPs, using equitable factors as the court determines are appropriate.

House Action

The House Commerce, Judiciary, and Public Works committees proposed a right of contribution with elements similar to that adopted by the Senate. The Judiciary Committee statement on the compromise adopted by it with the Commerce and Public Works committees sets out suggested criteria for court apportionment of contribution shares.[345] It also makes clear that CERCLA §113(f)(2) relieves a party to a settlement of contribution, but not indemnity claims (i.e., claims arising out of contract or special relationship).[346]

I. Citizen Suits[347]

The Amendment

Section 206 of SARA inserts a new CERCLA §310 on citizen

Senate Debate, 131 Cong. Rec. S11854-55, 11858-59 (daily ed. Sept. 20, 1985) (statement of Sen. Stafford).
House Commerce Committee Report at 79-80, 188.
House Judiciary Committee Report at 2, 18-30.
House Public Works Committee Report at 24.
House Debate, 131 Cong. Rec. H11083 (daily ed. Dec. 5, 1985).
House Bill, H.R. 2817, §113(b).
Conference Committee Report at 221-25.
Senate Debate on Conference Committee Report, 132 Cong. Rec. S14904-5 (daily ed. Oct. 3, 1986).
SARA §113(b), §122(b).

337. SARA §113(b), CERCLA §113(f), 42 U.S.C. §9613(f), ELR Stat. 44041.

338. Senator Stafford expressed the view that such a challenge is likely and that the attempt to provide contribution protection in non-judicial proceedings is both "bad policy" and "flawed on constitutional grounds." 132 Cong. Rec. S14904-05 (daily ed. Oct. 3, 1986).

339. SARA §122(b), CERCLA §308, 42 U.S.C. §9657, ELR Stat. 44071.

340. *See, e.g.*, United States v. New Castle County, 16 ELR 21007 (D. Del. July 17, 1986); Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 15 ELR 20523 (D. Colo. 1985); United States v. Ward, 618 F. Supp. 884, 16 ELR 20127 (E.D.N.C. 1985); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 15 ELR 20346 (E.D. Mo. 1985); United States v. South Carolina Recycling and Disposal, Inc., 14 ELR 20272 (D.S.C. Feb. 23, 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 13 ELR 20986 (S.D. Ohio 1983).

341. EPA Interim Settlement Policy (Dec. 5, 1984), 50 Fed. Reg. 5034 (1985), ELR Admin. Materials 30001.

342. The proposal suggested that the government's claim against non-settling parties should be reduced to the extent stipulated by the settlement.

343. Senate Environment Committee Report at 45.

344.

> The amendment permits the timing and procedure for such contribution claims to be governed by the Federal Rules of Procedure. As a general rule, private party cleanup will occur more quickly if the courts first resolve issues of liability and remedies concerning the original defendants, leaving questions of apportionment until after the government's action has been completed. Nonetheless, consistent with the Federal Rules of Civil Procedure, these decisions are left to the discretion of the court.

131 Cong. Rec. S11855 (daily ed. Sept. 20, 1985) (statement of Sen. Stafford).

345. House Judiciary Committee Report at 18-30. The Committee refers to United States v. A & F Materials Co., 578 F. Supp. 1249, 14 ELR 20105 (S.D. Ill. 1984). *Id.* at 19.

346. 131 Cong. Rec. H11083 (daily ed. Dec. 5, 1985).

347. Legislative History Sources
Administration Proposal, H.R. 1342, S. 494, no provision.
Senate Environment Committee Report at 61-63, 119.
Senate Debate, 131 Cong. Rec. S12025-27 (daily ed. Sept. 24, 1985) (statement of Sen. Baucus).
Senate Bill, S. 51, §150.

suits.[348] Any person may bring suit in a United States district court against any person (including the United States, any governmental instrumentality, and any state to the extent permitted by the Eleventh Amendment) alleged to be in violation of any standard, regulation, condition, requirement, or order under CERCLA (including any provision of an agreement under §120 relating to federal facilities). Any person may also sue the President or any officer of the United States where there has been a failure to perform any nondiscretionary duty under CERCLA.

A citizen suit must provide 60-days prior notice to the federal government, to the state in which the alleged violation occurs, and to the alleged violator. The action may not be commenced if the federal government has commenced and is diligently prosecuting an action under CERCLA or RCRA to require compliance. Similarly, no action for failure to perform a nondiscretionary duty can be initiated against a government officer until 60-days advance notice has been given. A court may award costs of litigation, including reasonable attorney and expert witness fees, to the prevailing party. Both the United States and the affected state may intervene as a matter of right.

The new provisions in CERCLA §§113(h) and (j) on the timing of judicial review of challenges to removal or remedial actions selected under §§104 and 106 authorize review of EPA's administrative record on such actions under CERCLA §310.[349] An action can be brought

> following completion of each distinct and separate phase of the cleanup. It should be the practice of the President to set forth each separate and distinct phase of a response action in a separate Record of Decision document. Any challenge under this provision to a completed stage of a response action shall not interfere with those stages of the response action which have not been completed.[350]

CERCLA Prior to Amendment

There is no citizen suit provision at present in CERCLA. In 1984 an extensive citizen suit provision was inserted in RCRA §7002[351] which will be applicable to many problems arising at Superfund sites if the toxic substances involved constitute a solid or hazardous waste under RCRA. The RCRA provision permits a citizen suit against any governmental or private party alleged to be in violation of RCRA or a related regulation or standard; against EPA where it is alleged that EPA has failed to perform any nondiscretionary duty; and against any person, including any governmental agency or PRP, who has contributed to any hazardous waste problem that may present an imminent and substantial endangerment to health or the environment. This last feature of the RCRA citizen suit clause was thought to make a similar provision the CERCLA citizen suit provision unnecessary.[352]

Administration Proposal

The Administration made no proposal for a citizen suit provision.

Senate Action

The Senate Environment Committee initiated a proposal for citizen suits under CERCLA limited to enforcement of the Act and its regulations and suits against EPA for failure to perform a nondiscretionary act. This was incorporated in the Senate bill.

House Action

The House Commerce Committee drafted a citizen suit provision similar to the Senate proposal. The House Judiciary and Public Works committees proposed to supplement this by authorizing citizen suits to abate any imminent and substantial endangerment to health or the environment caused by hazardous substances (i.e., to cover problems similar to the endangerment from hazardous waste cases authorized by RCRA §7002). The compromise bill agreed upon by the House committees just prior to floor debate contained the full range of remedies recommended by the House Judiciary and Public Works committees. The House bill adopted this compromise proposal in §206 which authorized citizen suits to enforce any CERCLA requirement, challenge action contributing to a hazardous substance release which may present an imminent and substantial endangerment to public health or the environment, and challenge the government's failure to perform nondiscretionary duties under CERCLA.

J. Federal Lien[353]

The Amendment

Section 107(f) of SARA adds new subsections 107(*l*) and (m) to CERCLA.[354] This provision places a lien on response sites where federal money has been expended, ensuring that as much of the cost as possible will be recovered, especially if the site actually appreciates in value due to federal cleanup efforts.

Liability to the United States under CERCLA §107(a) results in a lien on any interests of a PRP in the real property subject to the response. The lien arises when costs are incurred or when notice is given to the PRP, whichever is later.[355] The rights of the government are explicitly subordinated to the rights of others whose interests were perfected before notice of the lien was filed or actual notice received. For purposes of state law the lien is to be treated as a judgment lien and may be enforced by an ac-

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House Commerce Committee Report at 107-08, 230-31, 249-50.
House Judiciary Committee Report at 11-14, 33-37.
House Public Works Committee Report at 80-83.
House Debate, 131 CONG. REC. H11077 (daily ed. Dec. 5, 1985) (statement of Rep. Snyder); 131 CONG. REC. H11087-88 (daily ed. Dec. 5, 1985).
House Bill, H.R. 2817, §206.
Conference Committee Report at 273-74.
Senate Debate on Conference Committee Report, 132 CONG. REC. S14898 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).
House Debate on Conference Committee Report, 132 CONG. REC. H9587 (daily ed. Oct. 8, 1986) (statement of Rep. Florio); 132 CONG. REC. H9600 (daily ed. Oct. 8, 1986) (statement of Rep. Roe); 132 CONG. REC. H9582 (daily ed. Oct.8, 1986) (statement of Rep. Glickman).
SARA §113(h), §206.

348. SARA §206, CERCLA §310, ELR STAT. 44072.

349. SARA §113(c), CERCLA §113(h), (j), 42 U.S.C. §9613(h), (j), ELR STAT. 44042. *See also supra* text at II.A. (annotated section on judicial review).

350. Conference Committee Report at 224. This particular issue, of when a citizen suit to challenge a choice of remedial action is permissible, is an illustration of the limitations of legislative history.
In the Senate and House debates on the Conference Committee Report, there was a sharp divergence of views among the conferees as to what rule should apply to citizen suit challenges to EPA's choice of response action. Senator Stafford expressed the view that citizen suits to challenge cleanup decisions should be allowed before such decisions were implemented. 132 CONG. REC. S14898 (daily ed. Oct. 3, 1986). In the House, Reps. Florio and Roe agreed with Senator Stafford. 132 CONG. REC. H9587, 9600 (daily ed. Oct. 8, 1986). On the other hand, Representative Glickman endorsed the view expressed in the Conference Report, prohibiting any citizen suit to review decisions about a cleanup remedy until completion of a "distinct and separate phase." 132 CONG. REC. H9582 (daily ed. Oct. 8, 1986).

351. 42 U.S.C.§6972, ELR STAT. 42034.

352. Conference Committee Report at 273.

353. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, §210.
Senate Environment Committee Report at 45.
Senate Bill, S. 51, §136.
House Commerce Committee Report at 73, 122, 125, 140.
House Public Works Committee Report at 17-18.
House Bill, H.R. 2817, §107(g).
Conference Committee Report at 206.
SARA §107(f).

354. SARA §107(f), CERCLA §107(*l*), (m), 42 U.S.C. §9607(*l*), (m), ELR STAT. 44029.

355. Since the lien arises when costs are incurred, it seems that the amount must be updated periodically as additional expenditures are made. The legislation does not address this point.

tion in rem in federal district court. Once the statute of limitations has made the claim unenforceable, the lien lapses, forcing EPA to sue within that period in order to preserve its rights against the property.

A special section restates the same principle for recovery of costs against shipowners through maritime liens.[356] Since a vessel, unlike real property, is movable, the action in rem on the lien may be brought in any district in which the vessel may be found.

CERCLA Prior to Amendment
CERCLA has no provisions for a federal lien.

Administration Proposal
The lien provision originated with the Administration, but in a slightly different form than that eventually adopted. According to this version, the lien began at the time the costs were first incurred and remained until satisfaction was made or until the statute of limitations expired. It was not, however, valid against third parties who were unaware of it—purchasers, holders of security interests, judgment lien creditors—until notice had been filed in the appropriate state office or federal district court, if there were no state office. Actual knowledge of the lien would render it valid against such third parties. The federal lien had no special priority, but was junior to previously perfected security interests.

Senate and House Action
The Senate adopted the Administration's language without substantial change. The House made the modifications appearing in the final statute, adding the maritime lien as a separate paragraph. It was the House version that was incorporated in the conference bill.

K. Nationwide Service of Process[357]

The Amendment
Section 113(a) of SARA, adding §113(e) of CERCLA, provides that in any Superfund litigation brought by the United States the government may serve a defendant wherever it may be found, resides, does business, or has an agent for service of process.[358]

CERCLA Prior to Amendment
The present statute contains no special provisions for service of process. It could thus be argued that under the Federal Rules of Civil Procedure, it is only possible to serve a party, other than in third-party practice, within the state where the district court is held.[359] According to Congress, however, this is not the case; a power of nationwide service is already implicit in CERCLA.[360] The courts have not always agreed.[361]

Administration Proposal
The Administration's draft revisions included an authorization for nationwide service.

Senate and House Action
The Senate adopted the Administration's language and added a section stating that federal courts of appeals and the Supreme Court were to give priority over other civil litigation to suits concerning certain disposal facilities. The purpose of this high priority was to encourage the development of the treatment technologies necessary for permanent cleanups. Since such new methods inevitably spark litigation, the Senate hoped that firms would be less strongly deterred from the attempt if they were assured that any resulting lawsuits would be handled expeditiously.

The House declined to accept the special priority clause and returned to the original proposal. However, where the original language had provided nationwide service for actions under CERCLA §§104, 106, and 107, the House did not extend it to CERCLA §104 actions. When the Conference Committee adopted the House language, coverage was extended to all actions "under this Act."

L. Foreign Vessel Liability[362]

The Amendment
Section 107(a) of SARA strikes a parenthetical phrase in CERCLA §107(a)(1) and extends CERCLA liability to foreign vessels responsible for release of hazardous substances in areas under American control, whether or not such vessels are otherwise subject to United States jurisdiction.[363]

CERCLA Prior to Amendment
CERCLA imposes liability only on owners and operators of a "vessel (otherwise subject to the jurisdiction of the United States)."[364] The parenthetical phrase could be interpreted to have the effect of excusing foreign vessels causing pollution in United States waters.

Administration Proposal
Section 213 of the Administration-sponsored bill struck the phrase in question.

Senate and House Action
Both the Senate and the House included the proposal without change.

M. Settlements[365]

The Amendment
Section 122 of SARA introduces a broad new §122 on settlements

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356. SARA §107(l), CERCLA §107(m), 42 U.S.C. §9607(m), ELR STAT. 44029.

357. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, §208.
Senate Environment Committee Report at 59.
Senate Debate, 131 CONG. REC. S11850-61 (daily ed. Sept. 20, 1985) (colloquy on Sen. Bentsen's amendment).
Senate Bill, S. 51, §145.
House Commerce Committee Report at 79.
House Judiciary Committee Report at 1.
House Bill, H.R. 2817, §113(a).
Conference Committee Report at 221-22.
SARA §113(a).

358. SARA §113(a), CERCLA §113(e), 42 U.S.C. §9613(e), ELR STAT. 44041.

359. FED. R. CIV. P. 4(f).

360. *See* Senate Environment Committee Report at 59; House Commerce Committee Report at 79.

361. *See, e.g.*, Missouri v. Bliss, 16 ELR 20361 (E.D. Mo. Dec. 16, 1985); Violet v. Picillo, 613 F. Supp. 1563, 16 ELR 20331 (D.R.I. 1985); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 16 ELR 20346 (E.D. Mo. 1985); *But cf.* United States v. Bliss, 108 F.R.D. 127, 16 ELR 20368 (E.D. Mo. 1985) (nationwide service implicitly authorized for §106 but not §107 actions).

362. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, §213.
Senate Environment Committee Report at 41-42.
Senate Bill, S. 51, §132.
House Commerce Committee Report at 73, 122, 141.
House Public Works Committee Report at 17.
House Bill, H.R. 2817, §107(a).
Conference Committee Report at 203.
SARA §107(a).

363. SARA §107(a), CERCLA §107(a)(1), 42 U.S.C. §9607(a)(1), ELR STAT. 44024.

364. CERCLA §107(a)(1), ELR STAT. 44024.

365. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Report, no provision.
Senate Debate, 131 CONG. REC. S12004-12010 (daily ed. Sept. 24, 1985) (statement of Sen. Domenici).

into CERCLA.[364] Most of the provisions are optional with EPA, but they offer a variety of techniques by which voluntary settlements can be facilitated. They also outline the liability releases that the government may offer as part of a settlement.

CERCLA §122(a) provides authority to enter into settlements which are in the public interest and consistent with the NCP. If EPA elects not to use the procedures of CERCLA §122, it must notify the PRPs concerned and give its reasons. An EPA decision not to use the settlement procedures of §122 is not subject to judicial review. However,

> [n]othing in this section diminishes the responsibility of or precludes the court from reviewing the lodged consent decree to determine whether relevant requirements of the Act have been met and whether entry of the decree is in the public interest.[365]

CERCLA §122(b) provides statutory authority for "mixed funding" of settlements. This means that EPA may make a payment from Superfund toward the cost of remedial action on behalf of PRPs who are unknown, insolvent, unavailable, or who refuse to settle. EPA is required to seek recovery of such mixed funding payments from non-settlors, "unless it would be unreasonable to undertake such efforts."[366] EPA may commit in a settlement agreement involving mixed funding to a future proportional mixed funding contribution from Superfund if the original remedial action fails. The Conference Report suggests EPA will seek to avoid the need for such subsequent Fund contributions in mixed funding cases through insistence on permanent remedies.

CERCLA §122(c), (d) and (f) deal with the contents of settlement agreements and covenants not to sue under CERCLA. Participation by a PRP in a settlement agreement is not to be construed as an acknowledgement of liability. A waiting period of at least 30 days, with opportunity for public comment, is required before entry of a consent decree settling a case. Where EPA rejects an on-site remedy that meets the cleanup standards provisions of §121 and orders off-site disposal, the agency must covenant not to sue over the off-site transportation and disposal. The hazardous substances involved must be disposed of at a facility which meets the requirements of RCRA. Similarly, EPA is required to provide a covenant not to sue where the PRP has the hazardous substance permanently destroyed.[369] Any covenant of the United States not to sue concerning future liability, however, shall not take effect until EPA certifies that the remedial action contemplated has been completed in accordance with CERCLA.

CERCLA §§122(c)(1) and (f) outline the considerations controlling government covenants not to sue in a settlement agreement. Generally, "[i]n determining the extent to which the liability of parties to an agreement should be limited pursuant to a covenant not to sue, the President shall be guided by the principle that a more complete covenant not to sue shall be provided for a more permanent remedy undertaken by such parties."[370] Any covenant not to sue is conditioned on the PRPs being in full compliance with any consent decree under §106 and any settlement agreement. The factors bearing on the government's willingness to give a covenant not to sue and any conditions imposed include: effectiveness and reliability of the remedy; nature of remaining risks; extent to which performance standards are included in the order or decree; extent to which response action provides a complete remedy; extent to which the technology used is demonstrated to be effective; whether funding for any additional remedial actions will be available; and whether PRPs will themselves carry out the remedial action. With very limited exceptions, EPA is required to insist on an exception to the covenant not to sue for future liability where the liability arises out of conditions unknown to EPA at the time it certifies remedial action has been completed. In extraordinary circumstances EPA may elect not to include such an exception for unknown conditions if other provisions of the settlement agreement are sufficient to provide reasonable assurances that public health and the environment will be protected from a future release.[371]

CERCLA §122(e), "Special Notice Procedures," represents the outcome of keen debate between the Senate and House as to how voluntary settlements should be facilitated. The Senate's mandatory provisions are almost entirely optional in the enacted law. Initially, if EPA thinks it would facilitate voluntary settlement and would expedite remedial action, the agency is to notify all PRPs as to the identity of all PRPs at a site, the volume and nature of substances contributed by each PRP, and a ranking by volume of the substances at the facility. Existing rules on confidentiality, including attorney work product, are applied. Thereafter, EPA is not to initiate response action or suit under CERCLA §106 for 120 days[372] if PRPs make proposals to undertake or finance response action within 60 days. Where no proposal is made by PRPs, the moratorium on EPA action is only for the first 60 days. EPA is required to develop guidelines for preparing Nonbinding Preliminary Allocations of Responsibility (NPARs). Where EPA determines it would expedite settlement and remedial action, the agency may, after completion of the RI/FS, submit an NPAR to the PRPs which allocates percentages of the total cost of response among them. The NPAR is not admissible as evidence in any proceeding. Its cost is to be borne by those PRPs whose settlement offers are accepted. Where there is no settlement, it becomes a response cost reimbursable under §107. Where EPA provides an NPAR and the PRPs make a "substantial offer"[373] which EPA rejects, EPA is required to provide a written explanation. However, EPA's decision to reject the settlement offer is not subject to judicial review.

Once the government or a PRP acting under an administrative order or a consent decree has initiated an RI/FS, no other PRP may undertake any remedial action at a site unless such action is authorized. If a significant threat to public health or the en-

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364. Senate Bill, S. 51, §§122, 129, 130, 131.
House Commerce Committee Report at 74, 100-03, 212-15.
House Judiciary Committee Report at 9-10, 17-18, 29-33.
House Public Works Committee Report at 58-65.
House Debate, 131 CONG. REC. H11157-58 (daily ed. Dec. 5, 1985) (statement of Rep. Roe); 131 CONG. REC. H11085-88 (daily ed. Dec. 5, 1985).
House Bill, H.R. 2817, §122.
Conference Committee Report at 69-73.
Senate Debate on Conference Report, 132 CONG. REC. S14904 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).

365. SARA §122(a).

366. SARA §122(b), CERCLA §122, 42 U.S.C. §9622, ELR STAT. 44058.

367. Conference Committee Report at 252.

368. *Id.*

369. The Conference Committee Report indicates that mere placement of [illegible] substances in a permanent storage container does not constitute permanent destruction for purposes of entitlement to an EPA covenant not to sue. The method used "must change the [illegible] character of such substances." Conference Committee Report at 25[illegible]

370. SARA §122(a), CERCLA §122(c)(1), 42 U.S.C. §9622(c)(1), ELR STAT. 44058.

371. For example, the government must be given "ample opportunity to discover whether unanticipated contamination exists." 132 CONG. REC. S14904 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).

372. An RI/FS may be initiated within 90 days.

373. The Conference Report comments as follows on the concept of substantial offer:

> A substantial offer is one which represents a commitment by the potentially responsible parties to undertake or finance a predominant portion of the total remedial action. Any substantial offer must provide for response on costs of response for an amount equal to or greater than the cumulative total, under the NPAR, of the potentially responsible parties making the offer. For a substantial offer to exist, all other terms must be agreed [illegible]

Conference Committee Report at 25[illegible]

vironment is present during the negotiation period, the government may take response or enforcement action.

A special program is authorized in CERCLA §122(g) to encourage the settlement of de minimis liabilities for response costs. Both the toxicity and the amount of the hazardous substances involved must be minimal or the PRP must be an innocent owner of the site who was not involved in the presence of hazardous substances there. Any party who purchased a site with actual or constructive knowledge of the presence of hazardous substances is not an innocent owner. EPA is given broader authority to give covenants not to sue in connection with de minimis settlements. For de minimis settlements at sites involving over $500,000 in response costs, the Attorney General must approve the settlement.

CERCLA §122(h) sets out general authorities that may be used to promote settlements. Settlements involving total response costs of less than $500,000 do not require Attorney General approval. Arbitration to settle [illegible] cases is authorized. If a PRP defaults on a settlement agreement, the Justice Department may sue for its enforcement, plus costs, interest, and attorneys fees. The terms of the settlement agreement are not subject to review in an enforcement action.

Thirty-day advance notice in the *Federal Register* is required for all settlements. Any person may use this period to file written comments on the settlement. The agency that has jurisdiction over the settlement shall consider these comments and may withdraw from the settlement if the comments disclose facts or considerations that indicate the proposed settlement is inappropriate, improper, or inadequate.

CERCLA §122(j) deals with procedures for settlement of natural resources damage claims.[374] Section 122(k) excludes releases from vessels from the settlement provisions, and CERCLA §122(*l*) makes a cross-reference to the $25,000 per day administrative penalty imposed under §109(b) for violation of the administrative order or consent decree concluding a settlement under CERCLA §104(b).

CERCLA Prior to Amendment

There are no provisions in CERCLA addressing settlements.

Administration Proposal

The Administration made no proposal to incorporate any part of EPA's Interim Settlement Policy[375] into CERCLA other than the agency's policy on contribution protection.[376]

The NCP does not discuss settlement issues. Expanding on earlier ad hoc settlement practices, EPA announced its comprehensive Interim CERCLA Settlement Policy in December 1984, shortly before the Administration presented its proposals for CERCLA amendment to Congress in February 1985. EPA's policy statement deals with many of the topics Congress has now legislated with SARA. The settlement policy discusses encouragement of voluntary settlements; consideration of settlement offers covering less than 100 percent of cleanup activities; use of the Fund to pay for "orphan shares" together with PRP settlement payments so as to provide "mixed funding" for cleanups; "contribution protection" arrangements to protect those settling from later claims for contribution from PRPs not participating in a settlement; special settlement arrangements for de minimis parties; provision of information to PRPs on the identity of PRPs; the volume and nature of wastes sent to a site; ranking by volume of material sent to a site; a listing of EPA's criteria guiding settlement; and EPA's policy on granting releases from liability.

Senate Action

The Senate Environment Committee report and bill contained no statutory proposals on settlement although both discussed contribution. The Senate amendments to foster Superfund settlements were proposed during Senate floor debate on S. 51 by Senators Domenici (R-N.M.), Simpson (R-Wyo.), and Bentsen (D-Tex.).[377] Senator Domenici stated that the EPA Administrator supported the proposed settlement package, that EPA already had authority to pay for orphan shares out of the Fund,[378] and that EPA was expected to issue guidance documents soon to identify who was a de minimis contributor. The settlement amendments were agreed to without debate or change. They contained novel, mandatory provisions on settlement going considerably beyond EPA's interim settlement policy. The following were the most significant new concepts in the Senate package of settlement amendments.

First, not later than completion of an RI/FS, EPA should, unless it had specified grounds for not doing so, send all PRPs a list of PRPs, an NPAR, information on settlements at other facilities, and technical information EPA expected to use in evaluating settlement proposals. The grounds on which EPA might decide not to distribute such information were specified: EPA must give PRPs an explanation if it decided not to provide this information.

Secondly, EPA should not initiate remedial action under CERCLA §104 or take any action under CERCLA §106 until 180 days after giving notice of intent to engage in procedures under the new settlement authority.

Third, PRPs should have 90 days to make a proposal responding to EPA's NPAR. If PRPs representing more than a 50 percent share of the proposed NPAR should offer to pay their allocated share or more, their settlement offer should be deemed as being made in good faith. The PRPs would be entitled to district court review of EPA's refusal to accept their offer to determine whether EPA's rejection was unreasonable. If the PRP settlement offer included everything but orphan shares, the Fund should contribute a 10 percent bonus to the cleanup costs assumed by PRPs.

House Action

The House Commerce, Judiciary and Public Works committees all addressed the topic of EPA settlement authority. In floor debate, they supported a compromise §122 on settlement which did not contain either the NPAR, compulsory settlement, or "bonus" provisions adopted in the Senate.

N. Claims Against Superfund[379]

The Amendment

Section 112 of SARA amends CERCLA §112 to simplify and regulate the process of handling response claims against the Fund.[380] The amended language, originating largely with the Administration, specifies that EPA will not approve or certify a claim under the Superfund while any suit involving costs subject to that claim is pending in court. The cumbersome sequence of negotiation and arbitration found in the original law is replaced by a conventional administrative hearing, with appeal as before to the federal courts. The burden of proof rests with the claimant, and time limits are imposed on the review process. A PRP will have 30 days to call for an administrative hearing on a rejected claim

374. See also supra text at I.N. (annotated section on natural resource damages).

375. 50 Fed. Reg. 5034 (1985), ELR Admin. Materials 30001.

376. See supra text at II.I. (annotated section on contribution).

377. 131 Cong. Rec. S12004-06 (daily ed. Sept. 24, 1985) (statement of Sen. Domenici).

378. *Id.* at S12005.

379. Legislative History Sources
Administration Proposal, H.R. 1342 S. 494, [illegible]
Senate Bill, S. 51, no provision
House Commerce Committee Report at [illegible]
House Debate, 131 Cong. Rec. [illegible] (daily ed. Dec. 5, 1985)
House Bill, H.R. 2817 §[illegible]
Conference Committee Report at 219-[illegible]
SARA §§112(a), [illegible] and [illegible]

380. SARA §112(a)(b), amends CERCLA [illegible] 42 U.S.C. §9612, [illegible] Stat. [illegible]

EPA is obliged to render a judgment in writing within 90 days (plus possible extensions), and its judgment may be overturned only if found to be arbitrary and capricious. Payment must be made to a successful claimant within 20 days of the final determination. No double recoveries for the same response may be obtained from the fund.[381]

CERCLA Prior to Amendment

CERCLA §112 sets up an elaborate procedure for claims against the Fund. A PRP is required to present its claims to other PRPs before it may seek reimbursement from Superfund.[382] Once reimbursement is requested, EPA must attempt to negotiate a settlement with the claimant and any other PRPs, using where possible the services of private claims adjusters. If a settlement cannot be reached, the claim goes to compulsory arbitration before a special Board of Arbitrators, with appeal available to federal district court.

Administration Proposal

The Administration's proposed revision of CERCLA §112 was designed to give EPA greater control over reimbursement and to ensure that the Fund was a source of last resort. Response claims would be honored only if EPA had preauthorized the response; moreover, the proposal prohibited payment during the pendency of other litigation and introduced the new administrative process eventually adopted.

Senate and House Action

The House adopted the Administration's proposal without change.[383] The Senate version, however, did not amend the reimbursement provisions.

III. FUNDING

A. Financing Superfund[384]

The Amendment

A series of new tax provisions effective January 1, 1987 replenish Superfund (renamed the Hazardous Substance Superfund[385]) with a total of $8.5 billion over five years and provide an additional $500 million financed by a motor fuels tax for EPA's new underground storage tank program.[386] The following tax resources are made available to Superfund over the next five years in addition to interest, recoveries, and penalties.[387]

Excise tax on petroleum	$2.759 billion
Excise tax on feedstock chemicals	1.365 billion
Tax on imported chemical derivatives	.057 billion
Environmental tax	2.522 billion
Appropriation from general revenues	1.250 billion

The waste management tax proposed by EPA and the House was not adopted.

Natural resource damage claims are made ineligible for reimbursement from Superfund.[388] Expenditures from Superfund are permitted for purposes authorized by CERCLA §§111(a)(1), (2), (4), (5) and (6) and §111(e) other than §§111(c)(1) and (2) as amended by SARA.

CERCLA Prior to Amendment

CERCLA §221 created a $1.6 billion Hazardous Substance Response Trust Fund which was financed from 1981 to 1985 by taxes on petroleum, feedstock chemicals, and appropriated general revenues.

Administration Proposal

The Administration proposed a $5.3 billion five-year supplement to Superfund. This would be financed by a tax on petroleum and chemical feedstocks, a waste management tax, and interest, fines, and recoveries.

Senate Action

The Senate bill proposed a $7.5 billion replenishment of Superfund. This was to be financed from a continuation of the tax on petroleum and chemical feedstocks and a new Superfund excise tax on manufacturers. The broad-based Superfund excise tax was justified by the elimination of general revenue contributions to Superfund and the Senate Finance Committee's judgment

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381. The Conference Committee omitted an additional Administration proposal to require preauthorization of response actions for reimbursement. A vestige of that change, however, appears to remain in new CERCLA §111(*o*), added by SARA §111(h) ELR Stat. 44038. This provision, derived from §111(k) of the House bill, requires EPA to develop procedures to notify persons concerned with new NPL sites of the limitations on reimbursement in §111(a)(2), where the preauthorization requirement would have been placed. The Conference Committee Report seems to indicate that the notification is now unnecessary, but it remains in the text of SARA. *See* Conference Committee Report at 218.

On the presentation requirement, the Conference Committee noted:

> Section 112(a) of current law contains a sixty-day presentation requirement relating to the initiation of claims against the Fund. Because of the absence of adequate guidance of the procedure for filing such claims, the failure of Federal or State natural resource trustees to comply with this requirement does not constitute a bar to the trustees from maintaining a claim against the Fund prior to December 11, 1983. The sixty-day presentation requirement has never applied to civil actions, nor is the selection of remedies authorized in section 112(a) irrevocable.

Conference Committee Report at 219.

On changes in the statutes of limitations, *see supra* text at II.F. (annotated section on statutes of limitations).

382. The new language does not state that other PRPs must be sued before a claim against the fund can be made. If a PRP does sue other PRPs, however, claims against the Fund will be delayed while that action is pending.

383. The provision in the House bill appears to be out of place and lacks a proper section designation where it is printed in 131 Cong. Rec. H11619, H11625-26 (daily ed. Dec. 10, 1985). As originally offered it was labelled subsection (e). *See* 131 Cong. Rec. H11171-72 (daily ed. Dec. 5, 1985). The Conference Committee refers to it as §111(e). *See* Conference Committee Report at 218.

384. Legislative History Sources

Administration Proposal, H.R. 2342 & S. 494, Title III

Senate Finance Committee Report at 3-26.

Senate Environment Committee Report at 68-69, 120-25.

Senate Debate, 131 Cong. Rec. S11996 (daily ed. Sept. 24, 1985) (statement of Sen. Stafford); 131 Cong. Rec. S11660 (daily ed. Sept. 18, 1985) (statement of Sen. Symms).

Senate Bill, S. 51, §201.

House Commerce Committee Report at 77, 220-21, 238-48.

House Public Works Committee Report at 105.

House Ways and Means Committee Report at 2-74.

House Debate, 131 Cong. Rec. H11559-11565 (daily ed. Dec. 10, 1985) (statement of Rep. Downey).

House Bill, H.R. 2817, §§501, 511-17.

Conference Committee Report at 317-335.

Senate Debate on Conference Report, 132 Cong. Rec. S14908-09 (daily ed. Oct. 3, 1986) (statement of Sen. Bentsen); 132 Cong. Rec. S14923 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).

House Debate on Conference Report, 132 Cong. Rec. H9614 (daily ed. Oct. 8, 1986) (statement of Rep. Rostenkowski); 132 Cong. Rec. H9615-17 (daily ed. Oct. 8, 1986) (statement of Rep. Daub); 132 Cong. Rec. H9622-23 (daily ed. Oct. 8, 1986) (statement of Rep. Downey).

SARA §§111(a) and (i), 204, 511-517.

385. SARA §204(a), CERCLA §221(a), 42 U.S.C. §9631(a), ELR Stat. 44065.

386. Title V of SARA enacted the Superfund Revenue Act of 1986, Pub.L. No. 99-499, §§501-531, 100 Stat. 1613 (1986). The financing of Superfund is dealt with §§511-517. The financing of the leaking underground storage tank trust fund is dealt with in §§521-522. *See also* SARA §§111(a),(i), CERCLA §111(a), (p), 42 U.S.C. §§9611(a), (p), ELR Stat. 44034, 44038; SARA §204(a), (b), CERCLA §221(a), (c), 42 U.S.C. §9631(a), (c), ELR Stat. 44065.

387. In response to a query from Senator Domenici during debate on the Conference Report on H.R. 2005, Senator Stafford stated: "Our intention is that the expenditures authorized by the Conference Report on H.R. 2005 be subject to annual appropriations acts." 132 Cong. Rec. S14923 (daily ed. Oct. 3, 1986).

388. Conference Committee Report at 321. *See generally supra* text at I.N. (annotated section on natural resource damages).

"that the cleanup of abandoned hazardous waste sites is a broad societal problem extending beyond the chemical and petroleum industries."[389] The Senate Finance Committee Report proposed that there be a limitation so that no more than 15 percent of Superfund might be used for the payment of natural resource damage claims.[390]

House Action
The House Ways and Means Committee recommended a $10 billion replenishment for Superfund. This sum was to be made up of a contribution from general revenues; petroleum and chemical feedstocks taxes and a new tax on imported derivatives of chemical feedstocks; a new tax on the treatment, storage, and disposal of hazardous waste; and a Superfund excise tax similar to that adopted by the Senate.

The House Ways and Means Committee recommended that Superfund no longer be available to pay claims for damages to natural resources.[391]

On the House floor, by a narrow margin, the Superfund excise tax proposal was rejected. The other proposed sources of replenishment of Superfund were accepted.

B. Repeal of Post-Closure Tax and Trust Fund[392]

The Amendment
Section 514 of SARA terminates the Post-Closure Tax and Trust Fund. This trust fund was authorized as part of CERCLA in 1980 to assume the liability of owners and operators of hazardous waste disposal facilities which had been closed under RCRA. The trust fund was also available to pay certain monitoring and maintenance costs. Taxpayers who paid any of the excise tax imposed on hazardous wastes deposited in the trust fund since the tax began may now file claims for refunds.[393]

The repeal of the Post-Closure Tax and Trust Fund supersedes prior agreement of the Conference Committee to hold the Post-Closure Trust Fund assets pending a GAO study on options for the program, recorded in the amendment made by SARA §201 in CERCLA §107(k).[394]

CERCLA Prior to Amendment
CERCLA §232 created the Post-Closure Liability Trust Fund financed from an excise tax imposed on hazardous waste. The tax expired on September 30, 1985.

Administration Proposal
The Administration proposed repealing the Post-Closure Liability Trust Fund.[395] As a technical amendment, it also proposed repeal of CERCLA §§107(k) and 111(j).

Senate and House Action
The Senate proposed both a study of options for a program to finance post-closure maintenance of hazardous waste disposal sites and repeal of the Post-Closure Liability Trust Fund.[396] Amounts in the Trust Fund were to be refunded effective March 1, 1989, unless by that date Congress should authorize a transfer or assumption of post-closure liability in response to the mandated study.

The House bill repealed the Post-Closure Liability Trust Fund and tax, effective October 1, 1983, the original effective date of the tax. To effect this retroactive repeal, taxpayers who paid this tax would be allowed to file for refunds.

IV. MISCELLANEOUS

A. Reportable Quantities Regulations[397]

The Amendment
SARA §102 amends CERCLA §102(a) to require EPA to promulgate final regulations establishing reportable quantities by December 31, 1986 for all hazardous substances for which proposed regulations were published in the *Federal Register* before March 1, 1986.[398] For those hazardous substances for which reportable quantities will not published before March 1, 1986, EPA must publish proposed regulations by December 31, 1986 and promulgate final regulations by April 30, 1988.

CERCLA Prior to Amendment
CERCLA §102(a) grants authority to EPA to promulgate such regulations but establishes no deadline for this action.

Administration Proposal
None.

Senate and House Action
The Senate bill contained no comparable provision. The House bill set the deadline for all reportable quantity regulations to be promulgated by December 31, 1986. The House Commerce Committee voiced concern over EPA's failure to promulgate a complete set of regulations during the five years of CERCLA's existence.[399]

B. Transportation of Hazardous Substances[400]

The Amendment
Section 202 of SARA amends CERCLA §306[401] to require that all hazardous substances be listed and regulated under the Hazardous Materials Transportation Act (HMTA)[402] within 30 days after enactment of SARA or at the time of their designation under CERCLA as a hazardous substance, whichever is later.

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389. Senate Finance Committee Report at 13.

390. *Id.* at 16.

391. House Ways and Means Committee Report at 48.

392. Legislative History Sources
Administration Proposal, H.R. 1342, §304.
Senate Finance Committee Report at 25.
Senate Debate, 131 Cong. Rec. S1997 (daily ed. Sept. 24, 1985) (statement of Sen. Stafford).
Senate Bill, S. 51, §§161, 205.
House Commerce Committee Report at 104-05, 221.
House Public Works Committee Report at 73.
House Ways and Means Committee Report at 40-4?, 51-52.
House Bill, H.R. 2817, §§201, 514.
Conference Committee Report at 260, 337.
SARA §201, §514.

393. Conference Committee Report at 337.

394. SARA §201, CERCLA §107(k)(5) and (6), 42 U.S.C. §9607(k)(5) and (6), ELR Stat. 44028.

395. H.R. 1342, 99th Cong., 1st Sess., §304, 131 Cong. Rec. H944 (daily ed. [illegible] 28, 1985).

396. S. 51, 99th Cong., 1st Sess., §§161, 205, 131 Cong. Rec. S1823 (daily ed. Feb. 22, 1985).

397. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.
House Commerce Committee Report at 67.
House Public Works Committee Report at 6.
House Bill, H.R. 2817, §102.
Conference Committee Report at 188.
SARA §102.

398. SARA §102, CERCLA §102(a), 42 U.S.C. §9602(a), ELR Stat. 44009.

399. *See* House Commerce Committee Report at 67.

400. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Bill, S. 51, §164.
House Commerce Committee Report at 105.
House Public Works Committee Report at 75.
House Bill, H.R. 2817, §202.
Conference Committee Report at 260-61.
SARA §202.

401. SARA §202, CERCLA §306, 42 U.S.C. §9656, ELR Stat. 44071.

402. Pub. L. No. 93-633, 88 Stat. 2156 (codified in various sections of 49 U.S.C.).

CERCLA Prior to Amendment
Section 306(a) of CERCLA provides only for the listing, but not for regulation, of hazardous substances under the HMTA within 90 days after December 11, 1980 or at the time of the substance's designation under CERCLA as a hazardous substance, whichever is later.

Administration Proposal
None.

Senate and House Action
The Senate bill required that each substance designated as hazardous under CERCLA be regulated, in addition to being listed, under the HMTA by June 1, 1986 or at the time of designation, whichever is later.

The House Commerce Committee noted that the addition of the requirement to regulate as well as to list hazardous materials under HMTA was intended to ensure that transporters are notified whenever hazardous substances are transported. Currently, shippers need not inform transporters unless that substance is regulated pursuant to the HMTA.[403] The House amendment required regulation under HMTA, thus mandating notification to transporters of hazardous substances. These transporters should then be able to take proper precautions when handling the hazardous substance. Section 202 of the House bill required that all hazardous substances listed under CERCLA §101(14) also be regulated as hazardous materials under the HMTA within 90 days of the enactment of SARA.

C. Pollution Insurance

(i) GAO Study of Pollution Insurance Issues[404]

The Amendment
Section 208 of SARA inserts a new subsection in CERCLA §301 calling for a General Accounting Office (GAO) study within 12 months on the insurability of hazardous substance risks.[405] The Comptroller General, in consultation with a designated study group, is instructed to evaluate: (a) current economic conditions in, and the future outlook for, the commercial market for insurance and reinsurance; (b) trends in statutory and common law remedies; (c) the impact of possible changes in standards of liability, proof, evidence, and damages on statutory and common law remedies; (d) the effect of the standards of liability under CERCLA on health, environment, and insurance availability and price; (e) current trends in judicial interpretation of applicable insurance contracts; (f) the frequency and severity of claims; (g) other impediments to obtaining insurance; and (h) effects of CERCLA liability and financial responsibility requirements on developing innovative waste treatment methods.

CERCLA Prior to Amendment
The study called for is essentially an update of a similar study provided for in CERCLA §301(b). This earlier study was prepared by the Treasury Department on whether adequate private insurance was available on reasonable terms for PRPs and was filed with Congress in 1983.

Administration Proposal
None.

Senate and House Action
The Senate bill required the President to undertake a study and report to Congress within four years on the effects of the CERCLA standards of liability and financial responsibility on the cost of, and incentives for, developing and demonstrating alternative and innovative treatment technologies.

The House bill called for a GAO study of the insurability of liability for hazardous substances risks under CERCLA. The report would be due within 18 months.

(ii) Pollution Liability Risk Retention and Group Purchase of Insurance[406]

The Amendment
Section 210 of SARA inserts a new Title IV in CERCLA on pollution insurance.[407] It authorizes entities exposed to pollution liability to form risk retention groups to assume and share pollution liability among their members and to purchase pollution liability insurance and comprehensive general liability insurance on a group basis. The risk retention authority is similar to that authorized for product liability by the Risk Retention Act of 1981 and the Risk Retention Amendments of 1986.[408]

CERCLA Prior to Amendment
No provision.

Administration Proposal
None.

Senate and House Action
The Senate Environment Committee made no proposal. A floor amendment was introduced by Senators Stafford and Bentsen to authorize companies exposed to pollution liability to form risk retention groups and to purchase insurance on a group basis. The Senate bill incorporated these provisions.

The House Commerce Committee Report recommended a year-and-a-half study of the insurability of liability arising from hazardous substances as well as authorization of risk retention groups and insurance purchasing groups for pollution coverage.

The House Public Works Committee Report also recommended the insurability study as well as risk retention and group insurance purchasing authority. The House bill incorporated these proposals.

D. Lead Contamination[409]

The Amendment
Two SARA provisions deal with the presence of lead in the en-

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403. House Commerce Commmittee Report at 105.

404. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Report, no provision.
Senate Bill, S. 51, no provision.
House Commerce Committee Report at 109.
House Public Works Committee Report at 85-86.
House Bill, H.R. 2817, §209.
Conference Committee Report at 275-76.
SARA §208.

405. SARA §208, CERCLA §301(g), 42 U.S.C. §9651(g), ELR STAT. 44069.

406. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Environment Committee Report, no provision.
Senate Debate, 131 CONG. REC. S11619-21 (daily ed. Sept. 17, 1985) (statement of Sen. Stafford); 131 CONG. REC. S11658-9 (daily ed. Sept. 18, 1985) (statement of Sen. Stafford).
Senate Bill, S. 51, §§401-405.
House Commerce Committee Report, at 40-41, 109.
House Public Works Committee Report at 85, 101-04.
House Bill, H.R. 2817, §210.
Conference Committee Report at 278.
SARA §210.

407. SARA §210, CERCLA §§401-405, 42 U.S.C. §9671-9675, ELR STAT. 44079-81.

408. 15 U.S.C. §§3901 *et seq.* *See also* the Risk Retention Amendments of 1986, Pub. L. No. 99-563. These amendments were enacted October 27, 1986.

409. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.

vironment. SARA §111(b) amends CERCLA §111(a) to authorize the use of up to $15 million of Superfund for a pilot program to remove, decontaminate, or take other action with respect to lead-contaminated soils in one to three different metropolitan areas.[410] SARA §118(f) requires the ATSDR to report to Congress on the nature and extent of lead poisoning in children from environmental sources.[411] The authorization to pay for this new study appears in SARA §111(d)(2), adding CERCLA §111(c)(14).[412]

CERCLA Prior to Amendment

CERCLA §104(i) establishes the ATSDR to implement the health-related authorities of the Act. CERCLA §111 deals with the possible uses of the monies contained in the Superfund. Neither of these sections contains a specific reference to lead.

Administration Proposal

None.

Senate and House Action

The proposed pilot program for the removal of lead-contaminated soil was introduced by Senator Kennedy (D-Mass.).[413] A study conducted in Boston showed that there were certain areas with a high incidence, thus prompting Senator Kennedy's introduction of a pilot program to study lead contamination in urban areas. It was made clear that this pilot program would in no way limit EPA's existing authority to remove lead-contaminated soil from residential yards.[414]

The requirement of a report on lead contamination in children was proposed by Senator Weicker (R-Conn.) who addressed his amendment to lead in environmental sources rather than paint or gasoline.[415] Environmental sources usually involve long-term exposure to low levels, resulting in few immediate symptoms but leading to eventual mental impairment and loss of physical ability. The study was to be funded under Superfund and would concentrate on identifying areas of high incidence.[416]

The Conference Committee adopted both amendments from the Senate bill.

E. Worker Protection Standards[417]

The Amendment

Section 126 of SARA directs the Secretary of Labor to promulgate standards for the health and safety protection of employees engaged in hazardous waste operations.[418] These standards must include specific training standards mandating a minimum of 40 hours of initial instruction off site and 3 days of actual field experience. This section operates as a free-standing provision of law rather than as an amendment to CERCLA. Regulations to implement the standards shall at least address the denoted provisions and are required to be promulgated within one year after enactment. EPA shall promulgate identical standards to apply to employees of state and local governments. Grants to nonprofit organizations who specialize in the training and education of workers engaged in hazardous waste removal shall be administered by the National Institute of Environmental Health Sciences. SARA §111(d)(2) adds a new CERCLA §111(c)(12) authorizing $10 million yearly for these grants during the 1987-1991 period.[419]

CERCLA Prior to Amendment

Section 111(c)(6) of CERCLA authorizes use of the Fund to develop a program to protect the health and safety of employees involved in response to hazardous substances releases. Such a program would be developed jointly by EPA, OSHA, and the National Institute for Occupational Safety and Health.

Administration Proposal

None.

Senate and House Action

The Senate provision authorizing an employee training and protection program was passed as an amendment to CERCLA §111(c)(6) with up to $10 million per year from Superfund considered a permissible cost.

Senator Metzenbaum (D-Ohio) proposed this amendment as an effort to rectify the lack of action from both EPA and OSHA. He noted that workers are often untrained and ill-equipped to handle the new hazards posed by the proliferation of chemical and synthetic products.[420]

Worker protection standards as addressed in the House bill were adopted by the Conference Committee with some minor changes. Originally proposed as a new CERCLA section in the House bill, SARA §126 is drafted pursuant to §6 of the Occupational Safety and Health Act.[421] Second, instead of the $10 million coming from the general fund of the Treasury, SARA provides the funds from Superfund.

F. Reports to Congress On Superfund[422]

The Amendments

Section 212 of SARA adds a new subsection to CERCLA §301 requiring EPA to make an annual report to Congress on Superfund implementation.[423] EPA is required to review feasibility studies, newly developed feasible and achievable permanent treat-

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Senate Debate, 131 CONG. REC. S11659-60 (daily ed. Sept. 18, 1985); 131 CONG. REC. S11831-33 (daily ed. Sept. 20, 1985).
Senate Bill, S. 51, §§121(f)(13), 138.
Conference Committee Report at 214, 233.
SARA §§111(b) and (d)(2), 118(f).

410. SARA §111(b), CERCLA §111(a)(6), 42 U.S.C. §9611(a)(6), ELR STAT. 44034.

411. SARA §118(f), ELR STAT. 44046, AS A NOTE TO CERCLA §118.

412. SARA §111(d)(2), CERCLA §111(c)(14, 42 U.S.C. §9611(c)(14), ELR STAT. 44036.

413. Senator Kennedy explained that children often ingest lead from lead-laden soil in their yards, leading to irreversible neurological damage. The difficulty in diagnosing lead poisoning in its early stages suggests that the sources must be made inaccessible to children. 131 CONG. REC. S11831-33 (daily ed. Sept. 20, 1985).

414. *Id.* at S11832.

415. 131 CONG. REC. S11659-60 (daily ed. Sept. 18, 1985).

416. *Id.* at S11660.

417. Legislative History Sources
Administration Proposal, H.R. 1342 S. 494, no provision.
Senate Debate, 131 CONG. REC. S11996 (daily ed. Sept. 24, 1985).
Senate Bill, S. 51, §121(g).
House Public Works Committee Report at 72-73.
House Bill, H.R. 2817, §126.
Conference Committee Report at 257-59.
SARA §§111(d)(2), 126.

418. SARA §126, ELR STAT. 44033, as a note after CERCLA §110.

419. SARA §111(d)(2), CERCLA §111(c)(12), 42 U.S.C. §9611(c)(12), ELR STAT. 44036.

420. 131 CONG. REC. S11996 (daily ed. Sept. 24, 1985).

421. But note that as discussed above, the provision stands by itself and does not amend §6.

422. Legislative History Sources
Administration Proposal, H.R. 1342 S. 494, no provision.
Senate Environment Committee Report, no provision.
Senate Debate, 131 CONG. REC. S12020-01 (daily ed. Sept. 24, 1985) (statement of Sen. Specter).
Senate Bill, S. 51, §163.
House Commerce Committee Report, no provision.
House Public Works Committee Report, no provision.
House Bill, H.R. 2817, §§111(g), 214.
Conference Committee Report at 217, 280.
SARA, §§111(g), 212.

423. SARA §212, CERCLA §301(h), 42 U.S.C. §9651(h), ELR STAT. 44069.

ment technologies, the interim treatment facilities subject to review under CERCLA §121(c), and the status of all remedial and enforcement actions. The details required in each report will be a stimulus both to the Superfund program and to congressional oversight. EPA's Inspector General is required to review the report for reasonableness and accuracy and the appropriate congressional committees are to conduct annual oversight hearings.

SARA §111(g) amends CERCLA §111(k) to require the Inspector General of each federal agency carrying out any authority under CERCLA to conduct an annual audit of the agency's uses of Superfund and report to Congress.[424]

CERCLA Prior to Amendment
CERCLA §301 requires a variety of one time reports on the CERCLA program, all of which have been filed.

Administration Proposal
None.

Senate and House Action
The Senate Environment Committee made no proposal. Senator Specter (R-Pa.) introduced a floor amendment requiring EPA and the Attorney General to make reports to Congress about Superfund enforcement actions and the terms of settlements.[425] This became §163 of the Senate bill.

The provisions in the House bill on this subject[426] call for annual audits by the Inspector Generals of all departments using Superfund and an annual EPA report to Congress on the progress achieved in implementing CERCLA.

G. Used and Recycled Oil[427]

The Amendment
SARA §114(a) amends CERCLA §114(c) to provide that service station dealers who collect for recycling used oil that is not mixed with other hazardous substances and manage the recycled oil in compliance with standards to be promulgated under RCRA are exempted from CERCLA liability for releases occurring after they have relinquished control of the recycled oil.[428] Their liability under RCRA is not affected.

SARA §114(b) adds CERCLA §101(37) to define service station dealer as any person who (1) owns or operates a filling station or a similar retail establishment engaged in the business of selling, repairing, or servicing motor vehicles; (2) derives a significant percentage of the establishment's gross revenue from the fueling, repairing, or servicing of motor vehicles; *and* (3) accepts for collection, accumulation, and delivery to an oil recycling facility oil that has been removed from a light-duty motor vehicle or household appliance.[429] To qualify, a dealer must be willing to accept oil from do-it-yourselfers but may refuse if there is reason to believe that the oil has been mixed with other hazardous substances.

As long as all requirements are met, auto dealerships and large retail establishments with a legitimate automotive service component can be excluded from liability. The requirement that a significant percentage of their revenue come from the specified activities is intended to prevent the creation of service stations fronting for hazardous waste management firms. The amendment specifically designates collection facilities established by government agencies and refuse collection services compelled by state law to collect used oil as "service station dealers." The amendment will not take effect until EPA promulgates used oil regulations under RCRA.

CERCLA Prior to Amendment
The definition of hazardous substances in CERCLA §101(14) addresses used oil only in reference to RCRA. If a hazardous waste meets the criteria of RCRA §3001, it is also considered a hazardous waste for purposes of CERCLA.

Administration Proposal
Section 4 of H.R. 1342 added a statement to clarify that a substance need not be considered a "waste" to meet the definitional requirements of hazardous substances in §101(14)(C) so long as it meets the criteria of RCRA §3001.

Senate and House Action
There was no corresponding provision in the Senate bill. The amendment offered by Representative Shelton (D-Mo.) on the House floor would have excluded used oil listed as a hazardous substance under RCRA if it is treated in such a way as to render it harmless or is managed in compliance with RCRA. EPA assured the House that this amendment would not adversely affect the recently published RCRA amendments on their enforcement.[430] The Conference Committee replaced the House amendment with a new CERCLA §114(c), attempting to deal with the 43 percent of used oil that is presently outside of the recycling system, commonly being dumped in sewers, backyards, or municipal landfills. Fear of liability under CERCLA discouraged voluntary participation in the recycling system and the exemption created by the amendment intends to eliminate this barrier.

H. Radon[431]

The Amendment
The rising concern over the problem of radon gas[432] is evidenced by the establishment in Title IV of SARA of the Radon Gas and Indoor Air Quality Research Act of 1986.[433] The congressional findings in new CERCLA §402 indicate that high levels of radon gas pose a serious health threat, existing research is fragmented and underfunded, and an adequate information base needs to be developed by the appropriate federal agencies. Section 403 outlines the research program emphasizing the gathering of data and coordination of efforts. The amendments establish an advisory committee composed of individuals from the appropriate agencies to assist and advise EPA. Within 90 days of enactment, EPA must submit to Congress an implementation plan for the

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424. SARA §111(g), CERCLA §111(k), 42 U.S.C. §9611(k), ELR Stat. 44037.

425. 131 Cong. Rec. S12020-21 (daily ed. Sept. 24, 1985) (statement of Sen. Specter).

426. H.R. 2817, 99th Cong., 1st Sess., §§111(g), 214, 131 Cong. Rec. H4659 (daily ed. June 20 1985).

427. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, §4.
House Debate, 131 Cong. Rec. H11188-89 (daily ed. Dec. 5, 1985).
Conference Committee Report at 225-28.
SARA §114.

428. SARA §114(a), CERCLA §114(c), 42 U.S.C. §9614(c), ELR Stat. 44044.

429. SARA §114(b), CERCLA §101(37), 42 U.S.C. §9601(37), ELR Stat. 44008.

430. 131 Cong. Rec. H11189 (daily ed. Dec. 5, 1985).

431. **Legislative History Sources**
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Debate, 131 Cong. Rec. S11682-85 (daily ed. Sept. 18, 1985).
Senate Bill, S. 51, §156, Title V.
House Debate, 131 Cong. Rec. H11098 (daily ed. Dec. 5, 1985).
House Bill, H.R. 2817, §§118(a), 215.
Conference Committee Report at 232, 234, 235, 312-14.
SARA §§118(b), (k), (m), 401-405.

432. Radon is a radioactive gas, formed as a product in the disintegration of radium, which is found naturally in the environment in uranium minerals. Although the problem is nationwide, an extensive "radon belt" has been identified in the Mid-Atlantic region following the detection of a contaminated worker at an employment screening.

433. SARA, Pub. L. No. 99-499, §§401-405, 100 Stat. 1613 (1986)

program. A further report is required not later than two years after enactment of SARA detailing EPA's activities occurring under this section and EPA's recommendations. This title is strictly limited to the research and development activities specified and does not authorize any regulatory programs. The amendments place a cap of $5 million for fiscal years 1987, 1988, and 1989.

SARA §118(k) directs EPA to provide to Congress a national assessment of the radon gas problem within one year of enactment of SARA.[434] The report is to include: (1) an identification of locations where radon gas is found in structures; (2) an assessment of radon levels; (3) a determination of the level which poses a threat to human health and methods to eliminate this threat; and (4) guidance and public information materials based on these findings. The second part of this section sets out a radon mitigation demonstration program designed to test methods of reducing radon gas where it threatens human health.

SARA §118(b) authorizes an additional program dealing with the removal and temporary storage of containers of radon-contaminated soil.[435] The section grants $7.5 million to New Jersey for transportation of 14,000 containers of radon-contaminated soil from residential areas to temporary storage sites designated by the governor. The cost is to be treated as payment of government response costs under CERCLA §104.

Lastly, SARA §118(m) allows the President to use innovative and alternative methods as opposed to those fully demonstrated in selecting response actions at radon-contaminated NPL sites.[436]

CERCLA Prior to Amendment
CERCLA does not contain any reference to radon.

Administration Proposal
None.

Senate and House Action
The Senate bill authorized an Indoor Air Quality Research Act. Senator Lautenberg (D-N.J.) reported that EPA has estimated that 5,000 to 20,000 lung cancer deaths each year, one-fifth of total lung cancer deaths, may be attributable to radon exposure. Increased incidence may be anticipated in the near future because of the long latency period following increased use of insulation in the 1970s. None of the provisions authorizes a regulatory program but Senator Lautenberg confirmed that radon can be addressed by EPA through the Disaster Relief Act.[437]

The House bill proposed the sections now found in SARA §118 dealing with radon. Concern was voiced in the House debate over the new and potentially deadly environmental problem of radon gas. The House attempted to overcome the lack of understanding of the harm from radon exposure by requiring the determination of hazardous levels and creating the demonstration program. The House hoped that these provisions will eventually lead to federal recommendations of methods to remedy radon contamination in homes.[438]

(i) Shortages of Skilled Personnel Study[439]

The Amendment
SARA §118(d) which directs the Comptroller General to conduct a study of the problems arising from shortages of skilled EPA personnel who are capable of carrying out response actions under CERCLA.[440]

The report must address the types of skilled personnel needed, the extent of any shortages, the pay differential between the public and private sector, the rate of attrition to the private sector, the success of Department of Defense and Office of Personnel Management programs designed to retain such personnel, and the types of training needed to increase skills of existing personnel. The study is to be completed and submitted to Congress no later than July 1, 1987.

CERCLA Prior to Amendment
No provision.

Administration Proposal
None.

Senate and House Action
The Senate bill contained no comparable provision. The House bill provided the language adopted by the Conference Committee, which changed only the required date of submission from 12 months after the date of enactment of SARA to July 1, 1987.

(ii) Study on Joint Use of Trucks[441]

The Amendment
SARA §118(j) directs EPA, in conjunction with the Secretary of Transportation, to conduct a study of vehicles used both for hazardous substances transportation and for other purposes.[442] Within 180 days after enactment of SARA, the Administrator shall submit a report to Congress containing recommendations on whether joint use should be permitted and if so, what special safeguards should be taken to minimize threats to the public health and environment from such use.

CERCLA Prior to Amendment
No provision.

Administration Proposal
None.

Senate and House Action
The Senate bill contained no comparable provision. Representative Smith (R-N.J.) proposed the amendment on the House floor to address concerns over the dual use of trucks used for hazardous materials transportation.[443] The Conference Committee adopted the identical language used in the House bill.

J. Recontracting[444]

The Amendment
SARA §104(j) adds a new paragraph (8) to CERCLA §104(c)

434. SARA §118(k), ELR Stat. 44047, as a note after CERCLA §118.
435. SARA §118(b), ELR Stat. 44046, as a note after CERCLA §118.
436. SARA §118(m), ELR Stat. 44048, as a note after CERCLA §118.
437. 131 Cong. Reg. S11682-85 (daily ed. Sept. 18, 1985).
438. 131 Cong. Rec. H11098 (daily ed. Dec. 5, 1985)
439. **Legislative History Sources**
Administration Proposal, H.R. 1342 S. 494, no provision
House Bill, H.R. 2817, §118(c)
Conference Committee Report at 233.
SARA §118(d).
440. SARA §118(d), ELR Stat. 44046, as a note at the end of CERCLA §118.
441. **Legislative History Sources**
Administration Proposal, H.R. 1342 S. 494, no provision.
House Debate, 131 Cong. Rec. H11193-94 (daily ed. Dec. 5, 1985).
House Bill, H.R. 2817, §216.
Conference Committee Report at 234.
SARA §118(j).
442. SARA §118(j), ELR Stat. 44047, as a note at the end of CERCLA §118.
443. 131 Cong. Rec. H11193-94 (daily ed. Dec. 5, 1985)
444. **Legislative History Sources**
Administration Proposal, H.R. 1342 S. 494, no provision
Senate Debate, 131 Cong. Rec. S11833 (daily ed. Sept. 20, 1985) (statement of Sen. Kennedy).
Senate Bill, S. 51, §113.
House Debate, 131 Cong. Rec. H11175-76 (daily ed. Dec. 5, 1985) (statement of Rep. Eckart)

authorizing EPA to undertake or continue interim remedial action when additional contamination is found which necessitates recontracting.[445] The interim actions may not exceed $2 million.

CERCLA Prior to Amendment
No provision.

Administration Proposal
None.

Senate and House Action
Section 113 of the Senate bill was introduced by Senator Kennedy (D-Mass.) in an effort to avoid any disruption of a cleanup action when EPA is required to recontract for remedial services. The amendment would allow EPA more flexibility in choosing an alternative cleanup procedure if additional contamination is found.[446]

Although the House bill did not originally address recontracting, Representative Eckart (D-Ohio) offered the identical amendment later on the floor after stressing that many cleanups are delayed by a lengthy rebidding process.[447]

K. Ocean Incineration[448]

The Amendment
SARA §127 makes a number of amendments to CERCLA and the Marine Protection, Research, and Sanctuaries Act (MPRSA)[449] concerning liability arising from ocean incineration of hazardous substances. The amendments made to CERCLA §107 by SARA §127(b) equate the liability for releases from ocean incineration vessels to liability of land-based facilities.[450] In revised CERCLA §108(a), EPA is directed to require additional evidence of financial responsibility for ocean incineration vessels "appropriate for activities with similar risks."[451] SARA §127 makes clear that the MPRSA does not preempt any person's right to seek damages or enforcement of any applicable state law or to seek damages under any other federal law.[452] SARA §127(e) amends CERCLA §107(h) to clarify that a vessel owner may still be liable under maritime tort law.[453] EPA has announced its intention to promulgate final regulations covering permits for incineration of wastes at sea.[454]

CERCLA Prior to Amendment
Prior to amendment by SARA, CERCLA made no reference to ocean incineration of hazardous substances. CERCLA §107 holds land-based facilities liable for full cleanup costs plus up to $50 million in natural resource damages resulting from a release. The liability for pollution from a vessel is limited to $5 million per vessel. CERCLA §108 requires evidence of limited amounts of financial responsibility for vessels involved in the handling of hazardous wastes.

Administration Proposal
None.

Senate and House Action
Senator Bentsen (D-Tex.) proposed this amendment in order to eliminate the distinction between liability for ocean incineration and liability for land-based disposal of hazardous wastes. The amendment would treat each similarly and make clear that tort liability was not preempted. This increase in potential liability means that additional evidence of financial responsibility is needed to assure ability to cover such liabilities.[455] The House bill was nearly identical to that of the Senate, but did not address the applicability of the MRPSA and maritime tort law.

Conference Committee Report at 193-94.
SARA §104(j).

445. SARA §104(j), CERCLA §104(c)(8), 42 U.S.C. §9604(c)(8), ELR Stat. 44013.

446. 131 Cong. Rec. S11833 (daily ed. Sept. 20, 1985).

447. 131 Cong. Rec. H11175 (daily ed. Dec. 5, 1985).

448. Legislative History Sources
Administration Proposal, H.R. 1342/S. 494, no provision.
Senate Debate, 131 Cong. Rec. S11919 (daily ed. Sept. 23, 1985) (statement of Sen. Bentsen).
Senate Bill, S. 51, §108.
House Bill, H.R. 2817, §127.
Conference Committee Report at 259.
SARA §127.

449. 16 U.S.C. §§1401-1445, ELR Stat. 41861.

450. SARA §127(b), CERCLA §107(a)(3)-(4), (c)(1), 42 U.S.C. §9607(a)(3)-(4), (c)(1), ELR Stat. 44024.

451. SARA §127(c), CERCLA §108(a), 42 U.S.C. §9608(a), ELR Stat. 44029.

452. SARA §127(d), MPRSA §106, 33 U.S.C. §1416, ELR Stat. 41866.

453. SARA §127(e), CERCLA §107(h), 42 U.S.C. §9607(h), ELR Stat. 44026.

454. 50 Fed. Reg. 8222 (Feb. 28, 1985).

455. 131 Cong. Rec. S11919 (daily ed. Sept. 23, 1985).