

Calendar No. 371

105TH CONGRESS }
2d Session }

SENATE

{ REPORT
105-192 }

**SUPERFUND CLEANUP ACCELERATION ACT
OF 1998**

—————

REPORT

OF THE

**COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE**

together with

**ADDITIONAL, SUPPLEMENTAL, AND MINORITY VIEWS
TO ACCOMPANY**

S. 8



May 19, 1998.—Ordered to be printed

SUPERFUND CLEANUP ACCELERATION ACT OF 1998

Calendar No. 371105TH CONGRESS }
2d Session }

SENATE

{ REPORT
105-192 }

SUPERFUND CLEANUP ACCELERATION ACT OF 1998

—————
REPORT

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

together with

ADDITIONAL, SUPPLEMENTAL, AND MINORITY VIEWS

TO ACCOMPANY

S. 8



May 19, 1998.—Ordered to be printed

—————
U.S. GOVERNMENT PRINTING OFFICE

48-479

WASHINGTON : 1998

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED FIFTH CONGRESS

JOHN H. CHAFEE, Rhode Island, *Chairman*

JOHN W. WARNER, Virginia

ROBERT SMITH, New Hampshire

DIRK KEMPTHORNE, Idaho

JAMES M. INHOFE, Oklahoma

CRAIG THOMAS, Wyoming

CHRISTOPHER S. BOND, Missouri

TIM HUTCHINSON, Arkansas

WAYNE ALLARD, Colorado

JEFF SESSIONS, Alabama

MAX BAUCUS, Montana

DANIEL PATRICK MOYNIHAN, New York

FRANK R. LAUTENBERG, New Jersey

HARRY REID, Nevada

BOB GRAHAM, Florida

JOSEPH I. LIEBERMAN, Connecticut

BARBARA BOXER, California

RON WYDEN, Oregon

JIMMIE POWELL, *Staff Director*

J. THOMAS SLITER, *Minority Staff Director*

C O N T E N T S

	Page
General statement:	
Introduction	1
Overview of current law	4
Problems and solutions:	
Liability	5
Remedy selection	6
Brownfields	8
State role	9
Community participation	10
Natural resource damages	11
Federal facilities	12
Section-by-section summary:	
Section:	
Short title; table of contents	13
TITLE I—BROWNFIELDS REVITALIZATION	
Section:	
Sec. 101. Brownfields	13
Sec. 102. Assistance for qualifying State voluntary release programs	17
Sec. 103. Enforcement in cases of a release subject to a State plan ..	17
Sec. 104. Contiguous properties	20
Sec. 105. Prospective purchasers and windfall liens	21
Sec. 106. Safe harbor innocent landholders	23
TITLE II—STATE ROLE	
Section:	
Sec. 201. Transfer to the States of responsibility at non-Federal National Priorities List facilities	24
TITLE III—LOCAL COMMUNITY PARTICIPATION	
Section:	
Sec. 301. Definitions	30
Sec. 302. Public participation generally	31
Sec. 303. Improvement of public participation in the superfund decisionmaking process; local community advisory groups; technical assistance grants	31
Sec. 304. Technical outreach services for communities	34
Sec. 305. Agency for Toxic Substances and Disease Registry	34
Sec. 306. Understandable presentation of materials	36
Sec. 307. No impediment to response actions	36
TITLE IV—SELECTION OF REMEDIAL ACTIONS	
Section:	
Sec. 401. Definitions	36
Sec. 402. Selection and implementation of remedial actions	37
Sec. 403. Remedy selection methodology	47
Sec. 404. Remedy selection procedures	49
Sec. 405. Completion of physical construction and delisting	51
Sec. 406. Transition rules for facilities currently involved in remedy selection	52
Sec. 407. National Priorities List	53
TITLE V—LIABILITY	
Section:	
Sec. 501. Liability exceptions and limitations	54
Sec. 502. Contribution from the fund	58
Sec. 503. Expedited settlement for certain parties	59
Sec. 504. Allocation of liability for certain facilities	60
Sec. 505. Certain facilities owned by local governments	65

	Page
Section-by-section summary—Continued	
Section—Continued	
Sec. 506. Liability of response action contractors	66
Sec. 507. Release of evidence	68
Sec. 508. Contribution protection	69
Sec. 509. Treatment of religious, charitable, scientific, and edu- cational organizations as owners or operators	69
Sec. 510. Common carriers	70
Sec. 511. Limitation on liability of railroad owners	70
Sec. 512. Liability of recyclers	71
Sec. 513. Requirement that cooperation, assistance, and access be provided	74
TITLE VI—FEDERAL FACILITIES	
Section:	
Sec. 601. Transfer of authorities	74
Sec. 602. Innovative technologies for remedial action at Federal fa- cilities	75
Sec. 603. Full compliance by Federal entities and facilities	77
TITLE VII—NATURAL RESOURCE DAMAGES	
Section:	
Sec. 701. Restoration of natural resources	78
Sec. 702. Consistency between response actions and resource res- toration standards	79
Sec. 703. Contribution	79
Sec. 704. Mediation	80
Sec. 705. Coeur d'Alene basin	80
Sec. 706. Effective date	80
TITLE VIII—MISCELLANEOUS	
Section:	
Sec. 801. Result-oriented cleanups	84
Sec. 802. Obligations from the fund for response actions	85
Sec. 803. Recycled oil	86
Sec. 804. Law enforcement agencies not included as owner or opera- tor	87
Sec. 805. Lead in soil	88
Sec. 806. Pesticides applied in compliance with law	90
Sec. 807. Technical corrections	91
TITLE IX—FUNDING	
Section:	
Sec. 901. Authorization of appropriations from the fund	91
Sec. 902. Orphan share funding	92
Sec. 903. Department of health and human services	92
Sec. 904. Limitations on research, development, and demonstration programs	92
Sec. 905. Authorization of appropriations from general revenues	93
Sec. 906. Additional limitations	93
Sec. 907. Reimbursement of potentially responsible parties	93
Hearings	93
Rollcall votes	97
Regulatory impact	98
Mandates assessment	100
Comment from the General Accounting Office	101
Cost of legislation	104
Additional views of:	
Senator Kempthorne	113
Senator Bond	115
Supplemental views of Senators Allard and Wyden	117
Minority views of:	
Senators Baucus, Lautenberg, Moynihan, Lieberman, Boxer, and Wyden .	119
Letters from:	
Vice President	121
Administrator, Environmental Protection Agency	121
Secretary of the Interior	122
Secretary of Agriculture	122
Assistant Attorney General for Legislative Affairs, Department of Justice	123

	Page
Minority views of—Continued	
Senators Baucus, Lautenberg, Moynihan, Lieberman, Boxer, and Wyden—Continued	
Letters from—Continued	
Chairman, Council on Environmental Quality	124
Assistant Secretary of Commerce for Oceans and Atmosphere	125
Senators Baucus and Lautenberg	126
Changes to existing law	198

Calendar No. 371

105TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 105-192

SUPERFUND CLEANUP ACCELERATION ACT OF 1998

MAY 19, 1998.—Ordered to be printed

Mr. CHAFEE, from the Committee on Environment and Public Works, submitted the following

REPORT

together with

ADDITIONAL, SUPPLEMENTAL, AND MINORITY VIEWS

[To accompany S. 8]

The Committee on Environment and Public Works, to which was referred the bill (S. 8) to reauthorize and amend the Comprehensive Environmental Response, Liability, and Compensation Act of 1980, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

GENERAL STATEMENT

Introduction

The Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA” or “Superfund”) was signed into law on December 11, 1980. The law was enacted in large part to address contamination at abandoned sites and other facilities that were not covered by the Resource Conservation and Recovery Act (RCRA), the only Federal law in effect at the time governing the management of hazardous waste at active facilities. Extensive amendments to the law were enacted in 1986 in the Superfund Amendments and Reauthorization Act (SARA). In 1990, the Omnibus Budget Reconciliation Act extended the Superfund programs and taxes without modification. The program authorization was extended until September 30, 1994. The authorization for the collec-

tion of Superfund taxes expired on December 31, 1995. These taxes a corporate environmental income tax imposed on a broad range of businesses, a tax on chemical feedstocks, and a tax on crude oil generated approximately \$1.5 billion per year.

CERCLA, as amended, provides, among other things, a comprehensive legal framework for the Federal government to respond to uncontrolled releases of hazardous substances from a facility or vessel. It accomplishes this through a liability scheme imposed on a broad range of responsible parties that enables the Federal government to order responsible parties to order responsible parties to cleanup releases or threatened releases of hazardous substances. The law is backed up with Federal funding, giving the government flexibility to conduct cleanups itself and then seek reimbursement for cleanup costs from responsible parties.

Since its enactment in 1980, CERCLA and the Environmental Protection Agency's (EPA's) implementation of the law has been the subject of substantial controversy. The Office of Technology Assessment (OTA), the Government Accounting Office (GAO), Congressional committees and environmental organizations and others have published numerous reports criticizing, among other things, EPA's program management, the slow pace of cleanups, the cost of cleanups, protracted litigation involving hundreds and sometimes thousands of potentially responsible parties (PRPs),¹ including individuals and small businesses, lack of State and community involvement in cleanup decisions, and disincentives to cleanup industrial sites known as brownfields.

The statistics associated with Superfund program certainly suggest that there are too many unresolved sites; the costs are too high; and too many parties are caught in the web of Superfund liability: When the law was first enacted, it was expected that only a few hundred sites would require Federal attention and that cleanups could be accomplished with relatively limited Federal funding. Almost 41,000 sites, however, have been included on EPA's national inventory of hazardous waste sites, the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS). While EPA has determined that Federal action is not warranted at this time at 30,917 sites; it has placed 1,414 sites on the National Priorities List (NPL) since 1980. Currently, there are 1,197 NPL sites, with Federal facilities accounting for 151 of the total. In addition, EPA has proposed to list an additional 54 sites and estimates that 150 to 250 more sites may be added over the next 5 years. Only 162 sites have ever been deleted from the NPL.

The costs of cleanup activities at sites also has exceeded original expectations. The Congressional Budget Office (CBO) estimates that cleanup costs now average approximately \$22 million per site. This average is likely to increase as more complex sites move into the cleanup phase. EPA estimates that private parties have committed more than \$14 billion to cleanup sites under Superfund since the program began. According to a January 1994 Congress-

¹ Under CERCLA, the term "potentially responsible party" or "PRP" has come to be understood to include both those parties that are actually determined to be liable for response costs under section 107 (also known as "responsible parties") and those whose liability has not yet been resolved.

sional Budget Office study, the total amount of public and private monies spent on Superfund from 1980–1994 is approximately \$30 billion, a significant portion of which has gone to litigation costs.

And the number of cases in litigation continues to increase. In each year between 1992 and 1996, the Justice Department filed 100 to 150 new cases against PRPs. Parties named by EPA as PRPs, in turn, filed thousands of claims against third parties, many of who are individual homeowners who disposed of municipal solid waste, small businesses, charitable organizations and school districts.

EPA has recognized some of the problems associated with the Superfund program. The current Administration has undertaken three rounds of administrative reforms. On October 2, 1995, Administrator Browner announced 20 administrative reforms that were intended to accomplish three main goals: (1) make smarter cleanup choices that protect public health and the environment; (2) reduce litigation by achieving common ground instead of conflict; and (3) ensure that States and communities are better informed about and more involved in the decision making process with respect to cleanup actions. The Administration's initiatives reflect an important first step in the effort to improve the implementation of the law. Congressional authorization, however, is needed to expand and improve the Administration's reforms. Additional refinements are also appropriate to enhance their effectiveness. By adding express authorization for recent Administration reforms, the bill provides clarity regarding appropriate criteria and procedures for their implementation.

The Superfund Cleanup Acceleration Act of 1998 (S. 8) shares the fundamental goals of the Administrations reforms and builds upon those reforms. The bill makes significant improvements in each of the major provisions of the law. Among other things, the bill:

- establishes a “fair share allocation process” eliminating the unfairness of joint and several liability and provides for orphan share funding for insolvent and defunct parties;
- exempts from liability altogether many small businesses, parties whose disposed of municipal solid waste, and generators of truly minimal amounts of waste (de micromis parties);
- simplifies the remedy selection process, replacing the rigid statutory presumption in favor of treatment and the automatic adoption of all applicable or relevant and appropriate environmental requirements (ARARs) with a new, more flexible balancing test that considers: effectiveness of the remedy; long-term reliability; short term risks to the community; acceptability of the remedy to the community; implementability of the remedy; and the reasonableness of the cost;
- allows States to assume responsibility for response actions at non-Federal NPL sites;
- provides funding for grants to States, local governments, and other qualified agencies to identify and characterize or cleanup contaminated brownfield sites;
- clarifies the measure of damages for a natural resource damages (NRD) claim to include the costs of actual restoration of the resource, the costs of providing interim replacements for lost uses

- associated with the resource; and the reasonable costs of assessing the injury; and
- reauthorizes the Superfund program for a total of \$7.5 billion over 5 years, with orphan share to be funded by additional mandatory spending of \$1.45 billion over the same period.

Overview of Current Law

Superfund imposes liability for response costs, natural resource damages and the cost of any health assessment or health effects study on four categories of persons: present owners and operators of a Superfund facility; certain past owners and operators; waste generators; and transporters that arrange for the disposal of waste at a facility. Section 107(a) creates a cause of action for cost recovery by the United States, a State, or any other person who has incurred recoverable costs associated with the cleanup of a site. Section 113 also creates a cause of action by any person who has incurred recoverable costs for “contribution” from any other person who is liable or potentially liable for such costs under section 107(a).

The law itself does not mandate strict, joint or several liability. However, the courts have unanimously held that Section 107 liability is strict in that it applies without regard to fault on the part of the responsible party.² Similarly, the courts have developed a uniform rule applying joint and several liability to Section 107 in cases where the harm caused by the release of a hazardous substance is indivisible. Under this principle, a single party could theoretically be held liable for all the cleanup costs at a site.³

Whenever there is a release of a hazardous substance, section 104 authorizes EPA to remove the substance and take appropriate remedial action to protect human health and the environment. EPA can carry out either a response action or a remedial action itself under section 104 and, in most cases, recover the costs from responsible parties. Alternatively, EPA can order responsible parties to undertake a response action under section 106. Responsible parties who refuse to comply with a section 106 order, and cannot demonstrate “sufficient cause” for noncompliance, are liable for treble damages and civil penalties of up to \$25,000 per day of noncompliance. In practice, EPA’s authority under section 106 serves as an effective incentive for many responsible parties to enter into administrative consent orders to conduct response actions and avoid the costs of litigation as well as penalties.

CERCLA Section 121 governs the remedy selection process. For a site that is listed on the NPL, a Remedial Investigation/Feasibility Study (RI/FS) is performed to characterize contamination at the site and identify alternative remedial approaches. EPA then develops a remedial action plan that sets forth the cleanup goals for the site and discusses a range of alternative remedial actions issues to cleanup the site. EPA must ultimately select a remedy “that is protective of human health and the environment, that is cost-effective, and that utilizes permanent solutions and alternative treatment

²See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808–809 (S.D. Ohio 1983).

³See *United States v. DiBiase*, 45 F.3d 541, 544 (1st Cir. 1995).

technologies or resource recovery technologies to the maximum extent practicable.”

In addition to liability for response costs, responsible parties are also liable under section 107 for damages for “injury to, destruction of, or loss of natural resources resulting from such a release [of a hazardous substance].” The term natural resources is broadly defined in section 101 to include “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, or otherwise controlled by the United States, any State or local government, foreign government, or Indian Tribe.”

Unlike actions for response costs that are filed by EPA, natural resource damages claims are brought by Federal, State and Tribal trustees for the natural resources within their trusteeship. Trustees are responsible for assessing the injury to natural resources, recovering damages from PRPs to restore the resource, and implementing a plan to restore or acquire equivalent resources. Any monetary damages recovered under a natural resources claim may be used only to restore, replace or acquire the equivalent of the injured natural resource. The Superfund may not be used to pay for natural resource restoration activities.

PROBLEMS AND SOLUTIONS

Liability

The heart of the controversy surrounding the Superfund program lies in its judicially-imposed scheme of strict, joint and several liability. While this liability structure has made it relatively easy for the government to prosecute claims for response costs, it has also served to substantially increase litigation, bring thousands of parties into the Superfund process who were never intended to be included, and delay the cleanup of countless sites.

Imposing joint and several liability has effectively created an incentive for third party litigation. Under CERCLA’s liability scheme, EPA need only identify one or a few responsible parties at a site, but it can still seek to recover all of the response costs associated with the clean up of a site, regardless of the actual contribution of those parties to the site. Those responsible parties, in turn, have every incentive to try to involve as many other PRPs as possible in order to share the costs and minimize their own exposure. Thus, at some sites, responsible parties have filed third party actions against thousands of PRPs, often including individuals and small businesses. In many cases, those additional parties contributed only non-hazardous, household waste, or truly minimal amounts of hazardous waste (de micromis contributors) to a site. Even if those parties are ultimately able to settle the claims, they incur significant and unnecessary litigation expenses.

There is broad agreement that the statute must specifically exempt certain categories of PRPs who are now caught in the Superfund liability web.

For small businesses and other PRPs who contribute only a small amount of waste to a site so-called de minimis contributors improvements must be made to the settlement process. Current law authorizes EPA to enter into expedited settlements with de

minimis parties. These settlement agreements then provide protection to the settling parties from any third party litigation, as well as from any further cost recovery action by EPA. Until recently, however, EPA has been slow to take advantage of this tool. To date, EPA has negotiated de minimis settlements at only 171 sites covering approximately 15,000 parties.

A significant number of Superfund sites are the result of disposal activities at former municipal landfills. Although the vast majority of the materials in these facilities is ordinary household trash and non-hazardous industrial waste, small amounts of hazardous materials are also found (*e.g.*, mercury in batteries or chemicals and solvents in household cleaners). Because municipalities and local governments operated many of these landfills, they are subject to Superfund liability. Similarly, the individuals and businesses that sent their trash to these facilities may also be held liable. This interpretation of the liability provisions has been condemned as unfair and, to a large extent, unintended. The bill addresses the issue of liability for activities relating to the disposal of municipal solid waste by capping the liability of owners and operators of disposal facilities and exempting parties that disposed of municipal solid waste.

Significant concerns have also been raised about the transaction costs that responsible parties incur as a result of CERCLA litigation. Transaction costs include legal expenses and any other costs not directly associated with cleanup activities. According to a 1994 study by the RAND Corporation, transaction costs constitute between 30–36 percent of the total Superfund spending by private parties. The percentage of transaction costs is even higher in the context of total amounts spent by insurance companies for Superfund-related claims. Much of the litigation under Superfund relates directly to the issue of whether Superfund response costs are covered by the insurance policies that were typically issued until before CERCLA was enacted. Because of that litigation, the 1994 RAND study found that 88 percent of the Superfund-related expenses of insurers went to transaction costs, and only 12 percent to actual cleanup.

The bill will reduce transaction costs by reducing litigation. The bill's fair share allocation system is expected to facilitate the orderly resolution of many claims against PRPs without the delay or added costs of judicial proceedings. Eliminating the liability of thousands of small PRPs and capping the liability of others at co-disposal sites should further reduce transaction costs and avoid much of the third party litigation that occurs today.

Remedy Selection

The primary criticism of CERCLA's remedy selection process is that it results in remedies that cost too much and that take too long to complete. The subsidiary effect of this is that responsible parties are more likely to try to challenge agency decisions or to delay the final selection and implementation of a remedy. Also, the more costly the remedy, the more likely it is that responsible parties will seek to include other potentially PRPs to share the costs.

In large part, the focus of the criticism has rested on the statute's preference for treatment. In 1986, Superfund was a relatively

new program. Expectations were high that cost-effective treatment technologies would be developed. In practice, however, in a number of cases, effective treatment technologies have not been readily available or they have been inordinately costly. Moreover, in some cases, the preference may not be appropriate. For example, both the National Academy of Sciences and EPA have recognized that stabilizing and capping some waste sites may provide a more cost-effective and realistic way to protect public health than treatment. EPA has developed guidance documents in an effort to provide better criteria for the application of the preference for treatment. The fundamental problem, however, is that the preference for treatment is still the law. Until the statute is revised, EPA's authority to use its discretion in applying the preference is limited.

The bill addresses this problem by replacing the statutory preference for treatment with an emphasis on the long-term reliability of a remedy. This new approach would provide EPA with considerably more discretion to select among remedies that include the use of containment options and institutional and engineering controls. In many cases, applying these management options may substantially reduce the costs of a remedial action, without jeopardizing human health or the environment.

The costs of remedial actions have also been driven up by CERCLA's requirement that cleanup standards incorporate ARARs. There is little dispute that a remedial action should comply with any Federal or State requirements regarding the safe cleanup level for a particular contaminant. It is less evident, however, that cleanup decisions should always satisfy other "relevant or appropriate requirements" for a contaminant. In some cases, it is difficult even to identify the "relevant and appropriate requirements." This can result in cleanup goals and remedies that differ from one site to another. Even within a single State, Superfund remedial program managers may differ on the issue of whether a particular State requirement is "relevant" to a Superfund cleanup. This inconsistency contributes to uncertainty, protracted site evaluation, extensive debate over cleanup goals, higher cleanup costs, and an overall delay in completing cleanups.

The bill would delete the law's "relevant and appropriate" language, requiring instead that remedies comply with legally applicable standards and attain specified human health and environmental protection levels.

There is continuing uncertainty regarding the extent to which the cost of a remedy is to be considered in the remedy selection process. Current law requires both that the Agency consider cost in assessing remedial alternatives, and that response actions be cost-effective. EPA guidance further clarifies how cost-effectiveness is determined and how cost is factored into remedial action alternative balancing. The PRP community, however, claims that cost considerations are often ignored or minimized in EPA's remedy selection decision process. The bill reaffirms the significance of cost considerations in the remedy selection process, adding a new cost factor for consideration. Under the bill, EPA must consider, among other things, the reasonableness of the cost of a remedy.

To further minimize unnecessary costs associated with some cleanups, the bill expressly authorizes EPA to take into consider-

ation the reasonably anticipated future land use of a site. Applying appropriate future use standards and restrictions allows responsible parties to tailor their cleanup actions and resources to address the real risks that may be posed by the site. If a site is to be redeveloped for industrial purposes, for example, there is little dispute that responsible parties should not have to clean up the site to the level that would be required if it were to be developed for residential purposes. This is consistent with recent EPA policy that states that EPA will no longer assume that a site will be used for residential purposes, unless a determination is made to that effect. Institutional controls may be used in conjunction with land use assumptions to ensure that adequate protection is provided when contamination remains after cleanup is completed.

Brownfields

Fear of potential or actual Superfund liability has proven to be a substantial obstacle to the redevelopment of contaminated industrial property. In a 1996 Report to Congress, GAO concluded that "Superfund's liability provisions make brownfields more difficult to redevelop, in part, because of the unwillingness of lenders, developers, and property owners to invest in a redevelopment project that could leave them liable for cleanup costs." (*Superfund: Barriers to Brownfield Redevelopment* at 2, GAO RCED-96-125, June 1996). As a result, a number of contaminated, and in some cases uncontaminated, existing industrial sites remain vacant and unused while companies develop new facilities in suburban and rural "greenfields" to avoid the specter of potential environmental liability.

The redevelopment of brownfields is largely an urban concern, although one that affects communities of all sizes. GAO has estimated that there are approximately 150,000 brownfield acres in major U.S. cities. The U.S. Conference of Mayors conducted a survey in 1996 that identified more than 20,000 brownfields sites in just 39 cities alone. In that survey, 33 cities estimated that they lose as much as \$386 million in tax revenues each year because of lost development opportunities. There is broad consensus among State and local governments that reforms to promote brownfield redevelopment must be a priority of any Superfund reauthorization.

One of the fundamental obstacles identified by State and local government officials to the redevelopment of brownfields is the lack of funds for site identification and cleanup. In some cases, a relatively inexpensive site assessment will reveal that a site for potential redevelopment is, in fact, uncontaminated or requires only minimal cleanup. Yet, unless the site assessment is conducted, that site will generally remain unused because of the fear of liability. A site assessment can remove that fear. The bill, therefore, provides \$75 million in annual funding for EPA to establish a revolving loan and grant program for brownfield characterizations and assessments. The funds can also be used to cleanup sites, again helping eliminate disincentives to redevelopment. This relatively modest investment to capitalize revolving loan funds can be leveraged against other sources of funding.

The bill builds upon the State voluntary cleanup programs and also provides incentives to encourage voluntary cleanups of sites.

First, it authorizes \$25 million per year to provide technical and financial assistance to States to establish and administer voluntary cleanup programs. Many States have established voluntary cleanup programs to encourage landowners to address less contaminated sites and promote commercial development. The underlying principle is that sites that have only low levels of contamination are less likely to be cleaned up if the burdens associated with cleanup are too high. Given the fact that EPA has determined that Federal action is not warranted at over 30,000 sites, it is clear that if these sites are to be addressed at all, it will probably be through State programs. By streamlining the cleanup process, State voluntary programs can effectively increase the number of sites that are actually cleaned up.

Second, it provides finality for cleanups conducted under a State program. The incentive for landowners for agreeing to conduct cleanups is the assurance that they receive that the property has been cleaned up to the State's satisfaction and they will not be subject to further enforcement for that site.

State Role

States have gained substantial experience since the enactment of the 1986 amendments to Superfund in managing cleanups at contaminated sites. Most States have enacted their own "mini-Superfund" laws, many with far-reaching cleanup and liability provisions. The Environmental Law Institute surveyed programs across the country and found that only Nebraska and the District of Columbia do not have some type of cleanup fund available to help pay for site cleanups. (See, *An Analysis of State Superfund Programs: 50-State Study*. The record also reflects that States are actively implementing the laws on their books. The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) reports that, as of March 1996, 31 States were conducting emergency removals; 32 were conducting other removal actions; 34 were conducting remedial actions; and 34 were engaged in operation and maintenance at non-NPL sites. In light of the States' increased involvement in site cleanups under State programs, as well the simple fact that EPA lacks the resources to address the universe of contaminated sites, States argue that they should be authorized to play a larger role in implementing Superfund.

Under current law, the State's role in Superfund process is fairly limited. Most significantly, EPA is ultimately responsible for the selection of a remedy at an NPL site. Before undertaking any remedial action, EPA must consult with the affected State, but the State's concurrence is not a prerequisite to proceeding. Similarly, section 121 requires EPA to consider ARARs, including State environmental standards, but EPA may waive ARARs under certain limited conditions. (States can challenge a waiver.) As a final recourse, a dissatisfied State can hold up a Fund-financed cleanup by refusing to pay its 10-percent cost share, which is a prerequisite to proceeding with a remedial action.

Although the law does not authorize delegation of the Superfund program, the 1986 amendments expanded the authority of EPA to enter into a cooperative agreement with a State allowing the State

to act as the lead agency at NPL sites. Under a cooperative agreement, a State effectively assumes responsibility for implementing response actions in consultation with EPA. A State may recommend a proposed remedy, but EPA approval is still required. The decision of whether to enter into a cooperative agreement, moreover, rests with EPA.

Having “dual masters” Federal and State regulators involved at a sites has led to confusion and uncertainty in some cases. Disagreements between the regulators regarding the application of ARARs or the ultimate selection of the remedy, for example, can significantly delay a cleanup and increase the costs. Similarly, a decision by EPA to waive a State cleanup standard can leave open the possibility that the State will seek to impose additional cleanup requirements under its State law.

The bill recognizes that many States now have both the resources and the technical expertise necessary to conduct and oversee remedial actions at NPL and NPL-caliber sites. It provides that EPA may either delegate responsibility for the Superfund program to a requesting State or, alternatively, authorize the State program to operate in lieu of the Federal Superfund program. Whether the State operates under a delegated or an authorized program, it must still ensure that human health and the environment are protected. Under this new authority, States will have the ability to make their own decisions regarding the selection of remedial actions. They will have access to the Federal Fund to carry out the program. Significantly, States will assume sole responsibility for enforcement of the remedy at a site (except under exceptional circumstances). This should eliminate one of the principle concerns that responsible parties have raised about State-led cleanups.

Community Participation

While much of the criticism of the Superfund program has come from responsible parties, the communities that are affected by the listing of sites and delays in cleanup decisions have also raised concerns about the implementation of the program. There is general agreement that early involvement of affected communities and stakeholders in the Superfund decision making process may reduce conflicts and delays. However, community advocates have testified that citizen involvement is not yet a meaningful part of the process. In order to accomplish that, changes must be made to the law to enhance citizen participation in the decision making process.

Current law generally provides that remedial action plans are to be made available for review and comment by the public. More significant is the authorization for technical assistance grants (TAGs) of up to \$50,000 to be made available to citizens potentially affected by Superfund remedial actions. TAGs are designed to provide local communities with funding to evaluate potential risks to human health and the environment posed by contamination at a Superfund site, as well as by any alternative remedies proposed. They are intended to enable citizens to participate more meaningfully in the remedy selection process. Concerns have been raised, however, that the process for obtaining TAGs is too cumbersome and therefore limits their effectiveness.

The bill makes several important improvements to the community participation provisions of Superfund to address these concerns. First, it establishes Community Advisory Groups (CAGs) consisting of local citizens. These CAGs are intended to serve as a conduit of information for local communities, enabling them to play a more active role during the remedial action planning and implementation process. The bill also streamlines the process for obtaining TAGs and eliminates the 20-percent match requirement of current law.

Natural Resource Damages

Although the focus of attention and controversy over the past few years has been on issues relating to cleanup liability, the filing of an increasing number of NRD claims has raised concerns about the scope and implementation of the NRD program. One witness during Committee hearings characterized the NRD program as “an awakening sleeping giant of environmental liability.”

The fundamental problem is that the statute does not currently provide a clear statement as to what costs a responsible party will be held liable for under the NRD program. Regulations and case law, in contrast, provide for recovery of damages for: (1) restoration costs (*i.e.*, the sums necessary to restore the resource to the condition it would have been in prior to the release of a hazardous substance or the costs of acquiring equivalent resources); damages associated with lost use of the resource (*e.g.*, the costs of providing alternative fishing opportunities in a case where a fishing stream is contaminated); and (3) damages associated with nonuse (or passive use) values. This last category of damages, which are based on the premise that the public can associate a specific value even to resources that it does not use, is the most controversial. Without further statutory guidance, responsible parties fear that trustees may use the NRD program, and the recovery of nonuse damages in particular, to seek substantial and potentially arbitrary monetary damages.

At this time, there is limited information regarding actual NRD claims or substantial documentation of problems. The lack of information is due, in part, to the relative infancy of the program. To date, relatively few NRD claims have ever been resolved and most of those could be characterized as minor. GAO has found that most NRD settlements have been less than \$500,000, however, GAO has identified up to 20 sites where the Federal NRD claims at could be exceed \$50 million. In some cases, however, damages may be in the range of hundreds of millions and even billions of dollars. GAO, for example, has estimated that DOE’s potential liability for natural resource damages, not including the most contaminated sites, could be as high as \$13 to \$20.5 billion. At non-Federal sites, one of the larger NRD claims involves the Coeur d’Alene Basin. The Tribal trustee there has filed a claim seeking \$1 billion in damages, and the Justice Department has filed a separate claim seeking \$600 million on behalf of the Federal trustees for alleged injuries to resources stemming from mining activities.

Critics of the NRD program raise a number of legitimate concerns. First, as noted above, concerns have been raised that the statute does not provide a clear statement of the measure of dam-

ages. As a result, responsible parties believe that trustee may seek damages for injuries that were never intended to be covered. They argue, for example, that the authors of the original law never intended to provide for the recovery of non-use values. Similarly, they argue that the NRD program was never intended to require the removal of every molecule of a hazardous substance or the restoration of a resource to pristine conditions.

This legislation attempts to address these concerns by providing an affirmative statement of the scope of liability. The intent is to clarify that the purpose of the NRD program is to restore natural resources, but not to serve as a second cleanup program or as the mechanism to assess and collect arbitrary sums of damages. Restoration measures are intended to restore a resource to the condition that would have existed but for the release of a hazardous substance (not necessarily pristine conditions). Consistent with this objective, the bill also clarifies the prohibition against double recovery.

Critics also argue that the procedures used to assess injury to natural resources and select restoration measures are flawed. The selection of restoration measures, they suggest, often fail to take into consideration cost and may even disregard the results or expected results of any remedial action. Furthermore, they suggest that trustees frequently rely on inaccurate information and general assumptions without sufficient consideration of site-specific information.

The bill addresses these concerns, establishing a new process for trustees to consider alternative restoration measures and select among those that achieve an appropriate balance among the following factors: cost-effectiveness; technical feasibility; and the time period in which restoration is likely to be achieved. The unique intrinsic values of a resource may also be considered in the selection of a restoration alternative. New regulations would be issued to implement this new process, as well as to clarify that injury assessments should be based on scientifically valid protocols and use site-specific information whenever it is readily available.

Federal Facilities

The role of States in cleanups at Federal facilities has been the subject of ongoing controversy since the 1986 amendments.

States argue that these facilities should be required to achieve the same level of cleanup as non-Federal facilities. Accordingly, the bill makes a significant change to strengthen the State role at Federal facilities. The bill allows States to seek delegation authority to implement the Superfund program at Federal facilities. This new authority addresses the State concern that they be given the same decision-making authority with respect to Federal facilities as they are given under this bill at non-Federal facilities. In order to preserve the legitimate Federal interest in some level of national consistency, however, the bill does not allow State programs to be run in lieu of the Federal program at Federal facilities.

Currently, of the 1197 sites on the Superfund list, 151 are Federal facilities. Federal facilities include Federally-owned weapon research, development, test and evaluation laboratories; military training and maintenance facilities; nuclear production reactor

sites, and other facilities including those being surplused through the Base Realignment and Closure (BRAC) process. Federal facilities, particularly those controlled by the Department of Defense (DOD) and the Department of Energy (DOE), have significant potential liability under CERCLA.

While Federal agencies are generally required to comply with CERCLA to the same extent as private parties, EPA's system for identifying high-priority sites (the Hazard Ranking System) has resulted in a large number of DOE and DOD facilities being assigned a high-priority status. The costs associated with cleaning up these facilities is likely to be substantial. In some cases, moreover, the nature of the wastes at a facility may make cost-effective cleanup difficult or impossible.

SECTION-BY-SECTION SUMMARY

Section 1. Short Title; Table of Contents

Section 1 includes the citation of the short title of the bill as the "Superfund Cleanup Acceleration Act of 1998", and provides a table of contents for the bill.

TITLE I—BROWNFIELDS REVITALIZATION

SEC. 101. BROWNFIELDS

Summary

New Section 127 of CERCLA provides funding to identify and clean up properties that are abandoned or underutilized because of unresolved environmental concerns. A "brownfield facility" is defined as "real property, the expansion or redevelopment of which is complicated by the presence of a hazardous substance." Any portion of a property that is listed or proposed for listing on Superfund's NPL is excluded from the assistance provided under this section if there is an ongoing cleanup under Federal law.

This section provides \$75 million annually for EPA to establish a grant program for brownfield characterizations, assessments and response actions. Entities that are eligible to receive the grants are State and local governments, quasi-governmental land clearance authorities, regional councils, State-chartered redevelopment agencies and Indian Tribes. A mechanism to permit States to capitalize and administer revolving loan funds for brownfields is provided. The maximum grant amount for any individual facility may not exceed \$350,000.

Discussion

This title is structured to direct more public and private resources toward restoring contaminated properties that are not listed on the NPL. In the 17 years since its inception, some 1,414 sites have been listed on the NPL. That is less than 4 percent of the more than 41,000 contaminated sites known to the Federal government. Many States have identified contaminated sites numbering up to ten times the number of NPL sites in their States. Communities and States want to redevelop these sites, revitalize urban economies and protect open spaces.

Uncertainties about Federal liability under CERCLA can raise the cost of financing redevelopment projects or stifle redevelopment entirely. Developers often choose to avoid sites with potential for future Federal liability because the completion of a cleanup under a State law does not protect them from the potential for additional Federal liability. Delays and uncertainties are caused by the dual State and Federal oversight process as well. Taken together, dual oversight and potential Federal liability often undermine efforts to restore and redevelop contaminated properties.

EPA administratively created the existing Superfund brownfield program. No provision in the current statute specifically authorizes the type of activities that have come to be known as brownfield cleanup and redevelopment. The only enacted brownfield provisions are found in the Taxpayer Relief Act of 1997 (Public Law 105-34). That law makes brownfield cleanup costs tax deductible. This tax break is estimated by the Joint Committee on Taxation to cost the Treasury \$100 million annually. It expires on December 31, 2000.

Current EPA practice provides a limited number of grants of up to \$100,000 annually (\$200,000 total) to help communities address brownfields. The grants are for site assessment and related activities not cleanups. Recently, EPA has initiated a second phase of its brownfield program that will fund remedial activities at brownfield sites.

New section 127 codifies and builds on EPA's brownfield program. The definition of the term "brownfield facility" in S. 8 is intended to foster reuse of abandoned or idled sites. The primary feature of section 127 is the assistance provided to eligible entities for the characterization, assessment and cleanup of brownfield facilities. The term "eligible entities" means local governments, quasi-governmental land clearance authorities, regional councils, State-chartered redevelopment agencies and Indian Tribes. Any entity not in compliance with an administrative or judicial order issued under CERCLA, the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), the Toxic Substances Control Act (TSCA) or the Safe Drinking Water Act (SDWA) is excluded.

Section 127(b) directs the Administrator to create a grant program for site characterization, assessment and performance of response actions at brownfield facilities. Eligible entities can use grants for site characterization, assessment or response actions or to capitalize a revolving loan fund for those purposes. Site characterizations can include a process to identify and inventory potential brownfield facilities. This provision recognizes that some investigation may be needed to determine if a parcel qualifies as a brownfield facility. No individual facility may receive in excess of \$350,000 under this section. The Administrator may waive the limit based on site-specific factors, such as the level of contamination, the size of the facility, or the status of ownership of the facility. In order to assure that program benefits are shared fairly, the Administrator should only invoke the waiver in exceptional circumstances. Grant funds may not be used to pay fines, penalties or administrative costs.

Federal brownfield expenditures are appropriately limited to sites where, due to the threat of real or perceived contamination, no reuse is likely and no Federally-directed or funded cleanup is

underway or imminent. The language ensures that the limited resources available under this section are not expended on sites that will be cleaned up under other provisions of Federal law. Thus, the term “brownfield facility” excludes any property: (1) where there is an ongoing Superfund removal action; (2) that has been listed, or proposed for listing on the NPL; (3) where there is ongoing cleanup work prescribed by an administrative or judicial order under CERCLA, RCRA, CWA, TSCA or SDWA; (4) that is a hazardous waste disposal unit for which a closure notification has been submitted, and that has closure requirements specified in a closure plan or permit; (5) that is Federally-owned or operated; or, (6) that has received assistance from the Leaking Underground Storage Tank (LUST) Trust Fund. The bill recognizes, however, that excluded sites may nonetheless have significant redevelopment potential. Accordingly, a savings clause in section 127(a)(1)(C) provides that exclusion of a site from the definition of “brownfield facility” under section 127 shall have no effect on eligibility for assistance under any other provision of Federal law. Therefore, if an agency (*e.g.* the Department of Housing and Urban Development) were to establish a brownfield assistance program, exclusion from funding under section 127 would not preclude that agency from providing assistance to a facility otherwise excluded under this section.

In addition to direct grants, EPA can distribute brownfield funds to certain eligible entities to capitalize a revolving loan fund. Repayment of brownfield loans from successful redevelopment projects will extend the life and expand the utility of Federal expenditures under this program. Section 127(c) allows EPA to enter into agreements with States to make revolving loan fund capitalization grants. Such agreements may specify grant use requirements, including letters of credit. If a State elects not to establish a revolving loan fund, EPA may enter into a capitalization grant agreement with a city, county or a regional association of governments provided that the area covered by the agreement has a population greater than 1 million people. Eligible entities in an area covered by an agreement would receive assistance from the loan fund instead of assistance from EPA under the grant program in section 127(b).

A State, city, county or regional association must establish a brownfield revolving loan fund (referred to as a “State loan fund”) to receive a capitalization grant. The grant to a State loan fund is available for obligation for 2 fiscal years. EPA must conduct a regulatory negotiation to develop an allotment formula for State loan funds that reflects the number of potential brownfield facilities in the areas covered by agreements and the level of effort made by each State, city, county or regional association. Sufficient funds must be reserved to issue direct grants under section 127 (b) in areas not covered by the revolving loan fund. EPA must update the formula at least biennially. Any funds not obligated within 2 years shall be reallocated.

Money in a revolving loan fund can be used only for providing loans, as loan guarantees, or as a source of reserve and security for leveraged loans. Funds from capitalization grants may not be used for acquiring real property.

Each entity that has entered into a capitalization agreement is required to prepare, after providing for public review and comment, an annual plan that identifies the intended uses of the money available in the State loan fund. This intended-use plan must include a description of the projects to be assisted, the expected terms of financial assistance, the criteria and methods for the distribution of funds, a description of the financial status of the State loan fund, and short-term and long-term goals. Each State loan fund must be established, maintained, and credited with repayments and interest, and the fund corpus shall be available in perpetuity. Monies in the fund not required for current obligation or expenditure shall be invested in interest bearing obligations.

A State loan fund may provide additional subsidization, including forgiveness of principal, to an eligible entity. The total amount of subsidies made from the corpus or capitalization grant may not exceed 30 percent of the capitalization grant received by the State loan fund for that year. The State, city, county or regional association of governments must provide at least a 20 percent match before they can receive Federal grant payments under this section.

The cost of administering the State loan fund shall be borne by the State, city, county or regional association. This is in addition to the match referred to above. Except as additionally limited by State law, the State loan fund use is limited to making loans under certain conditions. The interest rate for the loan must be less than or equal to the market interest rate. Interest-free loans are permissible. The principal and interest payments must commence not later than 1 year after the project is completed. The loan must be fully amortized not later than 10 years after project completion. The State loan fund must be credited with all payments of principal and interest on each loan. In addition, loan funds may be used to guaranty or purchase insurance in order to improve credit market access or reduce the interest rate. Lastly, loan funds may be used to provide a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the State, city, county or regional association of governments if the proceeds of the sale of the bonds will be deposited in the State loan fund.

EPA must issue guidance and regulations on efficient operation of the fund. Each State, city, county or regional association must submit a report to EPA every 2 years on its activities, and include in that report the findings of the most recent audit of the fund. EPA shall periodically audit all State loan funds established under this section in accordance with procedures established by the Comptroller General.

Section 127(d) includes requirements for applications by eligible entities for assistance under section 127(b). Applications are made to EPA regional offices. The Administrator can prescribe the form and contents of the application. A single application can include grant requests for one or more brownfield facilities. The Administrator is directed to coordinate with other Federal agencies when developing application requirements under this section so that applicants are made aware of assistance available from other Federal agencies for related purposes.

The Administrator is directed to evaluate applications using ranking criteria in section 127(d)(3), and award grants to eligible entities submitting the highest ranking applications. The ranking criteria must emphasize the beneficial reuse of the blighted property. The ranking criteria also give preferential recognition to applications for projects that leverage other sources of funding as part of a project, stimulate economic development in the project area, create additional park, greenway or recreational acreage, or are located in areas with small populations or in low-income communities that cannot draw on other sources of project funding.

The total funding level for the grant program in section 127(b) and the loan program under section 127(c) is \$75 million per year.

SEC. 102. ASSISTANCE FOR QUALIFYING STATE VOLUNTARY RESPONSE PROGRAMS

Summary

Section 102 of the Superfund Cleanup Acceleration Act creates a new section 128 that authorizes \$25 million per year for 5 years to provide technical and financial assistance to States to maintain, establish and administer voluntary response programs. Qualifying States would receive a minimum allocation of at least \$250,000 per year.

Discussion

This section is intended only to authorize funding for technical and financial assistance. It does not create a process for EPA's approval of State voluntary response programs. Status as a qualifying State under this section has no effect on any other provision in Superfund, including Federal enforcement in the case of a release subject to a State plan in new section 129.

The vast majority of the hazardous sites on CERCLIS will not be cleaned up by the Superfund program. Instead, most sites will be cleaned up under State authority. For example, of California's more than 700 contaminated sites, only 94 are currently listed on the NPL. The remaining sites will likely be addressed under California's program. In recognition of this fact, and the need to create and improve State cleanup capacity, new section 128 provides technical and financial assistance to States to establish and expand voluntary response programs. In order for a State to qualify to receive a grant under this section for an existing program, it must demonstrate that the program includes the elements listed in section 128(b). A State that requests a grant to establish a new voluntary response program will be eligible if it notifies the Administrator of its intent to establish a qualifying program. The Administrator may develop procedures for allotting funds to qualifying States.

SEC. 103. ENFORCEMENT IN CASES OF A RELEASE SUBJECT TO A STATE PLAN

Summary

New section 129 places limitations on the circumstances under which Federal enforcement authority may be used when a release of a hazardous substance occurs at a facility subject to a State

plan. Enforcement action under Superfund is prohibited at a facility subject to a State remedial action plan unless the State requests assistance or the Administrator of EPA finds that other exceptional circumstances exist. At a facility not subject to a State remedial action plan, the President shall provide notice to the State within 48 hours after issuing a section 106(a) administrative order.

Discussion

One of the most often cited concerns regarding brownfield redevelopment is the fear of ongoing Federal liability after a State cleanup is completed. Overlapping State and Federal responsibilities have consistently undermined cleanup and economic development goals. Several attempts to resolve this issue administratively, including a 1995 draft directive on the Federal-State relationship at sites undergoing cleanup in State programs, have failed. Subsequent to the failure of that effort, EPA began entering into memoranda of agreement (MOAs) on a State-by-State basis. MOAs were used to define the scope of the States' authority and the conditions under which the Federal government might use its Superfund enforcement authority at sites at which response actions were conducted under State cleanup laws. The precise statement of conditions under which Federal enforcement would be permitted varied in several of the early MOAs. In 1995, EPA issued interim guidance to standardize MOAs. On August 1, 1997, EPA issued its *Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs*. This guidance was later withdrawn by EPA in December 1997, because of strong State criticism over provisions requiring EPA approval of State programs. States oppose Federal approval of State cleanup programs that address sites the Federal government is not likely to address.

The bill establishes limits on the ability of the Federal government to intervene at facilities where States are proceeding with cleanup activities under their own programs. Federal cleanup resources are limited and most States operate successful cleanup programs. States now conduct the overwhelming majority of response actions. The Federal government should, therefore, defer to a State at sites not on the NPL unless a State's inability or unwillingness to take appropriate action results in a public health or environmental emergency. In such cases, Federal action is appropriate to supplement, or take the place of, State action. However, there is little evidence that suggests that States are likely to assert exclusive jurisdiction over facilities at which they are unwilling or unable to effect appropriate cleanups.

Section 129 bars Federal action (subject to limited exceptions discussed below) at a facility where a response action "is being conducted or has been completed under State law." The definition of "facility subject to a State cleanup" from section 127(a)(3) is applied here. A facility subject to a State cleanup is one that is not listed or proposed for listing on the NPL and meets one of the following criteria: a State cleanup has proceeded without any Federal involvement; EPA archived the site from its CERCLIS database; the site was included on CERCLIS prior to enactment of the Superfund Cleanup Acceleration Act of 1998 and it is not listed or proposed

for NPL listing within 2 years; or the site is added to CERCLIS after the date of enactment and 2 years have elapsed since the earlier of the CERCLIS listing or the issuance of an order under section 106(a) of CERCLA. Thus, sites at which Federal response actions have been considered but not taken, and sites where the Federal government has not been involved at all, are covered by this section.

To be entitled to the bar on Federal enforcement, a facility must also be subject to an ongoing or completed State response action. The bar in new section 129(a)(1) provides that, in the case of a release of a hazardous substance at a facility subject to a State clean-up, no person (including the President) may use any authority in CERCLA to take an enforcement action against any person regarding any matter that is within the scope of a response action that is being conducted or has been completed under State law. A savings clause permits parties to continue to bring CERCLA cost recovery actions for pre-enactment response costs that otherwise would be barred.

The bar on Federal enforcement is subject to limited exceptions set forth in section 129(a)(2). First, a State can request that a Federal response action be taken. Second, the Administrator can initiate an action if a release or threat of release constitutes a public health or environmental emergency under CERCLA section 104(a)(4), provided that the State is unwilling or unable to take appropriate action. In that case, the Administrator must first give the Governor notice and an opportunity to take action. Third, the Administrator can determine that contamination from a facility has migrated across a State line, necessitating further response action to protect human health and the environment. The fourth exemption applies to a facility at which all State response actions have been completed. If such a facility presents a substantial risk that requires further remediation to protect human health or the environment (as evidenced by newly discovered information about the contamination, the discovery of fraud, or a failure of the remedy or change in land use that gives rise to a clear threat of exposure) the Administrator can lift the bar upon determining that the State is unwilling or unable to take appropriate action.

New section 129(b) establishes a new notification requirement whenever EPA takes an administrative or enforcement action at any facility. This permits the Federal and State governments to identify and resolve issues relating to the applicability of the enforcement bar in section 129(a)(1). The section requires EPA to notify a State of its intent to undertake an administrative or enforcement action at a facility where there is a release or threatened release of a hazardous substance prior to taking such action. The State has 48 hours to respond to the notice and inform EPA if the site is currently, or has been, subject to a State remedial action. The enforcement bar applies if the site is being addressed under a State program. At a facility not subject to a State remedial action, the President shall provide notice to the State within 48 hours of issuing a section 106(a) administrative order. This is simply a notice requirement and has no effect on the Federal-State relationship at the facility. In the situation where a release or threatened release constitutes a public health or environmental emergency

under section 104(a)(4), the Administrator can take any appropriate action immediately. The Administrator must still give notice to the State, but there is no requirement to await State acknowledgment.

The purpose of applying the heightened standard from section 104(a)(4) is to provide a clear distinction between State and Federal responsibilities at sites not included on the NPL and that ordinarily will be addressed by the States. In general, remedial actions, whether under the direction of the State or Federal government, are intended to address situations where there is an imminent and substantial endangerment. Allowing EPA to second guess cleanup decisions at sites being addressed by the States simply because there is an imminent and substantial endangerment would undermine the primary goal of the first two titles of this bill to clarify limits of State and Federal responsibility. However, EPA should be able to reassert its authority over a site where State action is substantially failing to achieve the appropriate level of protection. The heightened test for Federal intervention achieves an appropriate balance. It enables a State to take full responsibility for remedial action decisions at sites being cleaned up under State law, as well as for actions covered by delegated or authorized authorities transferred to the State. At the same time, it enables EPA to act if the State's actions are deficient to the point that an emergency develops. This is only one of several methods permitted in the bill for EPA to reassert its authority over a site.

Section 129(d) provides a transition rule for existing MOAs between EPA and the States, preserving their validity until they expire under their own terms. This is important because some of these MOAs address sites outside the scope of section 129, such as proposed and listed NPL facilities. This section also preserves the Administrator's authority to enter into new agreements regarding Federal-State relations at those sites that are not covered by section 129(a)(3). This would allow new MOAs to address facilities listed or proposed for listing on the NPL.

SEC. 104. CONTIGUOUS PROPERTIES

Summary

Section 104 provides liability protection for landholders whose property may be contaminated by a contiguous NPL site if they did not contribute to the contamination. These landholders must cooperate with the enforcement authority (EPA or the State) and provide facility access for site cleanup activities.

Discussion

New section 107(o) is added to Superfund's liability section to clarify that a person who owns or operates real property that is contaminated by a hazardous substance that has migrated from another person's land will not be considered to be a potentially liable owner or operator under section 107, so long as they meet certain conditions. The provision is similar to EPA guidance on the topic entitled *Final Policy Toward Owners of Property Containing Contaminated Aquifers* (OSWER Memorandum dated May 24, 1995), which clarifies that EPA will not bring enforcement actions against

owners and tenants of property that has been impacted by contaminated groundwater migrating from a neighboring facility.

Sections 107(o)(1)(A) and (B) establish the conditions that must be met for the liability protection to apply. First, the person can not have caused, contributed or consented to the release or threat of release. Second, the person must not be affiliated through familial or corporate relationship with another party that is or was a PRP at the facility. Third, the person must have exercised appropriate care with respect to each hazardous substance found at a facility by taking reasonable steps to stop any continuing release, prevent any threatened future release and prevent or limit human or natural resource exposure to any previously released hazardous substance.

The “appropriate care” standard applied to owners and operators under this section is a different standard of care than the “due care” standard required for the third party defense found in existing CERCLA section 107(b)(3). Section 107(o) protects parties that are essentially victims of pollution incidents caused by their neighbor’s actions. It is not intended to require parties raising section 107(o) as an affirmative defense to alleged liability to undertake full scale response actions with respect to migrating contaminated plumes passing through their property. To meet their “appropriate care” burden, persons invoking section 107(o) as a defense must take reasonable steps to address the conditions on their property. Such reasonable steps typically will consist of actions such as notifying appropriate Federal, State and local officials regarding the situation; erecting and maintaining signs or fences to prevent public exposure; or maintaining any existing barrier or other elements of a response action on their property that address the contaminated plume. These persons are not expected to intercept, pump and treat contaminated groundwater, build slurry walls, or undertake other response actions that would more properly be paid for by the responsible parties who caused the contamination.

Section 107(o)(2) allows the Administrator to issue assurances, known as “comfort letters,” that no enforcement action will be initiated against a person meeting the requirements of this section. EPA may also enter into settlements that would insulate a person meeting the requirements of the section from a cost recovery or contribution action under CERCLA. However, EPA may decline to settle with a party invoking this affirmative defense if that party fails to comply substantially with its obligation under new section 107(y) to provide full cooperation, assistance and site access in the course of any necessary response action, or if the party impedes the effectiveness or integrity of any institutional control employed at the facility (such as damaging a cap, removing signs or fences, etc.). In addition, the person must comply with any request for information or administrative subpoena issued by the President.

SEC. 105. PROSPECTIVE PURCHASERS AND WINDFALL LIENS

Summary

Section 105 of the Superfund Cleanup Acceleration Act provides liability relief for purchasers of contaminated property if they did

not contribute to the contamination and if they conducted appropriate inquiries prior to the purchase.

Discussion

Two provisions are added to CERCLA to provide protection to persons who wish to purchase contaminated property without incurring Superfund liability. Fear of liability is frequently cited as a barrier to redevelopment of contaminated sites. This has resulted in many previously productive facilities remaining idle, while pristine property is developed instead. EPA has attempted to address this problem on a case-by-case basis with so-called prospective purchase agreements. The process of negotiating these agreements, however, is cumbersome and resource-intensive.

The new provisions add a definition of “bona fide prospective purchaser” to CERCLA’s definitions. Section 107 has been amended to exclude persons who qualify as bona fide prospective purchasers from liability under CERCLA.

A bona fide prospective purchaser is a person, or his tenant, who acquires property after the date of enactment of the Superfund Cleanup Acceleration Act of 1998 and can establish each of the following conditions by a preponderance of the evidence. First, all deposition of hazardous materials must have occurred at the facility before the person acquired the property. Burying an intact drum containing hazardous substances is an act of deposition, leaks from the drum after it corrodes are not. Second, the person must have made all appropriate inquiry into the previous ownership and uses of the facility and the real property in accordance with generally accepted commercial and customary standards and practices. These standards and practices are either defined by the American Society for Testing and Materials (ASTM) Standard E1527-94, entitled *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, or an alternative standard to be established by a regulation issued by the Administrator. The section recognizes that due diligence for residential property is different than due diligence for commercial property. If the purchaser is not a governmental or commercial entity, a facility inspection and title search that reveals no basis for further investigation will generally satisfy the due diligence requirement. The person must also provide any required notices if there is a discovery or release of any hazardous substance.

In the case of a property at which a remedy is already in place, a bona fide prospective purchaser has the same duty of appropriate care as a contiguous landowner under section 107(o). Any bona fide prospective purchaser that undertakes any other response actions at the site must exercise appropriate care in the conduct of the response action.

Like the contiguous landowner, a bona fide prospective purchaser must substantially comply with its obligation under new section 107(y) to provide full cooperation, assistance and site access in the course of any necessary response action. In addition the prospective purchaser must not impede the effectiveness or integrity of any institutional control employed at the facility (such as damaging a cap, removing signs or fences, etc.). Finally, a bona fide prospective

purchaser must not be affiliated through familial or corporate relationship with another party that is or was a PRP at the facility.

The liability limitation for a bona fide prospective purchaser is created in new section 107(p). A bona fide prospective purchaser shall not be liable under CERCLA if that liability is based solely on the party's status as an owner or operator of a facility by reason of the purchase, provided that the purchaser does not impede the performance of a response action or natural resource restoration.

While bona fide prospective purchasers are protected from liability, new section 107(p)(2) prevents these parties from reaping a windfall due to the increase in a property's value as a result of the Federal government's cleanup efforts. If the Federal government incurs response costs at a facility, it may not sue a bona fide prospective purchaser for those response costs, but it may, however, place a windfall lien on the property. The amount of the lien would be equal to the lower of the Federal government's unrecovered response costs or the increase in the fair market value of the property due to the government's cleanup efforts. This recognizes that the cost of cleanup will often greatly exceed the fair market value of the property (which often is valueless unless it is cleaned up). The windfall lien would be satisfied from the proceeds when the bona fide prospective purchaser resells or otherwise disposes of the property.

SEC. 106. SAFE HARBOR INNOCENT LANDHOLDERS

Summary

Section 106 of the Superfund Clean Up Acceleration Act provides liability relief for innocent landholders of contaminated property if they did not contribute to the contamination and conducted appropriate inquiries prior to the purchase of the property.

Discussion

CERCLA provides an affirmative defense for innocent purchasers of real property who had no reason to know of any release or threatened release of a hazardous substance that was disposed of on, in, or at the facility prior to the date of purchase. This section amends CERCLA section 101(35) to clarify the obligations of parties that seek to use this defense.

First, a party using this defense must provide full access, assistance and cooperation in the conduct of any response actions at the facility. In addition, the landholder must not impede the effectiveness or integrity of any institutional controls at the facility. A landholder seeking to use the defense must also demonstrate that he or she had no reason to know of the contamination. This is intended to mean that at, or prior to, the date the property was acquired, the landholder undertook all appropriate inquiry into the previous ownership and uses of the facility and the associated real property in accordance with generally accepted commercial and customary standards and practices. These standards and practices are defined as the ASTM Standard E1527-94, entitled *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, or an alternative standard in a regulation to be issued by the Administrator. This section recog-

nizes that due diligence for residential property is different than due diligence for commercial property. If the purchaser is not a governmental or commercial entity, a facility inspection and title search that reveals no basis for further investigation satisfies the due diligence requirement.

A landholder must also demonstrate the exercise of appropriate care. This is the same standard that applies to owners or operators who qualify for the bona fide prospective purchaser exemption under section 107(q).

TITLE II—STATE ROLE

SEC. 201. TRANSFER TO THE STATES OF RESPONSIBILITY AT NON-FEDERAL NATIONAL PRIORITIES LIST FACILITIES

DEFINITIONS

Summary

This Title establishes two mechanisms for States to assume responsibility for cleanup actions at NPL facilities. Under the authorization approach, a State may conduct cleanups at NPL facilities according to a cleanup program established under State law. Under the delegation approach, a State may conduct cleanups at NPL facilities under the Federal Superfund program. Definitions in Title II distinguish between an “Authorized State” and a “Delegated State” based on whether State or Federal Law will be used to enforce cleanup activities at the site. These terms do not connote any distinction in the extent of a State’s ability to make and enforce cleanup decisions.

The definition of “delegable authority” establishes categories of authorities. The categories of authority are: site investigations, evaluations and risk analysis; development of alternative remedies and remedy selection; remedial design and remedial action; operation and maintenance; and information collection and allocation of liability. The responsibility for the performance of any category may be transferred to the State when EPA determines that a State applying for such a transfer is capable of adequately performing all of the tasks associated with that category. Allowing EPA to recognize discrete “delegable authorities” provides sufficient flexibility for EPA to transfer authority to the States in stages. Deficiencies in one aspect of an overall robust State cleanup program will not, therefore, place EPA in the position of having to withhold delegation entirely until every aspect of the State program is satisfactory. Categories of authorities are grouped in a way to allow associated activities to be transferred as a group.

States may also receive authority to manage response actions at Federal facilities. However, the term “non-Federal listed facility” is defined to clarify that, while States can apply for and receive a transfer of authority to conduct cleanups at NPL facilities at which the Federal government is an owner or operator, the approval of such a transfer must take place in accordance with the provisions of Title VI of this bill.

Discussion

The bill reflects the recommendations of the National Governors' Association that EPA be able to authorize or delegate full or partial management of the remedial action and emergency removal programs to all capable States that seek to administer cleanup activities at NPL sites in their jurisdiction. States have a strong track record in managing non-NPL cleanups. States that have significant experience managing comprehensive programs should be ready to receive authorization or delegation.

In establishing a new mechanism for transferring authority to States, it was necessary to define several terms for use in this title. The key terms are "authorized State" and "delegated State." The new terms clarify the respective limits of authority of EPA and States for NPL cleanup activities.

AUTHORIZATION

Summary

Section 201 of the bill creates a new section 131 of CERCLA, which gives qualified States the option of applying for authorization or delegation of Federal cleanup authorities. Under authorization, a qualified State would operate its own comprehensive hazardous waste cleanup program in lieu of the Federal program. Under delegation, States would conduct cleanups according to CERCLA.

Section 130(c) allows the Administrator to grant a State the right to apply any or all of its cleanup program requirements, in lieu of CERCLA, to specified facilities listed on the NPL. In order to receive this authority, a State must submit an application that identifies the facilities for which authorization is requested. Additionally, the State must submit documentation that demonstrates that its response program:

- (1) has adequate legal authority, financial and personnel resources and expertise to administer and enforce a hazardous substance response program;
- (2) will be implemented in a manner that is protective of human health and the environment;
- (3) has procedures to ensure public notice and, as appropriate, opportunity for comment on remedial action plans, consistent with section 117 of CERCLA; and
- (4) will include the exercise of State enforcement authority to require persons potentially liable under section 107(a), to the extent practicable, to perform or pay for response actions.

EPA is directed to establish a simplified application process for States. It cannot impose any additional terms or conditions beyond those outlined above on the approval of a State's application. The Administrator has 180 days to approve or disapprove the application. If the application is disapproved, the Administrator must explain the basis for that determination.

Should the Administrator fail to approve or disapprove an application, the applicant State, or any person, may bring an action without regard to the notice requirements of section 310(d)(1) to compel the Administrator to act on the application. This allows the

affected State or any interested party to take EPA to court under the “citizen suit” provision of CERCLA without waiting 60 days after filing of a notice of intent to sue, as current law requires. In that case, the court will determine if there is a reasonable cause for the delay in the Administrator’s decision on the application, and then establish a deadline for final EPA decision. The court shall order the Administrator to approve or disapprove the application within 30 days after the date of the order, or if additional information regarding the application must be considered, remand it back to the Administrator for not more than 90 days. A State may re-submit an application at any time after receiving a notice of disapproval.

Section 130(c)(3) establishes a pilot program to provide expedited authorization to not more than six States. The Administrator must promptly develop an expedited review process for applications. Those States applying for expedited authorization under this provision must submit an application along with any required documentation. The application shall be deemed approved on the last day of the 180-day period beginning on the date on which the application is submitted unless the Administrator publishes in the Federal Register (prior to the expiration of the 180-day period) an explanation as to why the State does not meet the criteria for expedited authorization.

EPA is directed to issue regulations within 3 years to provide criteria for expedited authorization for all qualified States. This permanent expedited authorization process shall be developed on the basis of experience gained under the six-State expedited authorization pilot program.

DELEGATION

Summary

The delegation provision in section 130(d) allows the Administrator to transfer to a qualified State the authority to perform one or more delegable authorities. These authorities are to be identified in a rule that must be finalized not later than 1 year after enactment of section 130. In order to receive delegation of any authorities under section 130, a State must be able to demonstrate that its enforcement authorities are substantially equivalent to the Federal authorities under CERCLA.

In applying for delegation, a State must identify the categories of authority it seeks and the NPL facilities at which it intends to enforce those authorities. Any application for a transfer of authority must provide sufficient information so that the Administrator can determine whether, and to what extent, the State:

- (1) has adequate abilities and resources to enforce a hazardous waste response program;
- (2) will implement the delegated authorities in a manner that is protective of human health and the environment; and
- (3) agrees to exercise its delegated authorities to require that those liable for cleanup costs under Federal law will pay for the response actions.

Within 120 days of receipt of an application, the Administrator must approve the application or issue a notice of disapproval, in-

cluding an explanation of the basis for the determination. If the Administrator fails to act on the application within the allowed time, the applicant State, or any person, may bring an action without regard to the notice requirements of section 310(d)(1) to compel the Administrator to make a determination. In such an action, the court shall order the Administrator to approve or disapprove the application within 30 days after the date of the order. If additional information regarding the application must be considered, the court must remand the application to the Administrator for not more than 90 days. The Administrator is required to provide opportunity for public comment on applications under this section. A State may resubmit an application at any time after receiving a notice of disapproval.

Discussion

This section strikes a balance between the States' strong interest in assuming responsibility for Superfund cleanups and the Federal government's interest in assuring that those cleanups will be conducted in a manner that is protective of human health and the environment.

The current Federal Superfund program does not utilize the resources of the Federal or State governments in the most efficient manner possible. At those NPL facilities where the States have been designated the lead agencies responsible for cleanups, EPA still reserves the right to select and enforce its own remedies whenever it disagrees with State-selected remedies. The result is an overly bureaucratic process of consultation that delays decision-making. Both EPA and the State agency end up overseeing and enforcing the cleanup. This, in turn, leads to lengthy disputes about how to conduct the cleanup. At sites where both EPA and the State are involved, responsible parties remain wary of proceeding with cleanup activities directed by the State without some assurance that EPA agrees with the State's cleanup decisions.

CERCLA and its "two-masters" system undercuts the ability of a State to achieve cooperation and compliance from responsible parties. Instead of enlisting the resources of willing and able States to speed up and expand cleanup activities, the current system reduces the enforcement credibility of the States, slows actual cleanup and inevitably increases costs. As a result, public dollars (both State and Federal) are not being spent in the most efficient manner and the maximum number of contaminated sites is not being addressed.

Under State-EPA cooperative agreements, EPA may allow a State to perform some cleanup activities. However, these agreements do not always afford States the flexibility they are seeking in managing site cleanups. Furthermore, EPA always reserves the right to select and enforce its own remedy should it disagree with a State-selected remedy. Currently, EPA does not have a mechanism either for determining that a State is capable of making independent decisions, and enforcing those decisions, or for transferring those responsibilities to a State. This title would establish the means for EPA to make such determinations and transfers.

PERFORMANCE OF TRANSFERRED RESPONSIBILITY

Summary

Once a State has received delegated authority or is authorized to conduct response activities in lieu of the Federal government, that State shall have sole authority to perform the transferred responsibilities. Delegated States must perform its delegated authorities in the same manner as would the Administrator.

Background

The fundamental goal of this title is to eliminate the “dual master” problem that results when the State, as lead agency, is not able to make and implement final cleanup decisions without second guessing by EPA. By creating a process for delegation or authorization that confers full decision-making responsibilities upon the recipient State, the lines of responsibility for future response actions should be clear. This language also makes clear that, in accepting delegated responsibilities, a State also accepts the burden of implementing CERCLA in a manner that is fully consistent with all applicable Federal rules and guidance.

Section 130(e) amends CERCLA by providing for the performance of transferred responsibilities to the States for non-Federal NPL facilities. In general, States are provided sole authority for the transferred responsibilities, except as provided in Section 130(f). The States shall implement each applicable provision of this Act including any regulations and guidance issued by the Administrator of EPA. States are to carry out these responsibilities “in the same manner as would the Administrator.” This provision is not meant to allow the Administrator to second guess each State decision. The Administrator should allow each State sufficient latitude in interpreting the regulations and guidance to address its individual needs, while still ensuring that the State’s actions are consistent with the goals of the Federal program. The process for allowing the Administrator to regain Federal control is provided in Section 130(f).

RETAINED FEDERAL AUTHORITIES

Summary

EPA may withdraw the transferred responsibility from a State if it finds, at any time, that the State no longer meets the requirements of this Title. In a delegated or authorized State, EPA may take any removal action permitted by CERCLA, after giving the State an opportunity to conduct the removal, if: (1) the State requests assistance; or (2) EPA makes a determination that the release constitutes a public health or environmental emergency, and obtains a declaratory judgment in U.S. District Court that the State has failed to make reasonable progress. In the case of a public health or environmental emergency, EPA need not provide the State with an opportunity to act first.

If a State conducts cost recovery actions, it may retain 25 percent of any monies it collects. This will serve as a strong incentive for States to seek cost recovery from responsible parties. EPA may conduct cost recovery actions if the State does not intend to, or if the

State fails to do so in a timely fashion. To prevent double recovery, only one agency be will allowed to bring a cost recovery action against a responsible party.

A State may request the removal of all or part of a transferred facility from the NPL. EPA must comply with the request if the delisting is not inconsistent with a requirement of CERCLA.

The agency is directed to report annually to Congress describing actions taken under subsection 130(f).

Discussion

The bill provides a Federal “safety net” when CERCLA authorities are transferred to States. Should an authorized or delegated State fail to implement its responsibilities under section 130, EPA retains the authority to take any necessary action to ensure the protection of human health and the environment. In some cases, an individual facility may present technical or resource challenges that were unknown at the time an application for authorization or delegation was approved, and that are beyond the capabilities of the State. In such cases, the State may request assistance from EPA in performing a response action. Such cooperative interaction to address previously unknown circumstances is expressly permitted by this bill. There is little reason to believe that EPA will need to rely on the safety net mechanism often because States must first be approved by EPA to operate delegated or authorized programs.

If a State fails to meet its responsibilities under section 130, any transferred authorities may be withdrawn under paragraph 130(f)(1). Also, EPA may use paragraphs (3) or (4) of subsection 130(f) to perform any emergency action permitted under CERCLA to address human health and the environmental emergencies. EPA’s removal authority is subject to the conditions stated in existing law in section 104(a)(4), and not the more lenient standard found in sections 104(a)(1) and 106 that authorize EPA to respond to any imminent and substantial endangerment. The reason for applying this more stringent standard for EPA action is that, in delegated or authorized States, it is assumed that the State is responding to a situation that already poses an imminent and substantial endangerment. In exercising its authority under paragraph 104(a)(4), the Administrator may intervene only if there is an immediate risk of actual exposure that would directly cause a public health or environmental emergency.

This balanced approach ensures that State programs will be allowed to operate with the greatest degree of flexibility and without fear that EPA might exercise removal or enforcement authority at a site for reasons other than emergency situations. At the same time, it ensures that if a State fails to adequately protect human health or the environment, EPA will be able to reassume full responsibility at a site.

FUNDING

Summary

EPA must provide funding to States to which responsibility has been transferred. Every 3 years, EPA and a State with transferred

responsibilities must jointly determine the amount of Federal funding required for administrative costs and preconstruction costs. Every year, they must determine the amount of funding required for remedy construction costs.

In prioritizing the allocation of funds, EPA must not favor facilities for which EPA is responsible over those for which a State is responsible. Grant money may not be used to pay the State share of response costs. The Governor shall annually certify to EPA that the State has used the funds in accordance with CERCLA. EPA may bring a civil action against a State to recover any funds that were not used properly.

The 50 percent State cost-share requirement is repealed at State-operated facilities. Indian Tribes are not subject to cost-sharing.

Discussion

In transferring responsibility for Superfund cleanups to States, it is appropriate that EPA also transfer the funds it would expend on the sites for which it is no longer responsible. This process should result in an overall cost savings for the Federal government. Elimination of the uncertainties and delays caused by the “dual master” problem should decrease the overall time needed to complete a response action. Significant savings are expected to be realized at sites that are cleaned up more quickly.

EPA currently operates a funding prioritization process to ensure that cleanup funds are spent in the most efficient manner possible, based on the demand for funds and the relative urgency of the response action at a particular NPL facility. EPA will include in this prioritization process any facilities for which responsibility has been transferred to States. EPA will use the same criteria to evaluate all facilities, regardless of whether the State or EPA is responsible for action at the facility.

The bill includes a mechanism for EPA to recover any funds misspent by the State. Also, EPA and the State shall establish and implement a 3-year plan for all non-construction funding. This will enable long-term planning for administration and pre-construction activities.

TITLE III—COMMUNITY PARTICIPATION

The purpose of Title III is to ensure that citizens living near potential or actual Superfund facilities have opportunities for meaningful participation throughout the site assessment and remediation process. Currently, CERCLA requires only that there be a public notice and comment period before the adoption of certain emergency removal actions and all remedial actions.

SEC. 301. DEFINITIONS

Summary

This section adds definitions for the terms “Agency for Toxic Substances and Disease Registry,” “affected community,” and “covered facility.” Section 301 also makes several technical and conforming changes to existing section 117.

Discussion

Current law does not identify a role for public involvement in decision-making for affected communities until after a facility is placed on the NPL and a remedial action plan is developed. There may be little opportunity for citizens to learn about the site or cleanup options or to influence decisions about the future of their communities before construction begins. Yet, these cleanup decisions may significantly affect their lives. This bill provides for early and continuing public involvement in decisions about NPL sites. It does so by defining an “affected community” as any group of two or more individuals who may be affected by a release or threatened release of a hazardous substance, pollutant, or contaminant from a “covered facility,” and then defining a “covered facility.” It also defines any facility listed or proposed to be listed on the NPL, as well as any facility at which there is a removal action anticipated to take longer than a year or to cost more than \$4 million.

SEC. 302. PUBLIC PARTICIPATION GENERALLY

Summary

Section 302 amends CERCLA Section 117 to ensure that EPA provides the affected community adequate notice before adoption of any remedial action plan. EPA is required to publish required notices, analyses, final plans, and explanations in local newspapers of general circulation. Section 302 ensures that all records in the possession of the United States relating to the release or threatened release of a hazardous substance are readily available to the affected community for inspection and copying. This requirement does not apply to records that relate to liability or that are exchanged between parties to settle a dispute under CERCLA, or to information protected from disclosure by privilege or as confidential business information.

Discussion

These relatively minor changes to the existing law remove obstacles to meaningful public involvement that have been identified by affected communities. Meaningful participation is active rather than passive and therefore expands opportunities for citizens to provide as well as to receive information. The amendments allow citizens adequate time and access to documents to become informed and better prepared to make relevant comments. Local community advisory groups and recipients of technical assistance grants also are ensured access to relevant documents.

SEC. 303. IMPROVEMENT OF PUBLIC PARTICIPATION IN THE SUPERFUND DECISIONMAKING PROCESS; LOCAL COMMUNITY ADVISORY GROUPS; TECHNICAL ASSISTANCE GRANTS

Summary

Currently, CERCLA requires only that there be a public notice and comment period before certain removal actions and all remedial actions. Section 303 creates new opportunities for citizens to participate in the remedial action planning and implementation process. First, the section provides that citizens should be con-

sulted about their views, notified about opportunities to gather and convey information, and have access to information about the release or threatened release of a hazardous substance, and the plans and progress of response actions. Second, the section establishes Citizen Advisory Groups (CAGs) to represent the diverse interests of community members. Early and continuing influence of CAGs in the development and implementation of remedial activities is required. Finally, the bill makes a series of changes to the technical assistance grants (TAG) program to improve the administration of the program.

Discussion

The current public participation program under CERCLA has not resulted in a decision-making process at Superfund facilities that is responsive to the concerns of affected communities. Critics of the current program include members of the Board of Directors of Clean Sites, Inc., a non-profit public interest organization dedicated to accelerating the cleanup of hazardous waste sites in the United States. In testimony before the Senate Committee on Environment and Public Works, Subcommittee on Superfund, Recycling, and Solid Waste Management in July 1993, Clean Sites President Edwin Clark identified three key problems related to the CERCLA public involvement program:

- (1) It focuses more on community relations than on public participation. That is, the community is asked to react, not to contribute.
- (2) Citizens are not brought into the process early or often enough, impeding citizen understanding and support of remedial activities.
- (3) Citizens do not have easy access to information and may not have the technical resources needed to understand the information they do receive.

Mr. Clark argued that improving the public participation program under CERCLA would lead to more effective and more efficient cleanups, especially as future land uses are considered in setting remediation goals. A 1994 report by the U.S. General Accounting Office supports this conclusion. It recommends that EPA include communities in decisions beginning at the time of the Agency's earliest active involvement in a Superfund project through completion of the cleanup.

The bill addresses all of these concerns. First, it amends CERCLA section 117 by adding a new subsection (g) that requires EPA, to the extent practicable, to disseminate information to, and solicit information from, the local community, consider its views, and include those views and EPA's response to them in the administrative record. Section 117(g) authorizes EPA to conduct, as appropriate, face-to-face community surveys to obtain information about the location of private drinking water wells, historical, current, and possible future uses of water, and other environmental resources in the local community. Public meetings and other appropriate activities also are authorized.

Section 117(g) also mandates consultation with a local community advisory group, if there is one, and members of the affected community about which community participation activities should

be conducted. It requires EPA to notify the community and local government about the schedule and location of plans for construction at the facility, the results of any 5-year review under section 121(c), and any use of institutional controls at the facility. This section directs EPA to inform local government officials, community advisory groups, Indian Tribes on a regular basis, and, to the extent practicable, other interested members of the affected community about technical meetings held between the lead agency and PRPs.

Second, new section 117(h) requires EPA to assist in establishing CAGs when requested by 20 or more residents or at least 10 percent of the population in the area where the facility is located. If there is no such request, EPA is directed to establish a CAG at the request of a local government. EPA also has the discretion to establish a CAG if it would further the purposes of CERCLA.

Each CAG is required to solicit and represent community views regarding response action concerns. It must keep the community informed about the progress of the response action at a facility and opportunities to participate in meetings and CAG activities. EPA must consult with the CAG about key issues in developing and implementing the response action, inform the CAG of response action progress, and consider the comments and recommendations provided by the CAG. The CAG should try to achieve consensus before providing its comments and recommendations to EPA. However, the CAG must allow the presentation of divergent views.

The voting membership of a CAG is limited to 20 non-compensated members. A CAG's voting membership must include, to the extent practicable, at least one person from each of the following groups: nearby residents or property owners, other affected citizens, local public health practitioners, representatives of any local Indian communities, representatives of citizen, civic, environmental, or public interest groups, local business persons, and employees of the facility. Non-voting members of the CAG may include representatives of EPA, ATSDR, other Federal agencies, States, affected Indian Tribes, affected local governments and governmental units that regulate land use, facility owners, and PRPs. A CAG may receive a TAG. EPA must also provide administrative and support services to the CAG.

In order to avoid duplication of existing Federal community participation programs, section 117(h) provides that the President may determine that other advisory groups such as those established by the Departments of Defense or Energy, or by ATSDR may serve in lieu of a CAG.

The third major provision related to public participation is the new section 117(i), which establishes revised requirements for TAGs. It broadens TAG eligibility by authorizing EPA to make grants available to members of an affected community and by eliminating the current matching requirements for TAG recipients. It increases the flexibility of the grant monies for TAG recipients by allowing early disbursement of a portion of the grant (up to \$5,000 or 10 percent of the grant). It also allows EPA to expand both the duration, as well as size of the grant, to accommodate unique site-specific circumstances, such as the complexity and duration of a response action. TAGs may be used to hire experts to

interpret information and present views of recipients, to disseminate information to the community, or to fund training to facilitate effective participation in the selection and implementation of a response action.

SEC. 304. TECHNICAL OUTREACH SERVICES FOR COMMUNITIES

Summary

Section 304 expands existing CERCLA section 311(d)(2) to allow University Hazardous Substance Research Centers established under that section to provide educational and technical assistance to communities regarding the potential effects of contamination on human health and the environment.

Discussion

The University Hazardous Substance Research Centers established under section 311 conduct short- and long-term research on all relevant scientific and technological subjects related to hazardous substances, including the manufacture, disposal, clean up, and management of hazardous substances; disseminate the results of their research and findings; and provide training, technology transfer, and technical outreach and support to organizations, communities, and individuals involved with hazardous substances. The Centers do not conduct human health effects research. Each regional research center serves two adjoining Federal EPA regions. The centers, each of which is affiliated with several universities, collaborate on a national program, but also conduct independent research in specialized areas.

Section 304 of the bill, directs the centers to provide educational and technical assistance to affected communities about the effects of contamination on human health and the environment, is intended to allow these centers to become more actively involved in providing useful and relevant information to the communities adversely affected by actual or potential exposure to hazardous substances.

SEC. 305. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY (ATSDR)

Summary

Section 305 establishes a new section 104(b)(3) that directs the President to notify State, local, and Tribal public health authorities about any investigation of a possible release or threatened release of a hazardous substance. The section also requires ATSDR to perform a health assessment at each covered facility, unless the ATSDR publishes a finding that the facility presents no significant health risk. For each facility placed on the NPL after the date of enactment of this Act, a health assessment is to be completed prior to the completion of the RI/FS. The study shall not delay the progress of remedial action.

ATSDR may conduct health education activities, as appropriate, to make the community aware of steps it can take to mitigate or prevent exposure to hazardous substances. When a facility receives its 5-year review, public health recommendations must also be re-

viewed. ATSDR, in consultation with EPA, is required to conduct a study regarding the identification, management of, and response to multiple sources of community exposure.

Discussion

Section 305(b) of the bill makes a number of changes to the authority of ATSDR set forth in CERCLA section 104(i). These provisions are meant to ensure that ATSDR provides the same services to Indian Tribes as it does to States. It is directed to utilize the expertise of the Indian Health Service in the same manner as the Public Health Service. It also removes an existing provision authorizing ATSDR to refer individuals to hospitals and other facilities and services offered by the Public Health Service. Instead, ATSDR may now refer affected individuals to licensed or accredited health care providers. The existing requirement for ATSDR to update toxicological profiles no less often than every 3 years is changed to require updates "if the Administrator of ATSDR determines that there is significant new information."

Under CERCLA Section 104(i)(6), ATSDR is required to conduct a health assessment for each facility on the NPL. The bill expands this requirement to include all "covered facilities" as that term is defined in amended subsection 117(a), unless the ATSDR publishes a finding that the facility presents no significant health risk. Current law also requires ATSDR to complete assessments "to the maximum extent practicable, before the completion of the remedial investigation and feasibility study." However, ATSDR health assessments often have been conducted too late to be useful for EPA remedy selection activities. For facilities placed on the NPL in the future, health assessments must be completed prior to the completion of the RI/FS. However, a failure to complete the health assessment cannot be used to delay the progress of remedial action.

Section 305 of the bill authorizes ATSDR to conduct health assessments of community exposure to hazardous substances released, or threatened to be released, at a facility. It directs ATSDR to give special consideration to any practices of the affected community that may result in greater exposure. In addition, section 305 requires ATSDR to prepare and distribute educational materials and information on human health effects of hazardous substances to the community. ATSDR should use any available information networks, including any CAG to accomplish this.

The bill authorizes ATSDR to conduct health education activities to make a community near a covered facility aware of steps it may take to mitigate or prevent exposure to hazardous substances and their related health effects. If it chooses to conduct such activities, the bill directs ATSDR to use community health centers, area health education centers, or other community information networks, including a CAG or a TAG recipient.

People in affected communities may be exposed to hazardous substances from sources other than covered facilities in addition to releases from covered facilities. The bill directs ATSDR, in consultation with EPA, to conduct a study on multiple sources of exposure affecting or potentially affecting a community. ATSDR is authorized to examine various approaches to protect communities and to include recommendations for the President to consider in devel-

oping an implementation plan to address the effects or potential effects of exposure at covered facilities.

SEC. 306. UNDERSTANDABLE PRESENTATION OF MATERIALS

Summary

The bill provides that information distributed to the community must be presented in a manner that may be easily understood, considering any unique cultural needs of the community.

Discussion

A 1994 GAO report recommends that EPA should information repositories more useful and accessible to the public; redesign its public notices and print them in local newspapers to make them more visible to a broader segment of the public; and assess the benefits of routinely evaluating the reading level of fact sheets and other documents intended for the general public to make them less technical and more accessible. The bill requires that information distributed to the community as part of the public participation program of CERCLA Section 117 must be presented in a manner that may be easily understood by the community. EPA is directed to consider any unique cultural characteristics of a community, as well as any educational or language barriers, in carrying out this requirement.

SEC. 307. NO IMPEDIMENT TO RESPONSE ACTIONS

Summary

The bill provides that nothing in the public participation section of the law should impede or delay the ability of EPA to conduct a response action necessary to protect human health and the environment.

Discussion

The bill adds a number of requirements for public participation in affected communities at covered facilities. However, it is not intended that these requirements should impede response actions that are needed to protect human health or the environment.

TITLE IV—SELECTION OF REMEDIAL ACTIONS

SEC. 401. DEFINITIONS

Summary

This section adds definitions to section 101 of CERCLA for the terms “Technically Impracticable” and “Beneficial Use.” Both terms are used elsewhere in the title.

Discussion

The definition of the term “technically impracticable” states the conditions that must exist for a standard or requirement in the cleanup provisions in section 121 to be waived. The definition is based upon EPA guidance for the remediation of contaminated groundwater. OSWER Directive 9234.2–25, *Interim Final Guidance for Evaluating the Technical Impracticability of Ground-Water Res-*

toration (September, 1993), states that a technical impracticability determination should be based on “. . . engineering feasibility and reliability, with cost generally not a major factor unless compliance would be inordinately costly.” (OSWER Directive 9234.2-25 at 10, citing 55 Fed. Reg. 8748, March 8, 1990). The definition in S. 8 is consistent with EPA guidance and the National Contingency Plan.

The definition of the term “Beneficial Use” states the goal for future utility of land after a Superfund cleanup is completed. The definition is used in section 121(b), which details the process to develop assumptions regarding the future use of contaminated land. The potential for beneficial use of land in a manner that confers economic, social, environmental, conservation, or aesthetic benefit is a factor that the Administrator must consider in developing assumptions regarding the future use of the land, which will have an impact upon the remedial action alternatives that the Administrator will consider.

SEC. 402. SELECTION AND IMPLEMENTATION OF REMEDIAL ACTIONS

Summary

The bill provides a new section 121 that replaces existing section 121 of CERCLA. The fundamental remedy selection rule in the new section states that the Administrator must select a cost-effective remedy that protects human health and the environment. Further, applicable Federal and State law cleanup requirements must be met at NPL sites. A risk-based standard is used if there is no applicable Federal or State law requirement. The bill modifies the existing statutory preferences for permanence and treatment with a more flexible six-factor balancing test.

The bill requires consideration of the reasonably anticipated future use of land and water resources in determining the degree of cleanup. Uncontaminated groundwater which is suitable for use as drinking water is protected if it is technically practicable to do so. Contaminated groundwater that is a foreseeable source of drinking water must be restored if it is technically practicable to do so. The bill also contains a new preference for treatment that is limited to those materials that cannot be reliably contained and pose a substantial risk to human health and the environment because of the material's high toxicity, high mobility, and a reasonable probability of actual exposure to the hazardous substance. New provisions on institutional controls are included to ensure long-term protection when a selected remedy leaves contamination in place. A new provision also is included to describe the process for obtaining a waiver due to technical impracticability, and the obligations for any alternative remedial action to protect human health notwithstanding a waiver.

Discussion

General Cleanup Rule. S. 8 provides a complete replacement for existing section 121 of CERCLA and states the new remedy selection process for Superfund cleanups. Section 121(a)(1)(A) states the general cleanup mandate: the President must select a cost-effective

remedial action that protects human health and the environment, and attains or complies with applicable Federal and State laws.

Protection of Human Health and the Environment. New section 121(a)(1)(B)(I) contains an absolute mandate that remedial actions protect human health, and states the conditions that must be met for a remedial action to protect human health. The term “human health” specifically includes the health of children and other highly exposed or highly susceptible subpopulations. This is not a new requirement, as EPA has applied the current law’s mandate to protect human health, which does not include any language identifying specific populations at greater risk, to include protection of these groups.

Remedial actions must achieve a residual risk from exposure to threshold carcinogenic hazardous substances such that the cumulative lifetime additional cancer risk is in the range of 10^{-4} to 10^{-6} (1 in 10,000 to 1 in 1,000,000) for the affected population. In the case of nonthreshold carcinogenic and noncarcinogenic hazardous substances, cleanups must assure that the exposed population will not experience adverse health effects. Finally, cleanups must prevent or eliminate any human ingestion of drinking water containing hazardous substances in excess of Safe Drinking Water Act maximum contaminant levels (MCLs), or if MCLs have not been established for the substance, levels that meet the goals for protecting human health. This risk management goal gives the decision maker the flexibility to make appropriate risk management decisions in light of the nature and magnitude of the uncertainties which may be present in any given risk assessment at a particular facility. These uncertainties include strength of evidence regarding a substance’s human carcinogenicity, and the degree of knowledge about potential exposure pathways, and the characteristics of the exposed population.

EPA has established a risk management goal of 10^{-4} to 10^{-6} , with a point of departure at 10^{-6} , in Superfund’s National Contingency Plan. The point of departure is used for determining remediation goals or alternatives when ARARs are not available or are not sufficiently protective because of the presence of multiple contaminants at a site or multiple pathways of exposure.

S. 8 does not adopt a point of departure at either the more protective or less protective end of the risk range. Use of single point risk targets or points of departure could artificially limit the decision maker’s ability to select a protective, cost-effective remedial alternative. Use of the range recognizes that at certain sites, where there is thorough site characterization and data regarding the health effects of the contaminants, setting goals near 10^{-4} may be protective. EPA generally uses 10^{-4} as the lower end of the protectiveness range in making risk management decisions, however EPA may consider a specific risk estimate around 10^{-4} acceptable if justified based upon site-specific conditions. (See, e.g., OSWER Directive 9355.0-69, *Rules of Thumb for Superfund Remedy Selection*, August 1997, at 9). Conversely, at sites with less extensive data, setting goals at the high end of the range to account for uncertainty may be required for a protective remedy. Further, the final numeric risk goal selected is influenced by application of the remedy balancing test. The first prong of the balancing test for reme-

dial alternatives in section 121(a)(3) is the effectiveness of the remedy in ensuring protection of human health. This is a direct reference to the protectiveness requirements in section 121(a)(1)(B)(I), so the relative degree of protection within the range is balanced with the other five factors.

For hazardous substances other than nonthreshold carcinogens, remedies should reduce contaminant concentrations so that exposed populations will not experience adverse health effects during all or part of a lifetime, incorporating an adequate margin of safety (*i.e.* a hazard index at or below one). Finally, S. 8 prohibits actual human ingestion of drinking water that exceeds maximum contaminant levels established under the Safe Drinking Water Act (42 U.S.C. 300(f) et seq.), or at a risk-based protective level if no maximum contaminant level is established. Prevention of actual human ingestion of contaminated groundwater may require action under this section prior to the time that any actual ingestion occurs so long as such ingestion is reasonably foreseeable.

A remedy protects the environment if it protects plants and animals from significant impacts resulting from releases of hazardous substances at the facility. This is a site-specific inquiry that shall not be based upon an impact to an individual plant or animal that does not also have an impact at the population, community, or ecosystem level. Impacts to individual plants or animals are considered if the plant or animal is listed as a threatened or endangered species under the Endangered Species Act (16 U.S.C. 1531 et seq.).

Compliance with Applicable State and Federal Laws. Current law requires remedial actions to attain the relevant and appropriate requirements of State law (so called “RARs”). Critics contend that this requirement often leads to remedies that are not cost-effective. S. 8 retains the requirement in current law that Superfund cleanups must attain or comply with applicable Federal or State laws, however, S. 8 modifies the existing requirement to attain or comply with RARs. New section 121(a)(1)(C) requires a remedy to comply with the substantive requirements of Federal and State environmental and facility-siting laws applicable to the conduct of the remedial action or to the determination of the cleanup level. More stringent State requirements may be applied if the State demonstrates that they are generally applicable and consistently applied to remedial actions, and the State identifies the requirements to the President.

New section 121(a)(1)(C)(iii) authorizes waivers from the substantive requirements of applicable Federal and State laws for specified reasons. These waivers are essentially the same as the waivers found in existing law. New section 121(a)(1)(C)(iii)(ff), the so-called “fund balancing” waiver, does change current law to recognize the changes made to the Superfund liability scheme in Title V. Existing law limits the waiver to remedial actions funded “solely” by the Superfund Trust Fund. Limiting the use of the waiver to remedial actions funded solely with Federal resources made sense in the era when the Superfund management philosophy was to use the Federal Trust Fund first, then later seek cost recovery. Such a limitation makes far less sense for a reformed Superfund program. In recognition of the fact that the Trust Fund will assume a greater share of the cleanup costs due to the liability limitations

and exemptions created in Title V, as well as the availability of orphan share funding in the allocation system, the standard in S. 8 for invocation of the fund balancing waiver is for remedial actions that are funded “predominately” from the Trust Fund.

New section 121(a)(1)(D) states that if no applicable Federal or State standard exists for a contaminant a remedy must meet a standard that EPA determines to be protective. The Administrator’s action will be guided by the requirements in section 121(a)(1)(B) and the risk evaluation principles in section 131(b) and (c) in establishing such a protective standard.

New section 121(a)(1)(C)(ii) restates the exception in existing law that Federal, State and local procedural requirements, including permitting requirements, would not apply to response actions conducted onsite. For example, this would exempt a Superfund remedy from procedural, but not substantive, requirements of RCRA such as obtaining a subtitle C permit for the storage of hazardous wastes.

New section 121(a)(1)(C)(I)(II) provides an exemption from certain substantive RCRA requirements for hazardous waste management. Specifically, the standards applicable to owners and operators of hazardous waste treatment, storage and disposal facilities will not apply to the return, replacement or disposal of contaminated media (such as soil) into the same media in or very close to then-existing areas of contamination at the facility. This would allow soil excavated at a site during the construction of the remedy to be retained and managed onsite with other material that was not excavated. This fact pattern often arises when contaminated soil at a landfill, where the selected remedial action is a protective cap, is moved and consolidated under the protective cap. Section 3004 of RCRA could, in such a situation, require additional treatment that would not result in added protection of human health and the environment.

Remedy Selection Process Explained. New section 121(a)(2) provides a roadmap for the remedy selection process. It states that the President shall select a remedy from a range of alternatives that satisfy the requirements described above, by balancing six criteria in 121(a)(3). Alternatives that are to be evaluated under the balancing test must meet any additional remedy selection rules in section 121(b) that apply at that site, as well as the general requirements in section 121(a)(1) regarding protectiveness, cost-effectiveness and compliance with applicable State and Federal law.

New section 121(a)(3) contains the new remedy selection balancing test. This six-factor test is similar to proposals in previous bills reported by the Committee, including S. 1834 in 1994. The six-remedy selection balancing criteria are: effectiveness in protecting human health and the environment; long term reliability; short-term risk posed by the remedy; community acceptance; implementability, and reasonableness of the cost. In applying the balancing test the decision maker is directed that no single factor shall predominate over the others, and S. 8 does not provide any weighting to a specific factor.

The first factor is “the effectiveness of the remedy in protecting human health (including the health of children and other highly exposed or highly susceptible subpopulations) and the environ-

ment.” This factor directly invokes the standards for protection of human health and the environment in section 121(a)(1)(B). The second factor, “reliability of the remedial action in achieving the protectiveness standards over the long term” contains an implicit preference for permanent remedies that use treatment. Remedial actions that remove and neutralize hazardous substances are inherently more reliable than those that contain hazardous substances onsite. The third factor is “[a]ny short-term risk to the affected community, those engaged in the remedial action effort, and the environment posed by the implementation of the remedial action.” This factor directs the decision maker to consider whether the proposed remedial alternative presents risks that could outweigh the marginal risk reduction that the alternative would attain. For example, there may be significant risks to human health and the environment due to suspension of hazardous substances in the air or water column during remedy construction, or risks to residents or operators due to the excavation and removal of contaminated material from a site. These risks must be quantified and balanced against the other remedy factors.

The fourth factor is “acceptability of the remedial action to the affected community.” Title III of S. 8 contains significant improvements to Superfund’s existing community participation requirements and enhances the role of the community in the remedial action selection process.

The fifth factor is “implementability of the remedial action.” This means that remedial alternatives must be technically feasible from an engineering perspective. Maximizing this balancing factor favors remedies that are relatively easier to implement over those that are relatively more difficult, while eliminating those that are technically infeasible from further consideration.

The final balancing factor is “reasonableness of the cost.” The balancing test demands a relative weighing of all six factors in order to maximize the benefits of a remedial action within the overall mandate that selected remedial actions be cost-effective. In order to balance cost as a factor, a relative measure of the particular quality of the cost element must be expressed. EPA has recognized that reasonableness is an appropriate quality of the cost criterion to measure in some of its Superfund guidance. For example, in an September 26, 1996 memo from the Director of the Office of Emergency and Remedial Response regarding the National Remedy Review Board, EPA states that one of the appropriate review criteria the Board should consider when it evaluates a remedy decision is “[a]re the cost estimates reasonable?” (Attachment to OERR memo at 2). The cost factor in the balancing test in S. 1834, the Administration-supported “Superfund Reform Act of 1994,” was “the reasonableness of the cost of the remedy.”

Current EPA policy specifies three roles for cost in Superfund remedy selection. EPA recently issued guidance to clarify and interpret both the Superfund statute and the National Contingency Plan in OSWER Publication 9200.3-23FS, *The Role Of Cost in the Superfund Remedy Selection Process* (September, 1996). This fact sheet summarizes the cost consideration as follows:

Cost considerations are therefore factored into the balancing of alternatives in two ways. Cost is factored into

the determination of cost-effectiveness, as described above. And, cost is evaluated along with the other balancing criteria in determining which option represents the practicable extent to which permanent solutions and treatment or resource recovery technologies can be used at the site. (*Id.* At 5.).

The OSWER fact sheet goes on to recognize the role of cost in technical impracticability as follows:

Cost is relevant to the technical impracticability waiver, because engineering feasibility is ultimately limited by cost. EPA has stated that cost can be considered in evaluating technical impracticability, although it should generally play a subordinate role' and should not be a major factor unless compliance would be inordinately costly.' (*Id.* At 6, citing the preamble to the National Contingency Plan, 55 Fed. Reg. at 8748, March 8, 1990).

Similar to current EPA policy, S. 8 uses cost in remedial decision making in three ways. First, there is a mandate, identical to current law, that selected remedial actions be cost-effective. Second, the reasonableness of the cost is a balancing factor for the evaluation of remedial alternatives, but does not predominate over other factors such as long-term reliability (which contains an implicit preference for permanent remedies that use treatment). Finally, inordinate cost is the cost criterion that can be used to invoke a technical impracticability waiver.

Additional Remedy Selection Rules. Section 121(b) consists of five paragraphs that define additional rules that must be taken into account when selecting a Superfund remedy.

Reasonably Anticipated Future Use of Land and Water Resources. A frequent criticism of Superfund is that the selected levels of cleanup are not tied closely enough to the reasonably anticipated future uses of a facility. This can result in applying more-protective and costly residential cleanup standards where no residential use is contemplated or foreseeable. EPA provided the Committee with information during the 1997 stakeholder process that residential land use was assumed in 75–80 percent of all remedy decisions made since program inception. In 26 percent of these cases, residential use was the current use of the site, and in the remaining 74 percent residential use existed adjacent to the site, or was expected immediately off-site. This information was based on pre-1994 data. EPA reported that data for fiscal year 1995 indicated that 38 percent of the sites used only residential land use as the future land use assumption, while some industrial or commercial use was assumed at 60 percent of the sites. Many sites used multiple assumptions due to the large size of the site.

While EPA issued land use guidance on the topic in 1995. (*See* OSWER Directive 9355.7-04, *Land Use in the CERCLA Remedy Selection Process*, May 25, 1995), current law is silent on land use assumptions. New section 121(b)(1)(A) requires that, in selecting a remedy for a facility, EPA take into account the reasonably anticipated future use of land and water potentially affected by the release. When developing assumptions regarding the future use of land, new section 121(b)(1)(B)(I) requires EPA to consider the views

of local officials and community members, and consider specified factors in developing assumptions regarding reasonably anticipated future land uses. The process and factors listed are similar to the process and factors in OSWER Directive 9355.7-04.

It is important to note that the land use assumptions developed during the remedy selection process do not create "Federal zoning" for Superfund sites. This section does not provide EPA with the authority to enforce or compel the enforcement of local or State laws in the future. This section merely requires EPA to ensure that at the time any land use assumption that relies on an institutional control is made, that the relevant local or State governments have the necessary legal mechanisms to implement, monitor and enforce the institutional controls. Local governments retain the full scope of police powers over land use decisions delegated to them by the respective States. The goal of this provision is to prevent unwarranted expenditures where there is reliable information regarding the reasonably anticipated future use of a Superfund site.

Section 121(b)(1)(C) contains rules for development of assumptions regarding the reasonably anticipated future use of ground water and surface water. EPA must give substantial deference to the classifications in an approved State comprehensive ground water protection program (so-called "CSGWPPs"). This policy accords with EPA guidance on the subject, which states that EPA will "[d]efer to State determinations of current and future groundwater uses, when based on an EPA-endorsed CSGWPP that has provision for site-specific decisions." (See OSWER Directive 9283.1-09, *The Role of CSGWPPs in EPA Remediation Programs*, April 4, 1997, at 1). If the plan is not EPA-approved, then EPA must still consider it along with other designations or plans adopted by the governmental unit that regulates water use planning in the vicinity.

Protection and Cleanup of Groundwater. New section 121(b)(2) includes additional provisions applicable to protection of uncontaminated ground water and the cleanup of contaminated ground water. Section 121(b)(2)(B) requires that a remedy seek to protect uncontaminated groundwater that is suitable for use as drinking water, if it is technically practicable to do so. Suitability for use as drinking water is a site-specific decision, and not dependent upon any designation or reasonably foreseeable use under section 121(b)(1)(C). Suitability would be limited by the conditions stated in section 121(b)(2)(F), which describe ground water not suitable for beneficial use as drinking water. Section 121(b)(2)(C) requires that contaminated ground water that is a current or reasonably foreseeable source of drinking water should be restored to a condition suitable for such beneficial use if it is technically practicable.

New section 121(b)(2)(A) states that a remedy for contaminated ground water shall proceed in phases in order to allow the collection of sufficient data to evaluate the effect of any other remedial action taken at the site and to determine the appropriate scope of any needed future remedial action. This approach is consistent with current EPA guidance on groundwater remedies. (See OSWER Directive 9283.1-12, *Presumptive Response Strategy and Ex-Situ Treatment Technologies for Contaminated Groundwater at*

CERCLA Sites, October 1996, at 5, 6 (hereinafter “*1996 Groundwater Guidance*”). Remedial decisions for contaminated ground water must also consider the current or reasonably anticipated future uses of the groundwater under section 121(b)(2)(C); any natural attenuation or biodegradation that would occur without remedial action, and the effect of any other completed or planned response action. Again, this is consistent with current EPA policy. (See the *1996 Groundwater Guidance* at 17 through 19).

The cleanup process for contaminated groundwater is described in section 121(b)(2)(C). The mandate in this section is that as much of any contaminated ground water that is a current or reasonably foreseeable source of drinking water shall be restored unless it is technically impracticable to do so. This section allows division of groundwater into two or more zones to tailor cleanup to differing conditions throughout the contaminated plume. This approach allows EPA to differentiate between areas in the contaminated plume where restoration is technically practicable from those areas where it is not; restoration is not an “all or nothing” decision.

Section 121(b)(3)(C)(iv) requires that a remedial action for contaminated groundwater attain the more stringent of Federal drinking water standards or State water quality standards. If no standard exists, then the remedy must be protective of human health and the environment based on a risk assessment. Restoration to a level that is more stringent than the naturally occurring background levels in the surrounding area is not required. This section does not require restoration of contaminated groundwater beneath a containment area, such as under a landfill which is covered and capped. The boundary of the containment area defines the lateral extent of the area where restoration is not required.

Contaminated ground water or surface water that is not suitable for beneficial use as drinking water because it meets the conditions stated in section 121(b)(3)(F) nonetheless must be remediated unless it is technically impracticable to do so. Such contaminated water must attain a standard that is protective for the current or reasonable anticipated (non-drinking water) future uses of that water and any surface water to which the contaminated water discharges.

Even if the restoration of some or all of the contaminated groundwater is technically impracticable, section 121(b)(2)(C)(vii) imposes conditions that a remedial action must meet. Consistent with the mandate in section 121(a)(1)(B)(iii), no human ingestion or exposure is allowed, and the remedy must incorporate provision of alternate water supplies, point-of-use treatment or other measures to ensure there is no ingestion or exposure. Impairment of designated surface water uses under section 303 of the Federal Water Pollution Control Act or comparable State law caused by a hazardous substance, pollutant or contaminant in any surface water into which contaminated groundwater is known or expected to enter, is prohibited unless it is technically impracticable to prevent such impairment. Long-term monitoring of the contaminated ground water is required, and groundwater monitoring requirements shall be reviewed during the periodic review of the remedial action to determine when the monitoring requirements may be modified or eliminated. The responsibility for any point-of-use treatment or alter-

nate water supplies remains the obligation of the responsible parties.

New section 121(b)(3)(D) allows the use of monitored natural attenuation as an element of a remedy. Monitored natural attenuation is not a “no action” alternative, and does not relieve a party’s obligation to attain a cleanup level or standard required by this act. The use of monitored natural attenuation is consistent with long-standing EPA practice, the *1996 Groundwater Guidance* (See pages 18–19), and the more recent draft OSWER Directive *Use of Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites* (draft dated June 7, 1997).

Section 121(b)(3)(E) restates existing law for so-called alternate concentration levels (ACLs) where a contaminated groundwater plume intercepts surface water. There is one significant change from current law. Current law contained a proviso that limited the application of ACLs unless it could be demonstrated, inter alia, that “on the basis of measurements or projections, there is or will be no statistically significant increase of such constituents from such groundwater in such surface water . . .” (CERCLA section 121(d)(B)(ii)(II)). As practical matter, it is not possible to demonstrate satisfaction of the requirement. In order to remove the practical barrier to utilization of ACLs, S. 8 changes the provision to read “on the basis of measurements or projections, there is or will be no impairment of the designated use established under section 303 of the Federal Water Pollution Control Act (42 United States Code 1313) from ground water in such surface water . . .”

New section 121(b)(3)(F) defines groundwater that is not suitable for use as drinking water due to naturally-occurring conditions, broad-scale human activity unrelated to a specific facility or release that makes restoration of drinking water quality technically impracticable (such as an aquifer with multiple sources of contamination) and or low yield aquifers that are not currently used as drinking water sources and are physically incapable of yielding 150 gallons per day.

Preference for Permanence and Treatment. New section 121(b)(3) replaces current law’s preference for permanence and mandate for treatment. This section serves as a supplement to the preference implied in the long-term reliability prong of the remedy balancing test in section 121(a)(3). The bill provides that for discrete areas containing highly toxic contaminants that cannot be reliably contained, and present a substantial risk to human health and the environment because of high toxicity, high mobility, and a reasonable probability of actual exposure, the remedy selection process must include a preference for a remedy that includes treatment.

New section 121(b)(3)(B) states exceptions to the preference so that EPA may select a containment remedy for landfill or mining sites. Landfills will often have discrete areas of hazardous waste that are relatively small in volume compared to the overall amount of waste or contamination at the site which is not readily identifiable or accessible. A containment remedy may nonetheless be selected if such a remedy is the appropriate remedy for the larger body of waste in which the discrete area is located. A final containment remedy may be selected at sites where the volume and size of the discrete area is extraordinary compared to other sites on the

National Priorities List (typically mining sites), if it is highly unlikely that any treatment technology will be developed that could be implemented at a reasonable cost because of the volume, size and toxicity of the discrete area.

Institutional Controls. An institutional control is a restriction on the permissible use of land, ground water or surface water included in any enforceable decision document for an NPL facility to comply with the requirements to protect human health and the environment. Institutional controls are currently a part of most Superfund remedial actions. Data furnished to the Committee by EPA during the 1997 stakeholder process reported that 55 percent of all fiscal year 1994 records of decision (RODs) included institutional controls as part of the remedy. Data for fiscal year 1996 saw the percentage of RODs with institutional controls rise to 66 percent. Through fiscal year 1994, deed restrictions were the most frequently used institutional control, followed by ground water restrictions, and land use restrictions.

Current law is silent on the topic of institutional controls. New section 121(b)(4) establishes rules for the use of institutional controls that recognizes that they are already a part of most Superfund remedies, and attempts to balance the Federal interest that Superfund remedies are protective and reliable over the long term with the State and local interest in regulating property law.

Section 121(b)(4) permits EPA to select a remedy that allows a contaminant to remain onsite at a concentration above a protective level if institutional and engineering controls would be used to ensure protection of human health and the environment. The section includes a definition of institutional controls with a non-exclusive listing of institutional control mechanisms.

Section 121(b)(4)(B) requires that the Administrator use protective institutional controls if contaminants remain in place that would not permit unrestricted facility use after cleanup. Section 121(b)(4)(C) requires that institutional controls are adequate to protect human health and the environment, reliable over the long term, and are properly implemented, monitored, and enforced. Section 121(b)(4)(D) requires that the institutional controls are clearly identified in the record of decision. Section 121(b)(4)(E) requires the Administrator to maintain a national registry of institutional controls, including any engineering measures employed to achieve the level of protection required by section 121(a)(1)(B).

Technical Impracticability. Current law allows EPA to waive attainment of an applicable, relevant and appropriate requirement of Federal or State law that is incorporated into a Superfund remedy if it is technically impracticable to attain the standard. Current law is silent, however, on the process for raising and resolving the issue of technical impracticability, and on the procedure to follow in the case of a cleanup standard that is risk-based and not based upon an applicable Federal or State law. New section 121(b)(5) makes the waiver process for technical impracticability more predictable and transparent to the affected community and potentially responsible parties. This section provides that, even if EPA finds that attaining a standard is technically impracticable, EPA still must comply with the mandate to protect human health and select a technically practicable remedy that is protective as defined in sec-

tion 121(a)(1)(B)(I) and most closely approaches the cleanup goals through cost-effective means. Section 121(b)(5) allows technical impracticability waivers to be based on projections, models or other analysis; and requires the determination be made as soon as sufficient information is available. This answers a frequent criticism of the current technical impracticability waiver process that a remedy must be constructed and operated prior to the time a waiver becomes ripe for review.

The section establishes a process for technical impracticability reviews, and allows a party other than EPA that is performing the cleanup (such as a party cleaning up under a consent decree) to request a review. Notice and an explanation is required when technical impracticability is invoked.

SEC. 403. REMEDY SELECTION METHODOLOGY

Summary

S. 8 requires EPA to perform facility-specific risk evaluations as part of the remedial action. The bill states that the goal of an evaluation is to provide informative estimates that neither minimize nor exaggerate the current or potential risk posed by a facility. A facility-specific risk evaluation must use chemical- and facility-specific data in preference to default assumptions whenever practicable. S. 8 also adds risk communication principles to the Act and requires EPA to ensure that the presentation of health effects information is comprehensive, informative and understandable. Among other things, a document reporting the results of a risk evaluation must present the central estimate of risk for specific populations, as well as the upper- and lower-bound risk estimates, and identify significant uncertainties in the assessment process.

Discussion

Risk Assessment. New section 131 regulates risk assessment activity in Superfund. Section 131(a) states that the goal of a facility-specific risk evaluation is to provide informative and understandable estimates that neither minimize nor exaggerate the current or potential risk posed by a facility.

Section 131(b)(1) lists requirements that a facility-specific risk evaluation must meet. This section recognizes that risk evaluations are ultimately based on a combination of measured data from the facility, non-facility-specific data and assumptions where there are gaps in the data or knowledge of conditions at a site. This section states a preference to use chemical and facility-specific data in preference to default assumptions whenever practicable. This does not require the development of new toxicology data for every chemical at each facility, but merely expresses a preference for chemical specific data when it is practicable to obtain it. Consistent with the preference for facility-specific data, the section also requires: (1) evaluation of the exposed population and current and potential pathways and patterns of exposure; (2) consideration of the current or reasonably anticipated futures use of land and water resources in estimating exposure (a reference to the planning assumptions conducted under section 121(b)(1)); and (3) consideration of any institutional controls that comply with the requirements stated in

section 121(b)(4). Institutional controls are typically used to interrupt exposure pathways that otherwise would be completed. The President will consider only those institutional controls that are in place at the time that the risk assessment is conducted, and may inquire into the effectiveness of the institutional controls in assuring long-term protection of human health and the environment.

Section 131(c) directs the Administrator to use facility-specific risk evaluations for six different purposes. The listed uses are designed to ensure that selected remedies are protective while avoiding the phenomenon of compound conservatism that leads to unnecessary remedial expenditures. The listed uses of a facility-specific risk evaluation are: to determine the need for remedial action; to evaluate the current and potential exposures and risks at the facility; to rule out the need for further study of specific contaminants, areas or exposure pathways; to evaluate the protectiveness of alternative proposed remedies; to demonstrate that the selected remedial action can achieve the goals of protecting health and the environment and land and water resource uses; and to establish protective concentration levels if no applicable requirement exists or an existing requirement is not sufficiently protective.

Section 131(d) adds risk communication principles to the Act and requires EPA to ensure that the presentation of health effects information is informative, comprehensive and understandable. The provision is virtually identical to the risk communication provision in the Safe Drinking Water Act Amendments of 1996. This provision directs EPA to improve its performance in explaining scientific information and uncertainties that are included in facility-specific risk evaluation, and how the agency reconciles any inconsistencies that exist in the scientific data generated in the facility's evaluation.

Any chemical-specific, facility-specific or default assumptions used in a facility-specific risk assessment must meet the requirements in section 131(e). The requirements, virtually identical to provisions adopted in the Safe Drinking Water Act Amendments of 1996, require the President to use the best peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices. This places an affirmative duty upon the Administrator to rely upon the best available science and information to support decisions made under this section. This section also requires the Administrator to collect data using accepted methods. If accepted methods are not available, then the Administrator must use the best available methods if the reliability of the method and the nature of the decision to be made justifies the use of data instead of a default assumption. Any decision to obtain data is also informed by the requirement in section 131(b)(1)(A)(I) to use actual data in preference to default assumptions whenever it is practicable to obtain such data.

EPA has 18 months to issue final regulations implementing section 131.

Presumptive Remedies. New section 132 addresses so-called "presumptive remedial actions" to streamline the remedy selection process. Section 132(a) directs EPA to establish presumptive remedial actions that identify preferred technologies and approaches for

common categories of facilities, and identify site characterization methodologies for those categories of facilities.

Section 132(b) states that remedies may include institutional and engineering controls, and must be practicable, cost-effective and protective of health and the environment. Sections 132(c) and (d) contain limits on the use of presumptive remedies, and procedures for the promulgation of a list of presumptive remedies and updates to that list.

SEC. 404. REMEDY SELECTION PROCEDURES

Summary

EPA is required to streamline and accelerate the cleanup process by use of early response actions and combining the multiple studies now performed at a site into an integrated approach to site assessment. Removal program limits are increased. The duration of emergency response actions is raised from 12 to 36 months, and the authorized spending cap is raised from \$2 million to \$5 million per site. Qualified PRPs are allowed to conduct the bulk of the cleanup process under EPA supervision.

A Remedy Review Board is established with two missions. It will examine approximately 1/3 of all new remedy decisions to ensure national consistency in remedy selection. It may re-examine old remedy decisions and recommend a new remedy if the new rules in this bill save significant amounts over the current remedy while still reaching equivalent protection standards. Governors can veto the reopening of old remedy decisions.

Discussion

National Contingency Plan Revisions. New section 133 requires EPA to revise the National Contingency Plan, EPA's rule implementing Superfund's cleanup provisions, within 180 days of enactment.

Acceleration of Cleanups. New section 134 contains several improvements to the conduct and administration of Superfund cleanups. Sections 134(a) and (b) codify several improvements to Superfund that EPA promulgated in the Superfund Accelerated Cleanup Model in 1992 (SACM). (See OSWER Directive 9203.1-03, *Guidance on Implementation of the Superfund Accelerated Cleanup Model (SACM) Under CERCLA and the NCP*, July 7, 1992). SACM emphasizes the use of early response actions to prevent exposure and further migration of contaminants, the consolidation of multiple site studies in a phased manner that uses the results of earlier investigations and response actions to better define subsequent data needs and response actions.

Section 134(a) would require EPA to implement measures to accelerate and improve the remedy selection and implementation processes, tailor the level of oversight of response actions, and streamline the process for submitting, reviewing and approving plans and other documents. New section 134(b) requires EPA to attempt to expedite completion of response actions through appropriate phasing of investigative and response activities.

New section 134(c) would authorize EPA to allow one or more PRPs to perform a response action where EPA determines that the

party or parties would do so properly and promptly and the parties agree to reimburse the Fund for oversight costs. The section also allows EPA to tailor the level of Federal oversight of PRPs that are conducting response actions based upon the PRPs capability and prior performance. The specific oversight factors are listed in section 134(c)(5). This approach is consistent with EPA policy to reduce Federal oversight at Superfund sites where reliable parties are conducting the cleanup (*See* OSWER Directive 9200.4-16, *Reducing Federal Oversight at Superfund Sites with Cooperative and Capable Parties*, July 31, 1996).

The response action activities the President may authorize a potentially responsible party to perform are enumerated in section 134(c)(4). Included on this list is "preparation of draft proposed remedial action plans." This is a new document that is not covered in law or EPA regulations and guidance, and is essentially a recommendation by the party performing the response action to the Administrator concerning the contents of the proposed remedial action plan. The proposed remedial action plan is issued by the Administrator and, after public notice and comment, forms the basis for the record of decision at a Superfund site. New section 134(d) directs the Administrator to issue guidelines to identify the contents of a draft proposed remedial action plan. New section 133(f) states that the President may approve a PRP-prepared draft proposed remedial action plan and treat it as the President's proposed plan.

Remedy Review Boards. New section 134(e) directs the Administrator to create one or more "remedy review boards" in order to assure cost-effective remedy selection decisions, as well as national consistency among EPA's regions. The boards' function is to review new remedy decisions that meet certain criteria, as well as provide discretionary review of certain old remedy decisions. EPA has administratively created a remedy review board, and the provisions in S. 8 are modeled on EPA remedy review board (*See generally, Office of Emergency and Remedial Response Memorandum National Remedy Review Board*, September 26, 1996, which establishes operating procedures for the board). Unlike EPA boards, which merely require consultation with affected States (*See* September 26, 1996 memo at 3), section 134(c)(1)(B) requires that technical and policy experts from State agencies constitute 1/3 of the board membership if the draft proposed remedial action plan was prepared by a State to which EPA transferred responsibility for the facility under Title II of S. 8.

Reviewing New Remedy Decisions. 134(e)(2) requires EPA to issue a rule establishing operating procedures for the board, including cost-based or other criteria for determining which draft proposed remedial action plans would be eligible for review. Board review is discretionary, and section 134(e)(3)(B) allows the Administrator to deny a review to an otherwise qualifying draft proposed remedial action plan if the Administrator determines that review would result in an unacceptable delay in taking measures to achieve protection of human health and the environment. This section requires that the criteria cause an annual average of one-third of the draft proposed remedial action plans to be eligible for board review. EPA states that the goal of the thresholds in their current

guidance is to review 10 percent of the proposed remedial action plans in each year. New section 134(e)(3) establishes the timing of review at a point prior to the release of the draft proposed remedial action plan for public comment, consistent with both the November 28, 1995, OSWER memorandum establishing the remedy review board and the September 26, 1996, OERR memo on board operating procedures. As in current EPA practice, PRPs participating in the performance of the remedial investigation and feasibility study are provided an opportunity to meet with the board and provide written comments. Unlike the five-page limit on written comments imposed by EPA in its September 26, 1996 memo, the section requires that any limit established by the Administrator be rationally related to the level of detail contained in the draft proposed remedial action plan.

New section 134(e)(5) directs the board to provide recommendations to the Administrator, and in section 134(e)(5)(B) enumerates a non-exclusive list of factors for the board to consider. The factors were modeled on factors contained in various EPA guidance documents concerning the National Remedy Review Board, including the September 26, 1996 memo and its attachment. The Administrator is allowed to add other relevant factors to this list that the Administrator considers appropriate.

Section 134(e)(5)(C) requires the Administrator to give substantial weight to the board's recommendations in determining whether to modify a remedial action plan; however the section explicitly states the Administrator's rejection of the board's recommendation shall not, by itself, render a remedy selection decision "arbitrary and capricious." Nothing in the section modifies existing law with respect to the bar on pre-enforcement review under section 113.

SEC. 405. COMPLETION OF PHYSICAL CONSTRUCTION AND DELISTING

Summary

New section 135 establishes procedures and time frames for completion of a remedial action and delisting of a facility from the NPL. Delisting would not affect liability allocations, cost-recovery provisions, or operation and maintenance obligations. Section 135(c) states that the need for continued operation and maintenance at a facility is not a sufficient reason to delay delisting of the facility, as long as the O&M is legally enforceable.

Discussion

A frequent complaint of communities near Superfund sites is that the mere listing of a site on the National Priorities List can have a chilling effect on investment and development throughout a community. This section requires that, when capital construction of a remedy is completed and all that remains is the so-called "operation and maintenance" phase of the remedial action, EPA shall have 180 days to propose that the site be removed from the NPL. Since NPL listing and delisting decisions are informal rulemakings, EPA must provide for and consider public comment before publishing its decision to delist the facility. The President must publish a decision not later than 60 days after the commencement of the comment period. Section 135 limits the President's discretion by

only allowing approval or withdrawal of the proposed delisting petition (effectively a decision to retain the site on the NPL beyond the point in time when physical construction is complete) until implementation of the proposed remedial action is complete. The need for continued operation and maintenance that is subject to a legally enforceable agreement, order or decree shall not be the sole basis for the President to withdraw a proposed delisting. A delisting under this section has no effect on liability, cost recovery, allocation, enforcement or any other obligations arising under this Act.

SEC. 406. TRANSITION RULES FOR FACILITIES CURRENTLY INVOLVED IN REMEDY SELECTION

Summary

New section 136 establishes transition rules for selection of remedial actions at facilities currently involved in a cleanup. The remedy review board established under section 134(e) would evaluate petitions for remedy updates. While review of a petition requesting that an update for pre-enactment remedy that meets stated criteria is mandatory, the decision to actually update an old remedy is discretionary.

Discussion

Updating Old Remedy Decisions. It is EPA policy to periodically examine some old decisions about Superfund remedies. On September 27, 1996, EPA issued a memorandum from the Office of Emergency and Remedial Response entitled *Superfund Reforms: Updating Remedy Decisions*. The guidance states that the “updates are intended to bring past decisions into line with the current state of knowledge with respect to remediation science and technology while ensuring reliable short and long term protection of human health and the environment.” (Id. at 1). New section 136 incorporates a formal process to reexamine old remedy decisions into the Superfund statute, and uses the remedy review board established under section 134(e) to perform the reviews.

Section 136(b) details the process for implementors of records of decisions—such as responsible parties or PRPs that are performing the remedial action—to seek review of a pre-enactment record of decision (ROD). In the case of facility for which a ROD was signed before the date of enactment, the implementor of the ROD would have 1 year to petition the remedy review board to update the ROD to incorporate alternative technologies, methodologies or approaches into the remedy.

The remedy review board criteria are listed in section 136(b)(3). These criteria are premised on the view that older remedies involving ground water are the most likely to produce significant cost savings upon review based upon more recent experience in attempting to restore contaminated ground water. The specific board acceptance criteria are: the proposed new alternative complies with section 121; the Governor of the State where the facility is located does not object; the ROD under review was issued before 9/21/96 (the date EPA issued its guidance on updating old remedies); or the ROD under review involved groundwater treatment and was issued before 10/1/93 (the date EPA issued groundwater cleanup technical

impracticability guidance, OSWER Directive 9234.2-25, *Guidance for Evaluating the Technical Impracticability of Ground-Water Restoration*). Further, one of the following cost criteria must be satisfied: the old ROD is estimated to cost more than \$30,000,000, or the old ROD costs between \$5,000,000 and \$30,000,000 and the new remedy saves at least 50 percent of the cost. The cost criteria are identical to the criteria used by EPA's remedy review board for evaluation of new proposed remedial action plans, and represents a dollar threshold where the Federal interest in preventing incurrence of unnecessary response cost may warrant reexamining the prior remedy decision. (See November 28, 1995, OSWER Memorandum *Formation of National Superfund Remedy Review Board*).

EPA's September 27, 1996, memorandum on the subject, *Superfund Reforms: Updating Remedy Decisions*, does not contain any lower dollar limit on remedies which may be updated. So as not to arbitrarily limit the Administrator's discretion, section 136(b)(3)(B) grants the Administrator the flexibility to waive cost thresholds at her discretion. Section 136(b)(4) directs the board to prioritize petitions based on criteria in section 136(b)(3) and estimated gross and proportional cost savings of the proposed remedy update. This is consistent with EPA's memorandum *Superfund Reforms: Updating Remedy Decisions* at page 6.

New section 136(c) lists the factors the Remedy Review Board must consider in evaluating petitions. The factors are closely modeled on factors promulgated by EPA in its guidance for the National Remedy Review Board (See OERR Memorandum, *National Remedy Review Board*, September 26, 1996, at page 5, and attachment at page 2).

New section 136(d) requires the Board to make a recommendation to the Administrator regarding remedy update. Section 136(e) requires the Administrator to give substantial weight to the board's recommendations, but does not mandate acceptance of the recommendation. Discretion to accept or reject a recommendation remain with the Administrator.

136(f) requires EPA to report to Congress annually on the Board's activities. Section 136(g) provides guidance to the Administrator in prioritizing her review of the recommendations provided by Board.

SEC. 407. NATIONAL PRIORITIES LIST

Summary

This section instructs EPA to not include as part of a National Priority List facility any parcel of real property at which no release has occurred, but to which a contaminant that was released from another parcel has migrated in ground water.

Discussion

When facilities are added to the National Priorities List, there are often adverse economic consequences for any property that is within the facility boundary. Section 407 amends CERCLA so that, to the extent practicable, a parcel of real property at which no release occurred is not included in the listed facility if it merely overlies the contaminated plume that was caused by a hazardous sub-

stance release occurring elsewhere. There is an exception to this listing policy for ground water that is (or was) in use as a public drinking water supply, if the owner or operator of parcel that would not be included as part of the facility is in privity with any other person who is liable for response costs at the facility. The Administrator's ability to take response actions at parcels excluded from the NPL facility boundaries is preserved.

TITLE V—LIABILITY

SEC. 501. LIABILITY EXCEPTIONS AND LIMITATIONS

Summary

The bill would modify existing section 107 to create liability exemptions and limitations for some of the parties that have been adversely impacted by strict, joint, several and retroactive liability imposed under current law.

Small generators of only municipal solid waste, de micromis contributors of hazardous waste, and small businesses with fewer than 75 employees or \$3 million in gross annual revenue would be excluded from the liability system. These classes of responsible parties also receive protection from any other Federal or State law for any cleanup costs that are expended at NPL facilities after the date of enactment of the Superfund Cleanup Acceleration Act.

Larger generators of only municipal solid waste would have their liability limited to 10 percent of the total cleanup costs incurred after the date of enactment of the bill. Municipal owners and operators of co-disposal landfills (landfills where both solid waste and hazardous substances were disposed) listed on the NPL prior to January 1, 1997, could take advantage of a liability cap based on the size of their community. Communities with fewer than 100,000 residents would be subject to a cap of 10 percent, and communities with greater than 100,000 residents would be subject to a 20 percent cap.

Each of the liability caps for municipal owners and operators could be adjusted upwards or downwards by the President or the allocator at the site, depending on whether the municipality undertook activities that exacerbated or mitigated the potential for environmental contamination at the site.

Discussion

Section 107 of CERCLA provides that persons can be held liable for the costs of cleaning up Superfund sites ("response costs") in the following situations: (i) they currently own or operate facilities from which there is a release or a threat of release of hazardous substances; (ii) they owned or operated such a facility in the past at a time when hazardous substances were disposed at that facility; (iii) they generated hazardous substances that are now found at such a facility and/or arranged for the transport of those substances to that facility; or (iv) they accepted hazardous substances for transport to disposal or treatment facilities from which there is a release or a threat of release of hazardous substances.

The courts have interpreted the liability provisions broadly, imposing liability on owners and operators, generators and transport-

ers, subject to very limited exceptions. They have imposed liability without regard to whether the events leading to the release of hazardous substances occurred prior to the original date of enactment of CERCLA in 1980, and without regard to whether the activity contributing to the release was in compliance with applicable laws.

Specifically, the Federal courts have made it clear that liability under the Superfund statute is not only retroactive (covered persons are liable for actions that took place prior to the enactment of CERCLA in 1980), but also that it is: (i) strict (covered persons are liable without regard to whether their actions were negligent or in full compliance with applicable law); (ii) joint (covered persons are all equally liable for the costs of cleanup so long as the harm is deemed indivisible); and (iii) several (each covered person can be held separately liable for costs attributable to that person)(*See, e.g., United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997) (retroactive liability); *United States v. R.W. Myer, Inc.*, 889 F.2d 1497 (6th Cir. 1989) (strict liability); *New York v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985) (strict liability); *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D. Ohio 1983) (joint and several liability)).

While S. 8 does not make any change to CERCLA's underlying liability system, S. 8 does ameliorate much of the unfairness of CERCLA liability through a system of liability limitations, exemptions, and proportional allocation. Considerable concern has been raised about the number of parties that are brought into the Superfund liability scheme as a result of third party contribution suits and actions by EPA. At some NPL sites, large PRPs who have been sued by the Justice Department have subsequently sought third party contribution from hundreds, and in some cases, thousands of homeowners, small businesses, churches and schools. The cost of seeking contribution from these small parties contributes significantly to the overall cost of the Superfund liability system. Although no specific figures are available because they involve private liability actions, a 1992 study on Superfund transaction costs conducted by the Rand Institute for Civil Justice (*Superfund and Transaction Costs—The Experiences of Insurers and Very Large Industrial Firms*) indicated that the transactional costs associated with these lawsuits was approximately 34 percent of the total private outlays at these sites.

Section 501(b) of the bill would create a new section 107(q) to exclude from liability home owners and renters, as well as businesses and non-profit organizations employing fewer than 100 people, who generated or transported municipal solid waste (MSW) and sewage sludge (SS) at an NPL facility. This liability exclusion would apply only to response costs at NPL facilities that were incurred after the date of enactment of the bill. At sites that are subject to a mandatory allocation under section 137, the share of liability associated with section 107(q) parties would be included within the orphan share and not assumed by other potentially responsible parties at the site. In order to obtain liability relief under section 107(q), parties must provide full cooperation, assistance and access for EPA cleanup efforts as required by that section.

Section 501(b) would also create a new section 107(r) to exclude from liability persons who generated or transported de micromis

levels (not more than 200 pounds or 110 gallons) of hazardous substances to facilities on the NPL. Unlike section 107(q), the share of liability costs associated with de micromis parties would not be borne by the orphan share, but instead, would be spread proportionally among the remaining parties at the site, as well as the orphan. An EPA estimate of the aggregate annual liability of all parties exempted by this provision is \$100,000. Since the program-wide costs associated with determining the appropriate orphan share for each de micromis party at each site would easily exceed this figure, it is more cost-effective to spread these costs among the other parties at the site.

Section 107(s) creates a new exclusion for small businesses that employ fewer than 75 employees or that have less than \$3 million in gross annual revenue, providing post enactment liability relief, under both Federal and State law, for tens of thousands of small businesses at NPL sites nationwide. During hearings on S. 1285 in the 104th Congress, as well as on S. 8 in the 105th, the Committee heard testimony from a number of small businesses that had been needlessly dragged into the Superfund liability net. One particularly stark example was that of Ms. Barbara Williams, the owner of Sunny Ray Restaurant in Gettysburg, Pennsylvania, who testified that her disposal of a ball-point pen in the Keystone Landfill resulted in third-party lawsuit seeking over \$76,000. Under new section 137(i), costs incurred after date of enactment by individuals meeting the requirements of new section 107(s) will be borne by the orphan share and not by other potentially responsible parties.

The small business exemption, however, does not apply where the small business contributed material containing a hazardous substance that “contributed significantly or could contribute significantly” to the cost of the response action at the site (section 137(s)(2)(A)). The “significant contributor” provision is to be narrowly construed so as not to subsume the general rule of section 137(s)(1) that exempts “small businesses.” A small business party eligible for this exemption is not a significant contributor unless the share of response costs incurred at a facility that are attributable to the exempt party’s waste contribution result in a substantial and disproportionate difference in the cost of the response.

Section 137(s)(1)(C) provides that persons who qualify for the small business exemption cannot be affiliated “through any familial or corporate relationship with any person that is or was a party responsible for response costs at the facility.” The term “affiliated” is intended to refer to individuals or firms that have identical or substantially identical business or economic interests, such as family members or persons with common investments. Generally, firms are affiliates of each other when one party controls or has the power to control the other, or a third party controls, or has the power to control, both. Factors to be considered when determining affiliation would include, ownership, management, previous relationships, or ties to another firm. The term “affiliated” appears in other sections of S. 8 and is intended to be interpreted in the same manner as described in this paragraph.

In order to discourage needless litigation, other potentially responsible parties who commence an action to recover post-enactment response costs or contribution against small municipal waste

generators, de minimis parties or small businesses who are relieved of liability under sections 107(q),(r) or (s), will be responsible for the litigation costs of the excluded party, including reasonable attorney fees and expert witness fees. In exchange for this relief, parties relieved of liability under sections 107(q),(r) or (s), will have to comply with the provisions of new section 107(y). Section 107(y) requires parties to provide full cooperation, assistance and access for EPA cleanup efforts.

Since the 103d Congress, there has been general agreement that the presence of large amounts of MSW or SS can complicate the process of determining the appropriate shares of liability at Superfund sites. This issue is exceedingly troublesome at co-disposal landfills, which are defined in the bill as facilities listed on the NPL as of January 1, 1997, that received both MSW or SS and may also have received hazardous substances. At a typical co-disposal landfill, the vast majority of the material at the site is comprised of non-hazardous MSW or SS, and it is the volume of this material that drives the cost of the cleanup due to the need for large caps. Yet, because EPA estimates that there are only two or three NPL sites (out of approximately 250+ co-disposal sites on the NPL) that contain only MSW or SS, the hazardous substances are typically the cause for the site being listed on the NPL.

Individuals and communities that disposed of only MSW or SS complain that they contributed only a small percentage of the total toxicity at the site, and thus, should be liable only for a very small percentage of the cleanup costs. Similarly, PRPs that disposed hazardous substances claim that they contributed only a small percentage of the total volume at the site, and thus, they should receive a very small share. EPA has tried a number of times since 1989 to issue guidance documents to sort out the liability between the various parties that disposed of hazardous and non hazardous materials at co-disposal sites. Most recently, on February 5, 1998, EPA issued guidance documents outlining how it would seek to settle this liability (*Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites*). Most notably, this policy would allow generators and transporters of only MSW to settle with EPA for an amount equal to \$5.30 per ton of material they sent to the site. While this policy was received favorably by municipal governments, it was roundly criticized by both the manufacturing and the waste disposal industries because of the wide range of settlements that would result from this arbitrary per ton rate. Critics claimed that in some cases, the settlement policy would result in generators and transporters of MSW assuming over 90 percent of the actual cleanup costs at the site, and in others, less than 5 percent.

Although EPA's per-ton approach was considered, the bill instead adopts a 10 percent cap for all generators and transporters of MSW or SS who do meet the criteria of new section 107(q). This approach is expected to more closely track actual cleanup costs at the individual sites. New section 101(45), defines MSW to include commercial, institutional or industrial waste that is substantially similar to waste normally generated by households, without regard to differences in volume. In combination with new section 107(q), this provision is intended to allow the manufacturers of high volume,

low toxicity materials, such as food products, to qualify for the 10 percent cap.

For co-disposal landfills owned or operated by municipalities with a population of 100,000 or more, new section 107(t)(2) would limit municipalities' liability to no more than 20 percent of the post-enactment costs. EPA or the allocator may increase this amount to no more than 35 percent, or decrease it to no less than 10 percent, for any municipality that took specific acts that exacerbated or mitigated the environmental contamination. Similarly, for municipalities with a population of less than 100,000, the aggregate liability shall be no greater than 10 percent of the post-enactment costs, with the discretion for EPA or the allocator to increase it to 20 percent, or decrease it to 5 percent, if the municipality exacerbated or mitigated the contamination.

The liability limitations for co-disposal sites do not apply to municipalities that acted in violation of RCRA subtitle C or D if the violation pertains to a hazardous substance that caused the incurrance of response costs at the facility. The intent of this provision was to clarify that individuals who acted in violation of applicable RCRA requirements would not benefit from subsequent liability relief.

The transition rule in new section 107(t)(3) addresses the applicability of the exemptions and limitations of section 501 to pending cases. Specifically, the transition rule states that section 501 is applicable to any action under sections 106 (unilateral orders), 107 (cost recovery), or 113 (contribution claims) that become final on or after the date of enactment. The transition rule also states that section 501 does not apply to any claim for pre-enactment costs. For example, where a CERCLA cost recovery claim is pending in a Federal district court, any identified party would be exempted from liability for post-enactment costs. This exemption would also apply where a judgment has been entered for response costs, but either an appeal has been filed, or the time for filing the appeal has not yet expired.

SEC. 502. CONTRIBUTION FROM THE FUND

Summary

Section 502 amends existing section 112 to provide that a small generator or transporter of SS or MSW (107(q)), a de micromis party (107(r)), or a small business (107(s)) that is undertaking a response action pursuant to a section 106 order or a settlement decree is required to fulfill its obligations to conduct the cleanup activities, even if the party is no longer liable by reason of an exemption or limitation contained in S. 8. Instead, the exempted party shall be reimbursed expeditiously for 100 percent of its post-enactment cleanup costs.

Discussion

During the debate regarding the transition rule for sites at which a PRP is currently undertaking a response action, there was some concern that the party should continue to conduct the cleanup rather than have EPA take over this role. The fact that private parties can conduct cleanups between 10–15 percent less expensively than

EPA justifies the decision that these private parties should complete the cleanups. Balanced against this was the concern about how to deal with those sites where a party had previously agreed to undertake the cleanup, yet subsequently is relieved of liability as a result of the enactment of this legislation. This language makes clear that in such an instance, while the party is required to continue to conduct the cleanup, the party shall be reimbursed from the orphan fund for all costs that it incurs after the date of enactment.

SEC. 503. EXPEDITED SETTLEMENT FOR CERTAIN PARTIES

Summary

The bill would modify existing section 122(g) to replace CERCLA's existing de minimis settlement provisions, establishing new expedited settlement procedures for parties that contributed less than 1 percent of the volume of hazardous substance at an NPL facility. Section 503 also provides for a reduction in the settlement amount for a party that has a limited ability to pay when the party is a natural person, a small business that does not qualify for the exemption under 107(s), or a municipality.

Discussion

During the 103d, 104th and 105th Congresses, there has been a continuing debate about the most appropriate way to treat parties that contributed de minimis levels of hazardous substances at Superfund sites. Under S. 8, de minimis is defined as an amount equaling 1 percent or less of the total amount of hazardous substances at the facility, unless the Administrator identifies a larger percentage based on site-specific factors. Some legislative proposals considered by the Committee over the last few years proposed to exclude de minimis parties from liability altogether; others, including this legislation, would provide these parties with an expedited settlement process.

Over the last few years, there has also been some concern about EPA's limited authority to tailor settlement amounts for parties based on their ability to pay. New section 122(g)(1)(D) would expressly authorize EPA to enter into limited ability to pay settlements with natural persons, small businesses with under 50 employees or less than \$3 million in gross annual revenues, municipalities, or any other party. EPA is given the flexibility to conduct an analysis to determine whether a small business has the ability to maintain its basic operations in light of the potential response costs that it will have to assume.

In considering the ability to pay of a municipality, EPA can consider a variety of mitigating factors such as bond ratings, operating revenues, debt services, per capita income, as well as unemployment and population information.

In order to remove these parties from the litigation process as soon as possible, section 503 requires that EPA expeditiously identify and notify each party that may qualify for a de minimis settlement and offer to reach a final administrative or judicial settlement with the qualifying party. Persons eligible for an expedited settlement are protected from being named as defendants under

CERCLA or any other Federal or State law for 1 year after they have been notified that they qualify for an expedited settlement, or within 90 days of being provided with a written settlement offer.

SEC. 504. ALLOCATION OF LIABILITY FOR CERTAIN FACILITIES

Summary

Section 504 of the Superfund Cleanup Acceleration Act requires EPA to conduct mandatory, non-binding allocations at NPL facilities involving 2 or more potentially responsible parties where cleanup costs incurred after the date of enactment exceed \$1 million. NPL sites that are already subject to a consent decree or unilateral administrative order as of February 1, 1998, would qualify for a limited allocation process solely to determine the extent of orphan share funding only as long as the total of the orphan shares (including, but not limited, to defunct and insolvent shares of liability) for post-enactment cleanup costs at the site exceed \$500,000.

The Administrator is required to conduct a comprehensive search for all potentially responsible parties at mandatory allocation facilities. Subsequently, EPA shall appoint an alternative dispute resolution (ADR) neutral to conduct a 90-day settlement negotiation. If the parties fail to settle, EPA, at the request of a PRP, shall select a neutral third-party allocator who shall seek information from the PRPs, and prepare a non-binding allocation report that specifies the percentage liability share of each party and of any orphan share based on defined allocation factors.

The final allocation report that is submitted to the Administrator, the Attorney General, and each allocation party, shall specify the estimated percentage share of each party and any orphan shares. Unless an allocation report is jointly rejected by EPA and DOJ, parties subject to the allocation shall be entitled to resolve their liability to the United States based on the shares determined by the allocator, subject to specified terms and conditions.

Discussion

While there has been extensive concern expressed in the PRP community regarding the imposition of Superfund retroactive liability for activities that legally took place prior to 1980, even greater concern has been raised about the issue of joint and several liability. During the hearings and staff investigations over the last few years, there have been repeated examples where PRPs have declined to settle with the Justice Department and EPA because they refuse to assume the liability of defunct and insolvent parties.

Beginning with the introduction of S. 1834 in the 103d Congress, there has been increasing support for the idea that Congress should create an allocation process to sort out the liability shares of the various parties at these sites. In addition, there is nearly universal support for the creation of an orphan fund, which would include the shares of defunct and insolvent parties, as well as a proportional share of unattributable shares at the site. This allocation process is principally intended to relieve the harshness of the joint and several liability system and provide greater incentives for parties to settle rather than litigate. By creating an orphan share

to assume certain liability costs, parties would only be required to pay for what they contributed to the site—so-called “fair shares.”

Determining which sites would be subject to the mandatory allocation system in new section 137 involved the consideration of important tradeoffs between fairness and efficiency. On one hand, there was a desire to have the allocation system apply to as many sites as feasible. On the other hand, there was a concern about the cost of reimbursing parties for costs that they had incurred prior to the date of enactment of this legislation.

In order to strike a balance, the legislation provides that any federally owned, or non-federally owned site shall participate in a mandatory allocation process, subject to specified threshold criteria, to determine the post-enactment shares of liability. First, the new allocation process does not apply to any NPL site that, on the date of enactment, has a settlement decree or order determining the liability of all viable (*i.e.*, non-defunct or insolvent) PRPs at the site. Second, the PRPs must demonstrate that there are post-date of enactment response costs that will be incurred at the NPL facility (*i.e.*, this does not have to be limited to one operating unit) that will exceed \$1 million. Third, if the facility has an existing consent decree (CD) or unilateral administrative order under section 106 (UAO) that was issued, signed, lodged, or entered on or before February 1, 1998, there must be a third party determination that the amount of the orphan share for the response costs remaining to be incurred after the date of enactment can be expected to amount to \$500,000 or more.

The \$1 million and \$500,000 cost thresholds are intended to exclude sites from this process that do not have significant litigation issues remaining for post-enactment costs. Nonetheless, there are several reasons why a significant number of sites with existing CDs and UAOs were intended to qualify for post-enactment orphan determinations. First, while one party may have settled with the Justice Department at the site, there could be dozens or potentially hundreds of other parties who may not have settled. Since a primary goal of this provision was to eliminate the need for litigation among PRPs, an orphan share determination would prove beneficial to these sites as well. Second, the legislation is intended to provide some liability relief for individuals who had settled prior to the enactment of this bill, even though the scope of the orphan would be limited to amounts incurred after the date of enactment.

Section 137(a)(5) is intended to apply equally to both privately owned facilities (at which there are at least 2 PRPs) and federally owned facilities (at which there is at least 1 private PRP). The use of a neutral allocator at a qualifying Federal facility is appropriate given the fact that private PRPs at these facilities typically have some type of contractual nexus with the Federal government. Federal courts have appropriately held the government liable where it exercises significant control over the operations or disposal activities at a facility. In conducting an allocation at a qualifying federally owned facility, the allocator should consider the control exercised by the Federal agency, any relevant contractual provisions, including provisions regarding indemnification, and the specific facts concerning the disposal activity at the facility.

At those facilities that do not meet the criteria to become mandatory allocation facilities, the Administrator has the discretion to conduct an allocation process at the request of a party that has incurred response costs or that has resolved its liability to the United States, but still has outstanding litigation with other PRPs. Given the fact that a primary goal of this legislation is to minimize private litigation between parties, the Administrator is expected to accommodate petitions for requested allocations to the maximum extent possible.

Section 137(b)(6), requires a demonstration that the orphan share of post-date of enactment costs is equal to or exceeds \$500,000 at a facility with an existing CD or UAO. To initiate this process, two or more parties who are subject to the CD or UAO must nominate a neutral third party, subject to approval by the Administrator, who shall within a short period of time make a determination whether the site meets the \$500,000 threshold. If it meets this threshold, then a limited allocation can take place for the sole purpose of determining orphan funding. The parties who seek the review by the neutral are responsible for paying the cost of the review process and, if a subsequent allocation determines that there is not at least \$500,000 in post-date of enactment orphan shares, the parties will receive no orphan shares. This criteria is intended to prevent PRPs from misusing this process, and should have the effect of discouraging frivolous petitions for mandatory allocations.

In addition to allocating the post-enactment response costs, section 137(b)(7)(A)(ii) also requires an allocation of the unrecovered response costs incurred by the United States prior to the date of enactment. Orphan funding would also apply to these unrecovered costs. Finally, section 137(b)(8) also provides that with the agreement of the allocation parties and the United States, an allocator could also provide an allocation of the pre-enactment response costs at the facility. However, reimbursement for orphan shares would not apply to such an allocation. In order to eliminate as much private litigation as possible, the Administrator should allow pre-enactment costs to be included within the allocation to the maximum extent feasible.

Section 137(c) creates a moratorium on litigation and enforcement. If a site is undergoing settlement negotiations under section 137(e) or a mandatory allocation under section 137(f), the portion of the claim related to post-enactment response costs must be stayed until 120 days after the issuance of a report by an allocator under section 137(h), or a second report under section 137(m). This language also provides for tolling of applicable statutes of limitation during the pendency of the settlement negotiations or mandatory allocation. This language does allow PRPs and EPA to continue with claims for response costs that were expended prior to the date of enactment.

A significant key to the success of the allocation process is the need to accurately identify all PRPs at the site. EPA has come under justifiable criticism for its efforts in the past that have resulted in the identification of only the largest PRPs at a site. Section 137(d) explicitly requires that EPA shall perform, as soon as reasonably practicable, a comprehensive search for all PRPs at a

mandatory allocation facility. EPA is also required to allow the PRPs to nominate additional PRPs who shall be included on the list of parties unless EPA determines that there is no basis to believe they are liable. An accurate, fair and comprehensive search for all PRPs will give the ADR neutral or the allocator the most appropriate information to determine the fair share of the liable parties at the site, and should give the PRPs confidence that the allocation resulted in an accurate division of liability.

EPA has expressed the view that its allocation pilot projects demonstrate that a formal allocation process is not necessary at every site. Indeed, EPA stated that when orphan funding was made available, the use of a less formal procedure was sufficient to settle the liability at the site without having to rely on a full-blown allocation. Balanced against this belief was the impression of a number of PRPs that mandatory allocations would be necessary at a majority of NPL facilities because of the complex liability issues involved at these facilities. In order to bridge these differences, S. 8 includes an up-front settlement process utilizing an ADR neutral, followed by a mandatory allocation if this settlement process proves to be unsuccessful.

Under section 137(e), an ADR neutral shall be appointed and given 90 days to reach a settlement. After 90 days, if the ADR neutral is successful in reaching a settlement that allocates at least 90 percent of the recoverable costs, the Administrator shall be required to adopt that settlement and provide 100 percent of the orphan shares. If a settlement has not been reached, the Administrator and a majority of the parties can agree to extend the negotiation, or alternatively, the parties can proceed to a mandatory allocation under new section 137(f).

The allocation process under 137(f) shall be performed by a neutral third-party allocator selected by EPA and the allocation parties. In order to provide a fair, efficient and impartial allocation, the allocator should make every effort to streamline the process and minimize costs. Similarly, EPA shall not establish any regulations or procedures that restrict the discretion of the allocator in assigning estimated contribution shares and the orphan shares provided in section 136. The intention of these restrictions is to make clear that these allocations are intended to be performed in the most streamlined and efficient manner practicable without unnecessary meddling by EPA and the Justice Department. Although the PRPs can comment on the draft allocation report, allocator's report can only be overturned by the courts if the objecting party demonstrates that the allocator's determination was arbitrary and capricious or otherwise not in accordance with law.

After obtaining information from the PRPs regarding their activities at the facility, the allocator shall prepare a non-binding allocation report that specifies the percentage share of each party, and any orphan share. The factors for allocation outlined in section 137(g) are:

- the amount, toxicity, and mobility of hazardous substances of each party;
- the degree of involvement of each party;
- the degree of care exercised with respect to hazardous substances;

- the cooperation of each party in contributing to any response action, and in providing complete and timely information; and
- such other equitable factors as the allocator recommends, with the agreement of the allocation parties and the United States.

The most important key to the success of the allocation process is making an accurate estimate of what comprises the orphan shares at a site. Section 137(i) provides that the orphan shall include any shares attributable to insolvent and defunct parties, a proportional share of the unattributable shares at the site, and the difference between the share the allocator determines is attributable to an allocation party and the actual share paid by that party if the party is eligible for an expedited settlement, or the liability of the party is eliminated, limited or reduced by one of the other provisions of this bill.

If, for example, a small business is relieved of liability as a result of new section 107(s), the allocator may still need to seek information from that party regarding its past disposal practices so the allocator can correctly judge the appropriate share that should be assigned to the orphan on behalf of that party. Similarly, although parties may be subject to the 10 percent generator and transporter cap under 107(t)(1), an allocator could determine that the actual share of their liability is 5 percent. Conversely, if the allocator determines that the actual share of the parties under 107(t)(1) is 15 percent, the difference between that share and the 10 percent cap would also be assigned to the orphan.

Another important key to the allocation process is assuring that accurate information is made available to the allocator. Both the allocator and the ADR neutral have information-gathering authorities, including the authority to issue subpoenas. Information that is submitted to the allocator and the ADR neutral by the PRPs is required to be kept confidential by all persons involved in the allocation and is not discoverable (if not independently discoverable or admissible) in judicial or administrative proceedings. The submission of information to the allocator or the ADR neutral does not constitute a waiver of any privilege under any Federal or State law.

The determination of the allocator is subject to joint review and approval by the Administrator of EPA and the Attorney General. Under new section 137(l), EPA and DOJ will have 180 days after receipt of the report to determine if the allocation was fair, reasonable, and consistent with the objectives of this Act, or that the allocation process was directly and substantially affected by bias, procedural error, fraud, or unlawful conduct. The primary objective of this section is to promote prompt and non-litigious resolution of liability disputes at Superfund sites. Mere disagreement with the allocated shares (including the orphan share) assigned by the allocator is not sufficient to reject the allocator's report.

Unless an allocation report is jointly rejected by EPA and DOJ, parties subject to the allocation shall be entitled to resolve their liability to the United States based on the shares determined by the allocator, and in addition, shall receive complete protection from all claims for contribution for response costs incurred after the date of enactment. Section 137(n) requires that the United States shall provide 90 percent of the estimated contribution shares assigned to

the orphan share and, if applicable, the estimated contribution shares of non-settling parties, subject to specified terms and conditions. These terms include:

- a waiver of claims against the Fund for reimbursement;
- a waiver of contribution rights against all potentially responsible parties;
- a covenant not to sue, and assurances of performance of the response action; and
- a waiver of any challenge to any settlement that EPA or the Attorney General enters into with any other party at the facility.

The bill provides that an allocation party that incurs response costs after the date of enactment that exceeds its allocated share shall be entitled to prompt payment of the excess amount from the Fund, subject to the 90 percent orphan share limitation in section 137(n)(2)(A)(ii)(I). If the amount of claims against the Fund by eligible allocation parties exceed the monies available in the Fund in a given year, the Administrator may delay payment until monies are available. The priority for payment shall be based on the length of time that has passed since settlement. Any delayed payment shall include interest on the unpaid balance.

In order to provide the maximum incentive for the parties to settle their liability, the bill includes a vigorous enforcement hammer in section 137(q). If a party refuses to pay its allocation share, EPA may commence an action against that party to recover response costs including those not recovered through settlements with other parties, the cost of the orphan share, and the costs of the allocation process. Parties that do not pay their allocation share are subject to joint, several, strict, and retroactive liability.

In those instances where a party is found guilty of illegal activities related to the disposal of hazardous substances, the liability relief provisions of the bill shall not apply. In particular, section 137(s) excludes from liability relief the response costs of a party who has been found to be in violation of an applicable State or Federal environmental statute by a court or body of competent jurisdiction, if the violation pertains to the hazardous substances which caused the incurrence of response costs.

SEC. 505. CERTAIN FACILITIES OWNED BY LOCAL GOVERNMENTS

Summary

Section 505 of the Superfund Cleanup Acceleration Act would amend section 107 of CERCLA to provide that a local government that, as a result of tax forfeiture, abandonment, bankruptcy, or foreclosure, has acquired a facility at which there has been a release and that is contaminated by the release, shall not be considered an owner or operator of the property for purposes of CERCLA liability.

Discussion

Currently, EPA has guidance (*See, Fact Sheet: The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities*, 12/95) that exempts government agencies from liability if they involuntarily become owners or operators of contaminated property. However, this is only guidance and has not

been codified. Without codifying this language, local governments still run the risk of being entangled in the liability web of Superfund.

Without giving some assurance to local governments that they will not be held liable when they become owners of these properties, CERCLA ties the hands of local officials who want to redevelop these properties and put them back into productive use. Local governments should not be punished with the fear of being held liable for simply carrying out their inherent governmental duties. Indeed, without this type of protection, there will be little incentive for local governments to take advantage of the brownfield reforms contained in Title I of this bill.

Effective brownfield redevelopment efforts must provide adequate protection to local governments. For example, Cook County, which is the taxing authority for Chicago, Illinois, acquires property that has been involuntarily relinquished by non-governmental parties. Section 505 would allow the City of Chicago to acquire the property from the County for brownfield development purposes because the property was originally acquired by the County through tax foreclosure. Under this example, the City of Chicago would not be held liable as an owner or operator of the property if it is subsequently found to be contaminated.

SEC. 506. LIABILITY OF RESPONSE ACTION CONTRACTORS

Summary

Section 506 of the Superfund Cleanup Acceleration Action would modify section 119 of CERCLA to provide that response action contractors (RACs) would receive additional liability protection by being excluded from the definition of owners and operators. Section 506(b) amends section 119(a) by extending the current Federal negligence standard for RACs to State law claims unless the State has adopted its own law regarding RAC liability.

The indemnification provisions of existing section 119 would be extended to provide EPA the discretionary authority to enter into indemnification agreements with RACs if site-specific analysis demonstrates that the cleanup and liability risks outweigh the availability of insurance. Section 506(g) would extend the provisions of existing section 119 to subcontractors.

The bill would establish a national uniform statute of repose under a new section 119(h). It would limit a RAC's legal exposure under CERCLA to 7 years after the date of completion of work at any facility, unless the actions constitute gross negligence or intentional misconduct.

Discussion

This section is intended to clarify the liability of RACs under CERCLA to facilitate the cleanup of NPL sites in an expeditious and cost-effective manner, using innovative technologies and methodologies. These changes are needed to overcome technical barriers to cleanup, and resolve any ambiguity regarding the interpretations of CERCLA's liability scheme. Courts have allowed parties with direct CERCLA liability to bring suit under CERCLA against RACs, drawing cleanup firms into the liability net without regard

to fault or negligence in cleanup activities. (*See, e.g., Ganton Technologies, Inc. v. Quadion Corporation*, 834 F.Supp. 1018 (N.D. Ill. 1993) (holding in a motion for dismissal that response action contractors could be held liable as operators under CERCLA)).

Excluding RACs from the CERCLA definition of “owner or operator” is needed to ensure that the original intentions of CERCLA section 119 are left intact. Exempting RACs from the liability standard under section 107 will encourage contractors to participate in the CERCLA program, provide for innovative and cost-effective solutions to hazardous waste problems, and expedite the pace of cleanups. The trend in lawsuits to classify RACs, who have performed cleanup activities at sites, as site “operators,” “transporters,” “generators,” and “arrangers” under CERCLA, triggering strict liability even in the absence of fault, is a misinterpretation of the law and requires legislative clarification. This provision means that RACs will be judged in accordance with section 119,—as was originally intended by Congress—rather than being judged under the standards of sections 106 and 107 which are applicable to PRPs.

Section 506(b), which amends section 119(a) by extending the current Federal negligence standard for RACs to State law claims, is intended to supplement and not preempt State RAC laws. It specifies that State laws governing RAC liability take precedence over this provision. This provision is needed to further address the significant rise in lawsuits against RACs brought merely to have the RACs share in site cleanup costs. In addition, this provision will protect against the rise in lawsuits claiming recovery under State and common law, as well as the rise in toxic tort lawsuits.

Sections 506(c), (d), and (e) enhance EPA’s discretionary authority to provide indemnification for claims brought against RACs under both State and Federal law based on a site-specific analysis demonstrating that cleanup and liability risks outweigh the availability of insurance. These provisions have a safeguard that requires RACs to undertake diligent efforts to obtain insurance before EPA will make an indemnification determination. They also require RACs to continue to look for adequate insurance coverage each year thereafter. EPA would have the authority to limit the indemnification provided to RACs by specifying conditions and deductibles. Finally, these provisions provide consistency between the provisions of section 119 and the general provisions of CERCLA so that new section 119 and the rest of CERCLA will apply to “threatened” as well as “actual” releases. Under current law, CERCLA section 119 only applies to actual releases.

Sections 506(f) modifies the definition of response action contract to specify that section 119 applies to the full range of cleanup activities conducted under the authority of CERCLA. Section 506(g) modifies the definition of RAC to expressly include subcontractors, whose authority to assert the provisions of section 119 has been in question. Subcontractors are often small, specialty subcontractors or high-technology “niche” firms that are needed to ensure the applicability of the full range of technical expertise in cleanup activities. These subcontractors deserve the protections of section 119.

Section 506(h) addresses the applicability of section 119 to the surety firms that bond cleanup activities. Bonding firms have ex-

pressed concern that the provisions of section 119 may not apply to them if they should be required, under the terms of bonds issued for cleanup activities, to complete jobs for defaulting contractors (in the unlikely event that this occurs). This section removes the sunset provisions on the applicability of section 119 to bonding firms, reinstating the applicability of section 119's provisions to these firms.

Section 506(i) establishes a uniform statute of repose under a new section 119(h) of CERCLA. According to the American Bar Association (ABA), statutes of repose "serve to strike a balance between the interests of the plaintiff in needing a reasonable amount of time to seek redress for an injury sustained as a result of the actions or inactions of the defendant, and the interests of the defendant, who, after passage of a reasonable amount of time, should be free from the threat of litigation." The ABA also states that "the rationale behind such statutes is that, after passage of a reasonable period of time, injuries or damages are probably a result of improper maintenance by the owner or occupier, misuse, or normal deterioration, rather than because of negligent design or construction." This section specifies that any hazardous waste engineering or cleanup firm's legal exposure for CERCLA liability would only be for a specific period of time 7 years after the date of completion of work at any facility. After that time period has expired, these firms, as is customary in the engineering and construction field, would no longer be responsible for damages under CERCLA at the site unless their actions constitute gross negligence or intentional misconduct.

SEC. 507. RELEASE OF EVIDENCE

Summary

Section 507 would amend CERCLA to require that the public shall be provided with access to information furnished pursuant to existing section 104(e) within 14 days of this information being provided to EPA. In addition, orders issued pursuant to CERCLA sections 106 and 107, and settlements entered into pursuant to section 122, shall include the evidence of each element of liability asserted against the PRP.

Discussion

As revised, section 104(e)(7)(A) of CERCLA requires EPA to make available to the public within 14 days of receipt, the documents and information obtained under authority of section 104(e). This provision is intended to confirm and expedite the availability of this information to all interested parties, including PRPs, and provide a streamlining of the Superfund process. It is also intended to obviate the need for filing Freedom of Information Act requests to obtain this information. This amendment does not affect the protections otherwise extended to confidential business information.

The revisions to sections 106(a) and 122(e) of CERCLA require EPA to include certain information relative to liability in all administrative orders and special notice letters. The intention of this provision is that each PRP receiving an order or letter should immediately be able to tell what evidence EPA believes makes that

party liable under section 107. Sharing this information should help EPA and the PRPs to correct any misunderstandings at the earliest possible time, thereby facilitating the settlement process.

SEC. 508. CONTRIBUTION PROTECTION

Summary

Section 508 amends existing section 113(f)(2) to assure that contribution protection provided by EPA applies to both contribution actions under section 113 and cost recovery claims under section 107.

Discussion

Over the last several years, there has been considerable litigation as to whether a private party can pursue a cost recovery claim under section 107. Parties incurring response costs can use a section 107 cost recovery action in an attempt to reach settling parties despite the bar on contribution actions against settling parties. The courts which have addressed this issue are not in agreement. This amendment provides assurances to a settling party that regardless of the judicial resolution of this dispute, the contribution protection provided by EPA will be applicable.

SEC. 509. TREATMENT OF RELIGIOUS, CHARITABLE, SCIENTIFIC, AND EDUCATIONAL ORGANIZATIONS AS OWNERS OR OPERATORS

Summary

Section 509 of the bill would amend CERCLA sections 101(20) and 107 to provide that “501(c)(3) organizations” (religious, charitable, scientific and educational organizations) that receive a facility as a gift would have their liability as owners or operators limited to the fair market value of the facility.

Discussion

Many charitable and educational nonprofit organizations currently face the prospect of receiving a gift of real property that is contaminated. To prevent Superfund liability from chilling the ability to accept such gifts, and to discourage PRPs from seeking to spread the costs of liability to charitable and educational organizations by making the gifts of contaminated property, this section limits the liability of such organizations, provided certain conditions are met.

Section 509(a) amends CERCLA section 101(20) to include in the term “owner or operator” organizations that meet the qualifications of section 501(c)(3) of the Internal Revenue Code that are organized and operated exclusively for religious, charitable, scientific, or educational purposes, and that hold title to a vessel or facility.

Section 509(b) provides that an organization meeting the terms of section 509(a) that holds title to a facility or vessel as a result of a charitable gift, will have its liability as an owner or operator limited to the fair market value of the vessel or facility or the actual proceeds of the sale of the vessel or facility. Section 509(b) makes the limitation on liability conditional on various requirements to ensure full cooperation with and access by the United

States, assistance in identifying and locating PRPs who recently controlled the facility, a demonstration that all active disposal occurred before the organization acquired the facility, and proof that the organization did not cause or contribute to a release or threat of release at the facility.

SEC. 510. COMMON CARRIERS

Summary

Section 510 makes technical corrections to section 107 regarding the liability of rail operators pursuant to contractual arrangements.

Discussion

Section 510 exempts railroads from liability for the transportation of hazardous substances under the terms of a contract with a shipper who later mishandles the commodity. Subsection 107(b)(3) of CERCLA enables an otherwise liable party to defend claims on the basis that any release or threat of release was due solely to the acts of a third party. This third party defense is not available where a person has a contractual relationship with that third party. However, the contractual relationship limitation does not apply under current law to rail carriers whose sole contractual relationship is a transportation tariff.

Section 510 is a technical amendment that provides that the rail exception encompasses railroad transportation contracts—not just tariffs. This amendment is necessary to reflect current practice in the industry. CERCLA was adopted in 1980, the same year the Staggers Rail Act was enacted. Prior to Staggers, railroads transported virtually all of their traffic pursuant to tariffs. Staggers dramatically changed the railroad transportation system by enabling railroads to use contracts individually negotiated with shippers that are tailored to the shippers' needs. Today, most rail shipments move under individual contracts that are filed with the Surface Transportation Board.

There is no rational basis for distinguishing between transportation by tariff and transportation under contract. The reason for the rail exemption is simple. Railroads are obligated to transport hazardous substances, but they simply should not be liable under CERCLA for acts of others that cause contamination by virtue of such transportation.

SEC. 511. LIMITATION ON LIABILITY OF RAILROAD OWNERS

Summary

Section 511 modifies section 107 of CERCLA to provide an exemption for railroads from liability for contamination located on or around spur tracks that run to, and often through, facilities of shippers. Under current law, railroads can be held liable as landowners for such contamination, even when the contamination is caused by a shipper. Some have attempted to impose liability on railroads as spur track operators, again when the contamination is caused by a shipper.

Discussion

Specifically, section 511 provides an exemption from liability under CERCLA to the extent that liability is based solely on a person's status as an owner or operator of a railroad spur track, as long as: (1) the spur track provides access to a main line or branch line track owned or operated by the railroad; (2) the spur track is 10 miles long or less; and (3) the railroad does not cause or contribute to a release or threatened release at the spur track.

Railroads should not be liable under CERCLA when they are merely carrying out their common carrier responsibilities to serve shippers. Section 511 is intended to address situations where a railroad has no ability to control its customers' handling of hazardous substances, and it is the customers' actions that result in releases of hazardous substances, creating CERCLA liability. This spur track exemption applies only where the railroad does not cause or contribute to the release. If a railroad is in a position to prevent a hazardous substance release, but fails to exercise due care and thereby contributes to such a release, the railroad would continue to be liable under CERCLA.

SEC. 512. LIABILITY OF RECYCLERS

Summary

Section 512 of the bill amends sections 101 and 107 of CERCLA to provide an exemption from liability for response costs for those who arrange to recycle seven specified "recyclable materials" at "consuming facilities," and who meet certain threshold demonstrations. Section 512 defines consuming facilities as those facilities at which "recyclable material is handled, processed, reclaimed or otherwise managed." The seven recyclable materials are paper, plastic, glass, textiles, rubber (other than whole tires), metal, and batteries.

Section 512 provides that the United States shall pay the costs of all contribution shares attributable to persons relieved of liability under this section at mandatory allocation facilities (pursuant to new section 137) listed on the NPL prior to the date of enactment of this section. With respect to all other facilities, this section provides that the liability of any party covered by this exemption shall be borne by those parties who remain liable for section 107 response costs at those facilities.

In order to qualify for the exemption, persons who arrange for the recycling of recyclable material must demonstrate by a preponderance of the evidence that: (1) the recyclable material met a commercial specification grade; (2) a market existed for the recyclable material; (3) a substantial portion of the material is made available as feedstock for the manufacture of a new saleable product; and either (a) the recyclable material is a replacement or substitute for virgin raw material, or (b) the product to be made from the recyclable material is a replacement or substitute for a product made from a virgin raw material.

Persons who would be liable under section 107 for response costs in the absence of this exemption remain liable for such costs if: (a) the person had an objectively reasonable basis to believe at the time of the recycling transaction that: (i) the recyclable material

would not be recycled; (ii) the recyclable material would be burned as fuel for energy recovery or incineration; (iii) the consuming facility was not in compliance with environmental law; or (iv) that a hazardous substance had been added to the recyclable material for purposes other than processing for recycling; (b) the person fails to exercise reasonable care with respect to management or handling of the material; (c) the recyclable material contains more than 50 parts per million PCBs; or, (d) in the case of a transaction involving paper, the material contains any concentration of a hazardous substance that EPA determines to present a significant risk to human health or the environment as a result of its inclusion in the paper recycling process.

Discussion

The provisions in section 512 of the bill are intended to promote greater opportunities for recycling by accomplishing the following goals: (1) protecting persons engaged in the collection of "recyclable material" for recycling from liability under section 107(a)(1)(C) and section 107(a)(1)(D); (2) maintaining and increasing current rates of recycling of "recyclable material;" and (3) ensuring that existing persons engaged in legitimate recycling activities who are liable for response costs at NPL facilities affected by this amendment are not required to bear any increased liability by virtue of the amendment.

Given the fact that Federal case law has imposed joint, strict, several and retroactive liability, the recycling community has become concerned that section 107 liability is hampering, rather than encouraging, the recycling of "recyclable material." The "recyclable materials" covered by this section currently are recycled in significant quantities. For example, from 1990 through 1995, approximately 95 percent of the lead available from lead-acid batteries was recycled in this country. This high level of recycling promotes environmental protection by ensuring that lead-bearing materials are not discarded in a fashion that could create adverse effects. However, many persons engaged in the recycling effort associated with these materials are faced with potential liability under CERCLA section 107.

The limited recycling exemption provided in section 512 will encourage continued, legitimate recycling. Thus, persons who collect "recyclable material" under the conditions described in this section will be relieved of CERCLA liability under sections 107(a)(1)(C) and 107(a)(1)(D) for those legitimate activities.

At the same time, those persons involved in legitimate recycling activities who are not covered by this exemption will not be unfairly penalized by being forced to assume any additional liability at NPL sites. Instead, the United States will fund the share of response costs that would have been attributed to the newly-exempted recyclers. The intention of this change is to encourage continued legitimate recycling efforts.

Furthermore, in order to ensure this result, the language provides that at NPL sites where some parties become exempt by operation of this section, the exempt shares must be allocated to the Fund. The basis for this allocation is described in Section 504.

"Consuming facilities" are to include only those operations that are actively engaged in recycling activities (as opposed to mere collection and sorting). Thus, this term includes secondary lead smelters, but it does not include facilities known as "battery breakers." Battery breakers do not qualify for the exemption set out in this section.

Under the term "recyclable material," there is a specific exclusion for "shipping containers." The shipping container exclusion encompasses the range of containers currently processed for reuse in the United States. The size breakpoints correspond to provisions in U.S. Department of Transportation and United Nations regulations.

This provision avoids providing a liability exclusion for environmental contamination that could result from scrapping shipping containers that had been used to transport CERCLA hazardous substances without first removing those hazardous substances from the containers. The hazardous substances of concern do not include small pieces of metal that may remain in a container, or that may be an alloy or other material in the container itself, such as chrome or nickel that are metallurgically or chemically bonded in the container. In addition, such containers are excluded from the definition of "recyclable material" as this would create an unintended incentive for parties to scrap containers prematurely, rather than having them processed for reuse. Current industry practice is to remove hazardous substances from shipping containers in these sizes before the containers are scrapped or processed for reuse. This provision is intended to recognize and to encourage the continuation of this practice.

The language defining "scrap metal" is intended to embrace certain "metal byproducts" from copper and copper-based alloys, and provides an exemption for only a very narrow category of materials produced under certain conditions. Only metal products produced from copper and copper-based alloys, produced solely as the result of a secondary production and recycling process (*i.e.*, not from a primary smelting operation), that are stored in an environmentally safe manner, not speculatively accumulated, and meet all the other requirements in this section for a legitimate recycling transaction, are covered by this definition. This definition does not include metal byproducts from other source materials or from primary smelting operations.

This section allows any person that incurred response costs for a response action taken prior to the date of enactment of this section to bring a civil action for contribution against: (1) any person that is liable as an owner or operator of the affected facility; and (2) any person that, before this section is enacted, received and failed to comply with an administrative order issued under CERCLA section 104 or 106, or received and did not accept a written offer from the United States to enter into a consent decree or administrative order.

The exemption provided in this section shall not affect either a judicial or administrative action that has become final before the date the section is enacted, or a judicial action commenced by the United States before the date of enactment of this section.

SEC. 513. REQUIREMENT THAT COOPERATION, ASSISTANCE AND
ACCESS BE PROVIDED

Summary

Section 513 of the bill would create a new section 107(y) that makes qualification for the liability exemptions and limitations under sections 107(o),(p),(r),(s),(t),(u),(v),(w) or (x) or section 112(g) dependent on meeting certain criteria for cooperation and access.

Discussion

The liability exemptions and limitations outlined in the summary above, are dependent on: (1) full cooperation, assistance, and access to the facility for the installation, integrity, operation, and maintenance of the response action; (2) not impeding the effectiveness or integrity of any institutional control employed; and (3) complying with any information request or administrative subpoena issued by the President. This provision recognizes that while these parties should receive liability relief, they should not be taking actions that would impede the ability of EPA to ensure that these sites are cleaned up in an expedited fashion.

TITLE VI—FEDERAL FACILITIES

SEC. 601. TRANSFER OF AUTHORITIES

Summary

Section 601 authorizes a State to apply to EPA for transfer of authorities at NPL-listed Federal facilities in a manner similar to that in Title II for State delegation. It also provides a dispute resolution process where one does not already exist. The conditions for a transfer of authority are generally the same as for those that apply at a non-Federal facility. At sites where there is an existing interagency agreement between EPA and a Federal agency regarding facility cleanup, the section requires that there be no changes to the terms of the interagency agreement. The section also specifies that a remedial action selected by a State will be the only remedial action conducted at the facility and the State is precluded from enforcing other remedial action requirements except those under a RCRA corrective action that was initiated prior to enactment of this law.

Discussion

Section 601 authorizes a State to apply to EPA for transfer of authorities at federally owned NPL facilities. EPA shall enter into a transfer agreement under the same conditions provided in section 201 of S. 8 for State delegation at a non-Federal, NPL-listed facility. If a Federal facility does not have an interagency agreement that specifies a dispute resolution process between EPA and the Federal agency, the transfer agreement shall require that the State agree with the head of the Federal agency on a process for resolution of any disputes regarding the selection of a remedial action for the facility.

Under this section, the conditions for the State to exercise authorities at a Federal facility are intended to be the same as those

that apply to a non-Federal facility (except for the provisions regarding cost recovery). Specifically, a State has sole authority to exercise the responsibilities it is delegated under a transfer agreement. A State must carry out that authority in the same manner as EPA. In addition, EPA can withdraw a transfer of authority for failure to meet the Act's requirements. Nonetheless, EPA shall retain authority to recover response costs from responsible parties at a Federal site for which cleanup authority has been transferred to a State.

This section preserves existing interagency agreements between EPA and the Federal agency that owns the site, unless the terms are agreed to in writing by the Governor and the head of the agency.

The remedial action selected for a facility by a transferee State shall constitute the only remedial action required to be conducted at the facility. The transferee State is also precluded from enforcing any other remedial action requirement except for any corrective action under RCRA that was initiated prior to enactment of this law.

Section 601 also provides a dispute resolution process. If the State does not concur in the remedial action proposed by the Federal agency, the State shall engage in the dispute resolution process provided for in the interagency agreement or in paragraph (3)(B), except that the final level of resolution shall be the head of the Federal agency and the Governor. If no agreement is reached, the Governor shall make the final determination regarding remedy selection. To compel implementation of the State's selected remedy, the State must bring a civil action in U.S. District Court.

This section recognizes that the States have an increased technical ability to oversee cleanups at Federal facilities, and if they so choose, should be able to take over this role from EPA. Nonetheless, because this section requires the use of Federal remedy selection requirements, it recognizes the unique status of these facilities and the need to have a greater degree of uniformity in the cleanup of the facilities. By addressing both of these issues, this section attempts to strike the appropriate balance between increased State control and Federal facility consistency.

SEC. 602. INNOVATIVE TECHNOLOGIES FOR REMEDIAL ACTION AT FEDERAL FACILITIES

Summary

Section 602 allows the President to designate Federal facilities on the NPL as a test bed for demonstration, testing and evaluation of innovative technologies by Federal and State agencies, and public and private entities. Specific technologies selected at the chosen innovative technology sites are subject to approval by EPA. In its annual report to Congress on research, development, and demonstration, EPA shall include information on the use of Federal facilities for innovative technologies.

Discussion

The Committee recognizes the need for better mechanisms to test, demonstrate, evaluate and apply innovative technologies on

Federal facilities, particularly for unique types of contamination or special circumstances not typically encountered at non-Federal facilities. There are thousands of facilities owned or operated by the Department of Defense (DOD), the Department of Energy (DOE) and other Federal agencies that will require cleanup and there is a potential for additional sites to be discovered. Depending upon the contaminants, the media involved, and the applicable requirements, estimates for the complete cleanup at Federal facilities vary from hundreds of billions to over a trillion dollars. Cleanup at some of these facilities has been limited because it has been difficult to get regulatory concurrence for testing new technologies that may require additional development. The testing of innovative technologies is needed at these facilities to develop cleanup solutions and reduce the time and cost to complete site remediation.

Section 602 is intended to encourage the use of innovative technologies at contaminated Federal facility sites to further develop state-of-the-art technologies to provide cleanups that are not only protective, but also faster and cheaper. It allows the President to designate an NPL-listed Federal facility to be a test bed for those technologies. In considering whether to allow the application of a particular technology, the Administrator may amend any agreements or orders regarding the use of these technologies. Also, the Administrator is authorized to approve or deny the use of a particular innovative technology. Finally, Section 602 requires that EPA's annual report to Congress on research, development, and demonstration, shall include information on the use of Federal facilities for innovative technologies.

Section 602 is not intended to duplicate any current efforts such as the Strategic Environmental Research and Development Program (SERDP) that was established by Congress in 1980 (Public Law 101-510). SERDP is a tri-agency cooperative program that supports basic and applied research and development of innovative technologies to help meet the environmental obligations of DOD, DOE and EPA. Some of the technical challenges facing DOD and DOE sites are similar, and Congress continues to encourage Federal agencies to work together cooperatively in developing new solutions to shared problems. However, SERDP is DOD-focused and deals exclusively with hazardous waste cleanup at four congressionally mandated DOD sites. Consequently, SERDP does not fully address cleanup issues at other Federal agencies, such as radiological contamination at DOE facilities and acid mine drainage at Department of Interior facilities.

This section is intended to provide an opportunity for one or more Federal facilities to develop and test new and innovative ways to address cleanup challenges, such as radiological contamination, by providing real world sites to test and further develop innovative technologies. The test beds shall be used to collect appropriate data (e.g. cost and performance) to improve the technologies efficiency and cost-effectiveness in an effort to develop better solutions at Federal facilities. These efforts shall ensure appropriate use of funds and resources, and promote the maximum exchange of information and transfer of technology not only between various Federal agencies and departments, but also the private sector. Section 602 will allow the Secretary of Energy, and other Federal

agencies without SERDP sites to better address their unique problems. By providing this opportunity for a Federal innovative technology test bed, it should also provide useful and cost-effective cleanup solutions for both Federal and non-Federal facilities.

SEC. 603. FULL COMPLIANCE BY FEDERAL ENTITIES AND FACILITIES

Summary

Section 603 waives sovereign immunity at Federal facilities, thereby allowing States that have enforcement and liability authority similar to CERCLA sections 106 and 107 to sue Federal agencies and to impose penalties. Expanding the language of CERCLA's current waiver of immunity in paragraph (1) of section 120(a), the bill's section 603(1) states that Federal agencies are subject to all other Federal, State, interstate, and local laws and requirements, both substantive and procedural, relating to a response action, a restoration action, or the management of a hazardous waste, pollutant, or contaminant. Under this provision, Federal agencies must comply with these laws and regulations in the same manner and to the same extent as any nongovernmental entity.

Discussion

This section explicitly reaffirms and expands the waiver of sovereign immunity in section 120 that was added to CERCLA by the 1986 Superfund amendments. Section 603 is modeled after language used in the Federal Facilities Compliance Act of 1992 and also employed in the Safe Drinking Water Amendments Act of 1995. The waiver subjects the Federal government to the full range of available enforcement tools, making it liable for penalties whether the violation of Federal, State, interstate, or local law is a single or repeated occurrence, and regardless of whether the penalty is punitive or coercive in nature. Nevertheless, the State must be evenhanded in its actions. The requirements of a State law may not be applied more stringently to the Federal government than to other persons. The reference to a "restoration action or the management of a hazardous waste" in paragraph (1)(B)(I) of new section 120(a) is intended to show that the waiver of immunity extends to the restoration of injured natural resources, and includes corrective actions under the hazardous waste management provisions of RCRA.

The section further provides that agents, employees, and officers of the United States shall not be personally subject to civil penalties for any acts or omissions within the scope of their duties. They are not immune from enforcement of injunctive relief or criminal sanctions.

The section also authorizes the Administrator to issue section 106 administrative orders to any Federal agency in the same manner and under the same circumstances as it would initiate such action against other parties. In the past, the Department of Justice has declined to bring actions against Federal agencies under the theory of the unitary executive. This provision allows the Administrator to enforce compliance. The other Federal agency is given an opportunity to be heard, and an administrative order would not be-

come final until the agency has an opportunity to confer with the Administrator.

Any fines and penalties collected by a State from the Federal government are required to be used only for projects to improve or protect the environment or, more broadly, to defray the costs of environmental protection or enforcement unless the State's constitution or a State law in effect at the time of the bill's enactment requires a different use of the funds.

The existence of an interagency agreement between EPA and a Federal agency shall not impair or diminish the enforceability of a Federal or State law unless the requirements of the law were specifically addressed in the interagency agreement or were specifically waived.

DOD "strongly opposed" section 603 of the bill on several grounds. The DOD argued that the existing waiver of sovereign immunity was already total, and that all provisions of CERCLA already apply to Federal agencies. DOD maintains that any friction with the States occurs when the States insist on following their own cleanup process rather than CERCLA's. DOD already complies with substantive State standards through the use of ARARs under section 122(d). DOD maintains that requiring it to comply with a patchwork of State processes would slow its cleanups. DOD is especially concerned about the disruption that could result when a State's demands for response activities necessitates a reordering of DOD's risk-based priorities, and causes financial impacts exceeding DOD's appropriation, possibly affecting its other missions. During markup, these issues were discussed, as was the importance of protecting public health and the environment. It was ultimately determined that the President's authority under CERCLA section 120(j) to issue orders regarding response actions at a specified site or DOE or DOD facility was sufficient to protect the national security interests of the United States.

TITLE VII—NATURAL RESOURCE DAMAGES

SEC. 701. RESTORATION OF NATURAL RESOURCES

Summary

Section 107(f) of CERCLA provides that natural resource trustees (the Federal government, Indian Tribes, and States) may recover damages for the costs of restoring, replacing or acquiring the equivalent of natural resources injured, destroyed or lost by the release of a hazardous substance. Title VII of the bill makes a series of structural and substantive changes to section 107(f) to clarify the scope of liability under the NRD program.

Section 701(a) of the bill sets forth the measure of damages for a NRD. Under that section, a person may be held liable for the costs of restoring or replacing resources that have been injured, providing temporary replacements until the resource is restored, and the reasonable costs of assessing the extent of injury. In a series of limitations on liability, the bill provides that there shall be no liability for: the loss or destruction of natural resources identified in an environmental impact statement or comparable environmental analysis; restoration or replacement costs if the injury oc-

curred wholly before 1980; lost use damages for uses that might have occurred before 1980; or the costs of any study relying on contingent valuation methodologies (CVM). The bill also revises the prohibition against double recovery to clarify that a person cannot be held liable for natural resource damages under Superfund if damages have been recovered by another trustee under Superfund or any other Federal or State law for the same injury to the same resource.

The bill specifically authorizes trustees to extend the payment period for natural resource damages, depending on the extent of the damages, the ability of the person to pay, and the period of time over which the restoration activities are expected to occur.

Section 701(b) of the bill establishes procedures for trustees to assess the injury to a natural resource and to select the measures to restore the resource. Trustees are directed to consider alternative measures to achieve the restoration of the resource, including at least one alternative that relies on natural recovery. The final selection of restoration measures must achieve an appropriate balance among the following factors: technical feasibility; cost-effectiveness; and the time period in which restoration is likely to be achieved. In selecting restoration measures, the bill authorizes trustees to take into consideration the unique intrinsic values of a resource to provide for accelerated or enhanced restoration to replace the intrinsic values lost. However, if an accelerated or enhanced restoration alternative is selected, the incremental costs associated with that alternative must be reasonable.

Section 701(c) requires the Secretary of Interior to issue amended regulations governing the assessment of natural resource damages within 2 years after enactment. Among other things, the amended regulations must identify protocols based on scientifically valid principles for conducting natural resource damage assessments; require trustees to take into consideration the ability of a resource to recover naturally when selecting restoration alternatives; provide for designation of a lead administration trustee at sites where multiple trustees are involved; and require that injury assessments and restoration planning be based on site-specific information. The issuance of these amended regulations cannot be used to revive claims that under the existing law have expired because they were not filed within 3 years of the date of issuance of the current regulations.

SEC. 702. CONSISTENCY BETWEEN RESPONSE ACTIONS AND RESOURCE RESTORATION STANDARDS

Section 702 addresses the need to ensure consistency between response actions and resource restoration measures. It directs trustees to take into account the results or expected results of any removal or remedial action in selecting a restoration alternative. Conversely, remedial actions must take into account the potential for injury to natural resources.

SEC. 703. CONTRIBUTION

Section 703 authorizes a person to seek contribution from other responsible persons for natural resource damages.

SEC. 704. MEDIATION

Section 704 requires trustees seeking natural resource damages to initiate mediation of their claims within 120 days after commencing an action for damages.

SEC. 705. COEUR D'ALENE BASIN

Section 705 establishes a new pilot program for the restoration of the Coeur d'Alene Basin. The provision authorizes an advisory group, consisting of Federal, State, Tribal and local representatives, industry representatives and citizens, to jointly develop a restoration plan for the Coeur d'Alene Basin. Funding is also authorized to assist in the development and implementation of the restoration plan.

SEC. 706. EFFECTIVE DATE

Section 706 provides that these amendments shall not apply to cases that were in trial before July 1, 1997, or for which there was a final judgment before that date.

DISCUSSION

Measure of Damages. The amendments to Section 107(f) reflect the need to clarify that the objective of the natural resource damages program is to provide for the full restoration of natural resources that have been injured, destroyed or lost as a result of a release of hazardous substances. The NRD program is not intended to duplicate the remedial action program under CERCLA or to encourage additional litigation by promoting the assessment of potentially arbitrary monetary damages. The need for this clarification has become more urgent as the number of potential and actual NRD claims has increased dramatically in recent years, as has the number of claims seeking significant damages.

Therefore, the amendments provide for the first time a clear statement of what a person may be held liable for in a situation where a natural resource has been injured. Under new section 107(f)(1)(C), a person is responsible for the costs associated with restoring the resource to the baseline condition that it would have been in but for the release of the hazardous substance. The fundamental principle is that responsible persons should be responsible for redressing the impacts of their activities on the resource, but not those resulting from the activities of others or from other natural causes. As under existing law, a person may, in the alternative, be required to provide for replacement resources or acquire equivalent resources.

There has been considerable controversy over the issue of what restoration of a resource means. In general, the decision of what constitutes full restoration will be fact-specific and will have to be determined by the trustees on a case-by-case basis, subject to appropriate judicial review. Restoration will typically involve a variety of on-site and off-site measures, including revegetation efforts, habitat enhancements for fish and wildlife, wetlands restoration, and natural restoration. In some situations, where additional post-remedy contamination levels continue to impair the sustainability

or ecologically significant functions of a resource, restoration measures may also include additional removal of sources of contamination. However, this language is not intended to require responsible parties to remove every particle of a contaminant or to replicate the precise pre-injury biological, chemical and physical condition of an injured resource. Temporary effects on individual organisms and insignificant changes in resources will not necessarily give rise to a natural resource damages claim. Instead, restoration measures in most cases should focus on reestablishing the ecologically significant functions of a resource.⁴

The completion of restoration in any given case may take a substantial period of time during which the public may be deprived of significant services that would otherwise have been provided by the resource, such as recreational fishing or wildlife viewing opportunities. Thus, the amendments expressly provide that a person may be responsible for the costs of providing interim replacements for injured resources while the restoration is ongoing. For example, if restoration of a world class trout stream will take 10 years, the responsible party may be required to provide alternative fishing opportunities for the public until the trout stream is fully restored.

Finally, the responsible person will also be liable for the reasonable costs of assessing the injury to the natural resource. The amendments provide, however, that trustees may not recover for the costs of conducting studies that rely on CVM methodologies. CVM studies are traditionally used to try to determine the “non-use” or “passive use” values associated with a resource and are used by the National Oceanic and Atmospheric Administration (NOAA) to assess non-use values for oil spills under the Oil Pollution Act. The use and reliability of CVM studies, however, have been the subject of considerable controversy. On the one hand, critics argue that CVM studies significantly overstate the value of resources. On the other hand, a panel of economists convened by NOAA in 1993, concluded that, if conducted in accordance with strict guidelines, CVM studies could produce meaningful results. The amendments do not attempt to resolve this conflict. Under these amendments, there is no separate recovery of monetary damages for losses associated with non-use or passive values. Intrinsic values are taken into consideration as a scaling factor in the selection of restoration measures. Therefore, there is no longer any incentive for trustees to conduct CVM studies.

Selection of Restoration Alternatives. Section 701(b) amends CERCLA section 107(f) to establish statutory guidelines for the selection of restoration measures. The amendments provide that trustees are to consider a range of alternatives to achieve the objective of restoring an injured resource, including at least one alter-

⁴EPA has recognized these ecological principles in its development of ecological risk assessment guidelines, emphasizing the importance of determining the “ecological significance” of risks before making regulatory decisions. EPA’s 1992 *Framework for Ecological Risk Assessment* states that an ecological risk assessment, first, should focus on evaluating only ecologically relevant effects, and second, should characterize the overall ecological risk based on the its importance to an ecosystem’s structure or function (its “ecological significance”). *Framework for Ecological Risk Assessment* at 12–13, 33–34 (Feb. 1992). EPA has reinforced these concepts in its proposed *Draft Guidelines for Ecological Risk Assessment* in which EPA elaborates on how to determine the “ecological significance” of a risk, thus confirming the importance of taking into account natural biological response mechanisms, including recovery potential and natural variability.

native that relies on natural restoration. When making the final selection of the restoration measures that will be implemented, trustees are directed to select those measures that are technically feasible, cost-effective, and achieve restoration in a timely fashion.

The amendments do not assume a preference either for restoration measures that will achieve the restoration in the shortest time period possible (which are in many cases also likely to be the most costly restoration alternatives), or for those restoration measures that are the least costly. Any decision regarding the selection of restoration measures is necessarily driven by the specific facts of the situation—the nature of the resource injured, the availability of alternative or replacement resources, the public uses of the resource, any intrinsic values associated with the resource, the availability of technically feasible measures, and the costs associated with those measures. In some cases, for example, the restoration alternative that depends on natural restoration may be most appropriate because restoration will be achieved in a relatively short period of time or other alternatives are either too costly (*i.e.*, not cost-effective) or technically infeasible. Conversely, in some cases, trustees may select measures that achieve restoration as quickly as possible because those measures are the most cost-effective. In most cases, the restoration alternative selected will likely fall somewhere in between these two extremes. The amendments provide trustees the flexibility to select the restoration measures that achieve the appropriate balance among technical feasibility, cost, and timeliness.

Intrinsic Values. New section 107(f)(3)(B) expressly authorizes trustees to take into consideration any unique intrinsic values associated with a resource when selecting a restoration alternative. This provision is not intended to create a cause of action for monetary damages for injury to or loss of those intrinsic values or, more broadly, for the loss of so-called non-use values associated with a resource. Instead, it is intended to recognize that certain resources, such as wilderness areas, national monuments like the Grand Canyon, and endangered and threatened species, have unique characteristics that are lost when the resource is injured and that cannot be replaced until the resource is fully restored. In recognition of these special characteristics, the amendments allow trustees to justify the selection of an accelerated or enhanced restoration alternative that will replace the lost intrinsic values. Thus, for example, if a hazardous substance were released in Yosemite, the trustees might select restoration measures to restore the resource in a shorter period of time than they otherwise would have, even if the measures might not be the most cost-effective, in order to restore the intrinsic value of Yosemite. Similarly, if the release of a hazardous substance caused the extirpation of a population of endangered birds in an area, the trustees might require enhanced restoration to include introduction of a related species and habitat improvement measures to ensure the viability of the introduced population. In either case, the consideration of intrinsic values is intended to provide trustees some additional flexibility in limited situations to tailor the selection of restoration alternatives to the nature of the injury to the resource.

Site-Specific Basis of Assessment. New section 107(f)(4)(A) contemplates that the assessment of injury to a natural resource and the selection of restoration alternatives will be based on site-specific information, to the extent that this information is readily available. Because, as is noted above, many of the decisions relating to the selection of appropriate restoration measures are driven largely by site-specific factual considerations, this provision is intended to encourage trustees to obtain fact-specific information and data whenever it is practicable. The importance of fact-specific information is particularly important in situations where the nature of the resource injured is unique or where the extent of the injury, and therefore the potential restoration obligations, is significant.

This provision is not intended to eliminate the use of models, literature, previously obtained data, or other simplified assessment tools in appropriate circumstances. Even when models and other simplified assessment tools are used, however, fact-specific information and data should be used to the extent that it is available. All assessment methodologies must be based on generally accepted scientific principles, ensuring the validity and reliability of assessment results, and should be supported by appropriate, site-specific data to the extent practicable. However, to the extent practicable, fact-specific information and data should also be incorporated into the assumptions for any models or simplified assessment tools.

Prohibition Against Double Recovery. New section 107(f)(1)(D)(ii) clarifies language in the original statute's prohibition against double recovery. When natural resources have been injured, destroyed or lost as a result of releases of hazardous substances, responsible parties should bear the cost of restoring, replacing, or acquiring the equivalent of the resources, within the limits imposed by section 107. The responsible parties, however, should not have to pay that cost more than once. Therefore, new section 107(f)(1)(D)(ii) prohibits one or more trustees from obtaining duplicative recoveries under one or more statutes (including CERCLA and other Federal, State and local statutes) or common law, for the same resource injury. If a State trustee has recovered for injuries to a resource under its State law, for example, it may not also recover damages for the same injury to the same resource under CERCLA; it may, however, recover for different injuries to the same resource. Similarly, the fact that a State trustee has recovered for injuries to a resource subject to its trusteeship will not necessarily preclude a Federal or Tribal trustee from recovering for different injuries to the resource. The pivotal question will be whether the damages claimed are for the same injury to the same resource or, instead, for either different injuries or injuries to different resources.

Prohibition Against Retroactive Liability. New section 107(f)(1)(D) essentially retains the original CERCLA prohibition against retroactive NRD liability for injury that occurred wholly before the enactment of CERCLA in 1980, with a clarifying change substituting the word "injury" for the word "damages." The term damages in this context was intended to mean injury to a resource, not "damages" in the legal sense. This change makes clear that even though a responsible party is not liable for injury to natural resources that occurred prior to the passage of CERCLA, the party would remain potentially liable for new or further injury that oc-

curred after December 11, 1980. The amendments further provide that trustees cannot recover damages for the lost use of resources prior to December 11, 1980. This prohibition on the recovery of past lost use damages is consistent with current Administration practice.

Right To De Novo Trial. S. 8 does not change existing law regarding the standard of judicial review of NRD claims. Recent judicial decisions have held that NRD claims should be tried de novo, based on the presentation of all pertinent evidence to the trier of fact in accordance with the normal rules of evidence. *State of Montana v. Atlantic Richfield Company*, No. CV-83-317-HLN-PGH, (USDC D. MT March 3, 1997). *United States of America v. ASARCO Incorporated, et al.*, No. CV 96-0122-N-EJL, (USDC D. Idaho March 31, 1998).

Statute of Limitations. Section 113(g) of CERCLA establishes a two-pronged statute of limitations for the filing of NRD claims at non-NPL sites. Under this provision, claims must be filed within 3 years of the later of (1) the date of discovery of the resource injury and its relationship to the release of the hazardous substance, or (2) the date that NRD assessment regulations are promulgated. In order to address potential concerns that the provisions in section 701(c) that require the issuance of amended assessment regulations may be interpreted to reopen the statute of limitations for claims that have expired, the amendments expressly state that the issuance of these amended regulations shall not extend the period in which an action must have been filed.

Effective Date. The amendments do not apply to cases in which trial was begun before July 1, 1997, or in which final judgments were entered before that date. This provision is intended to promote judicial efficiency by allowing cases that have been closed to remain closed and, in one situation where a case is currently in trial, to allow that proceeding to continue under the law as it existed at the time the trial commenced. These amendments and their legislative history are not intended, however, to be considered or relied upon or used to create any negative inferences in those cases with respect to the state of the law.

Causation. The amendments do not change the existing statutory scheme requiring that trustees prove that a defendant's release caused the natural resource injury.

TITLE VIII—MISCELLANEOUS

SEC. 801. RESULTS-ORIENTED CLEANUP APPROACH

Summary

Section 801 amends CERCLA section 105(a) to require the use of a results-oriented cleanup approach. EPA would modify the NCP to minimize the time required to conduct response measures and to reduce the potential for exposure to hazardous substances, pollutants, and contaminants in an efficient, timely, and cost-effective manner. The new procedures apply to the entire response action and require expedited facility evaluations, timely negotiation of response action goals, a single engineering study, streamlined oversight of response actions, and consultation with interested parties

throughout the response action. The new procedures are subject to the requirements of CERCLA section 117 (public participation), section 120 (Federal facilities), section 121 (cleanup standards), and new section 133 (amendments to the NCP).

Discussion

The NCP is EPA's regulation for Federal response actions under CERCLA. It sets out the organizational structure and procedures for preparing for and responding to releases of hazardous substances, pollutants, and contaminants. (It also serves the same purpose for responses to discharges of oil under the Clean Water Act, as amended by the Oil Pollution Act of 1990.) CERCLA section 105(a) lays out in detail the contents of the NCP, and section 801 of the bill adds to the plan a requirement for a results-oriented approach to response actions in new paragraph (11).

Results-oriented cleanup language has been in Superfund reauthorization bills in both Houses of Congress since 1994, when the American Institute of Chemical Engineers presented to Congress its position paper, *An Engineering Approach to Superfund Cleanups*. It is an engineering-based procedure that permits compression of the multiple Superfund study processes into a single engineering study. It identifies the substances of concern at a site early in the process uses a site-specific risk assessment based on realistic assumptions, and then identifies and implements a remedy in a timely manner. The results-oriented approach focuses on the results rather than the process, establishing clear cleanup goals that reduce the risks at the site in a timely fashion.

SEC. 802. OBLIGATIONS FROM THE FUND FOR RESPONSE ACTIONS

Summary

Superfund removal actions are short-term interventions, including responses to emergencies, that can be undertaken at both NPL and non-NPL sites. The section raises the statutory limits on removal actions from \$2 million to \$5 million, and from 12 months to 3 years, reflecting the actual cost and time experienced in recent years.

Discussion

Despite the many criticisms of the Superfund remedial action program, the removal program has generally been commended. Through fiscal year 1997, EPA has conducted approximately 5,000 removal actions, of which more than 1,400 were at NPL facilities. In the last fiscal year alone, there were in excess of 250 removal actions, 35 of them at NPL facilities. The Superfund removal program is available to address them as long as CERCLA and NCP response criteria are met. The potential and actual releases of hazardous substances are extremely variable in size, threat, and location, requiring a flexible approach. Some of the response activities that are common to many removal actions include:

- sampling drums, storage tanks, lagoons, surface water, groundwater, and the surrounding soil and air;
- installing security fences and providing other security measures;

- excavating and disposing of contaminated soil, containers and debris;
- pumping out contaminated liquids from overflowing lagoons;
- collecting contaminants through drainage systems or skimming devices; and
- providing alternate water supplies, evacuating threatened individuals, and providing temporary shelter.

Occasionally, unforeseen events such as severe weather, vandalism, fire, or explosions require a return to the site and initiation of additional response activities.

In addition to expanding the scope and time of the response actions, section 802 broadens the range of activities that can be performed, and takes into account the dynamic situation that can exist at removal sites by replacing the requirement that the removal action be “consistent with the remedial action taken,” with a requirement that the action be “not inconsistent with any remedial action that has been selected or is anticipated....” EPA and State personnel have suggested that with additional time, flexibility and financial authority, emergency responders could address the entirety of the cleanup issues associated with a given site. The changes in section 802 are intended to provide that authority. Providing additional flexibility to project managers who are overseeing these emergency removal activities is intended to encourage additional use of these authorities and avoid the need for subsequent remedial actions.

SEC. 803. RECYCLED OIL

Summary

This section gives automobile dealers the same protection against liability under CERCLA sections 107(a)(3)-(4) as service station dealers enjoy. The provision adds automobile dealers to the definition of “service station dealer” under CERCLA section 101(37), and includes automobile dealers in the exemption from liability for releases occurring after the dealer has relinquished control of recycled oil under CERCLA section 114(c).

Discussion

The recycling of used oil in the United States depends in large measure on the cooperative actions of citizens, including small businesses such as service station dealers who perform a community service by accepting used oil from do-it-yourself oil changers and passing it on to recyclers. This activity, and the management of used oil in general, is regulated under RCRA and its regulations (40 CFR Part 279). To encourage the continuing participation of this important link in the system that returns old oil for reuse, CERCLA currently provides a liability exemption for service station dealers who are willing to accept used oil, a substance that could be categorized a hazardous waste if not properly handled.

While current law includes a “similar retail establishment engaged in the business of selling . . . motor vehicles” within the definition of “service station dealer,” the amendments made by section 803 explicitly extend the protection from CERCLA liability to automobile dealers and dealerships. To qualify for the exemption,

the service station, automobile dealer or similar retail establishment must derive a significant percentage of its gross income from the fueling, repairing, servicing, or selling of motor vehicles, and must accept used oil for collection, accumulation, and delivery to an oil recycling facility.

SEC. 804. LAW ENFORCEMENT AGENCIES NOT INCLUDED AS AN
OWNER OR OPERATOR

Summary

This section amends the definition of “owner or operator” (CERCLA section 101(20)) to exclude a law enforcement agency that acquires ownership or control of a facility where there is a release or threatened release of a hazardous substance “through seizure or otherwise in connection with law enforcement activity.”

Discussion

Increasingly, sites involving criminal activity also involve environmental contamination. One growing problem for law enforcement agencies concerns the seizure of clandestine drug laboratories, which typically are contaminated with hazardous chemicals and wastes. The number of these labs has increased rapidly in recent years. The U.S. Drug Enforcement Agency (DEA) cleaned up 325 seized drug labs in fiscal year 1995, 738 labs in fiscal year 1996, and 1,383 labs in fiscal year 1997. State and local authorities have also seized many illicit labs.

At issue is whether law enforcement agencies, upon seizing drug labs or other contaminated properties, become “owners or operators” of these sites under CERCLA and thus subject to Superfund liability. These illicit laboratories contain hazardous chemicals and wastes and may contaminate water sources and soil. The DEA reports that contamination may spread through various means: lab operators may dump or spill chemicals, or pour wastes down the sink or toilet into water supplies, or onto the surrounding ground. Beyond the immediate health hazards facing the law enforcement officers is this question of liability for cleaning up these labs as Superfund sites. This concern over potential exposure to Superfund liability has caused problems for officers attempting to carry out their duties. In some cases, law enforcement agencies have not seized homes known to contain these labs because of this liability issue, and, consequently, the potential for assuming Superfund liability has sometimes had the effect of deterring law enforcement.

Congress never intended for liability to extend to these circumstances. State and local law enforcement agencies currently are excluded from the definition of “owner or operator” under section 101(20)(D). This amendment is intended to clarify that State and local law enforcement agencies do not become owners or operators for purposes of CERCLA by acquiring ownership or control of a facility through seizure or other law enforcement activity.

SEC. 805. LEAD IN SOIL

Summary

The bill adds a new section at the end of CERCLA Title I requiring EPA to contract with the Health Effects Institute to establish and administer an independent scientific panel to review the existing science on the relationship between lead in residential soil and blood lead levels and to report to Congress and EPA. EPA is directed to use the study results to promulgate a rule establishing procedures for risk assessment and remedy selection for facilities with high lead levels in soil.

Discussion

CERCLA requires ATSDR and EPA jointly to rank, in order of priority, hazardous substances found at sites on the NPL. The three criteria for ranking are frequency of occurrence at NPL sites, toxicity, and potential for human exposure. Based on these criteria, lead is the hazardous substance of highest priority. Infants and young children who ingest small amounts of lead may suffer irreversible damage to their developing nervous systems, including reduced IQ, reading disabilities, and other learning and behavioral problems. Only slightly higher lead levels may threaten the health of exposed adults. Approximately 400 NPL facilities have lead levels in soil that are elevated above natural background. Some of these facilities require emergency action to restrict exposure to highly contaminated areas. Others require extensive, long-term responses to remove or cover soil. Still others may require no remedial action at all. The appropriate response depends on site-specific factors, including the chemical and physical form of lead that is present, its geographical distribution, the land use and potential for exposure, and whether or not there are other sources of lead exposure that may elevate the health risk.

Residents near NPL facilities that are contaminated with lead due to mining activity have complained that EPA has planned remedial action without regard to whether measured blood lead levels in children indicate that they have been exposed to lead in the environment. Similar complaints have been raised in response to NPL listing and remedial investigations in other communities whose exposure to lead has been in a form which they thought to be relatively benign, such as spent ammunition (as compared to the lead from lead-based paint or gasoline, for example). EPA and ATSDR argue, however, that the risk to children in such communities is real and often cannot be assessed accurately through community blood surveys. They further argue that any further exposure risks should be prevented. They maintain remediation should not be delayed until individual children show clear evidence of elevated lead exposure. On the other hand, EPA has acknowledged that risk assessments before about 1994 may have relied too heavily on assumptions and default values due to an inadequate scientific understanding of the factors affecting lead intake and uptake.

Recent research has improved the scientific basis for predicting blood lead levels based on lead levels in soil. For example, the Urban Soil Lead Abatement Demonstration Project, a three-city

pilot project mandated by CERCLA section 111(a)(6), examined the impact of residential soil lead abatement projects on blood lead levels in children living in Baltimore, Boston, and Cincinnati. The integrated EPA report on the studies concluded that soil lead abatement results in reduced exposure only under certain conditions when soil is a significant source of lead in the child's environment. The report identified five factors that are likely to be important: the child's past history of exposure to lead; the initial soil lead concentration and magnitude of the reduction in soil lead due to abatement; the initial interior house dust lead loading and magnitude of reduction due to abatement; the relative magnitude of other sources of lead exposure; and the relative strength of the soil exposure pathway. Correlations between lead-contaminated soil and blood lead levels have been influenced in other specific studies by a child's access to soil, behavior patterns, presence of ground cover, seasonal variation of exposure conditions, particle size and composition of the lead compounds found at various sites, and exposure pathways. Differences in other factors (such as a child's nutritional status) may also be important.

EPA introduced a new Integrated Exposure and Uptake Biokinetic (IEUBK) model and guidance (approved by EPA's independent Scientific Advisory Board) in 1994, which has improved the sensitivity of risk assessments to site-specific factors. For the past 3 years, EPA has worked to validate its model through extensive field testing and consultation with experts, including stakeholders. Nevertheless, there are scientists who criticize the current EPA model. An objective review of the science in general, and of EPA model in particular, might help resolve the controversy.

The bill amends CERCLA by adding a new section 138. The new section directs EPA to enter into a contract with the Health Effects Institute, within 30 days of bill enactment, to administer a scientific review of the science on the relationship between lead in residential soil and blood lead levels. The Health Effects Institute is an independent, nonprofit corporation chartered in 1980 to provide high-quality, impartial, and relevant science on the health effects of pollutants in the environment. It is supported jointly by EPA and industry.

The review panel will consist of university-based scientists and statisticians and the principal investigators of the three urban soil lead abatement studies conducted under CERCLA section 111(a)(6). The review is required to consider whether, and to what extent, blood lead levels are affected by removal of lead-containing soil; whether the type of lead, soil type, and other factors affect blood lead levels; and alternative methodologies for modeling the impact of soil lead levels on blood lead levels. This review may be facilitated by ongoing EPA workshops and pending reports on the validity of the IEUBK and other lead exposure models. The bill requires the review panel to complete its task within 180 days, and to provide an opportunity for peer review of and public comment on their work. The final report should be delivered to Congress and EPA within 30 days of completing the review.

The bill directs EPA to propose a regulation based on and consistent with the results of the review within 180 days of reporting to Congress. The regulation is to govern the conduct of risk assess-

ments and remedy selection at facilities where lead in soil is a contaminant of concern. The regulation may incorporate the current EPA guidance for use of the IEUBK model to the extent that it is consistent with the results of the scientific review. Within 180 days of proposing a regulation, after receiving public comments, EPA is required to promulgate the final regulation. The regulation will address the role of biomonitoring data (*e.g.*, blood testing) and the use of facility-specific data in risk assessments, as well as a process for reconciling the results of risk estimates or predictions with any available empirical data on lead levels in blood. Reconciliation requires a technical comparison of predicted values with available data, a written explanation of any difference between them, and selection of the risk value, whether predicted or measured, that is supported by the weight of the scientific evidence.

SEC. 806. PESTICIDES APPLIED IN COMPLIANCE WITH LAW

Summary

This section clarifies that a release of a hazardous substance into the environment resulting from the required application of a pesticide to treat livestock will not trigger CERCLA liability under section 107. The release of the hazardous substance (*i.e.*, the pesticide, insecticide, or similar product) must have occurred prior to enactment of the bill, and must have been in compliance with the Federal or State law requiring the treatment of livestock.

Discussion

CERCLA liability under section 107 does not attach to the “application of a pesticide product that is registered under the Federal Insecticide, Fungicide, and Rodenticide Act.” That exemption in subsection 107(i) is qualified in the following sentence, which says that it does not “affect or modify . . . the obligations or liability . . . under any other provision of State or Federal law . . . for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action”

The amendment made by section 802 would relieve a person from liability for such a release if it occurred prior to enactment of the bill, and if it resulted from the application of a pesticide in compliance with a Federal or State law or regulation that required the treatment of livestock. The Department of Agriculture’s Animal and Plant Health Inspection Service and its State counterparts have the authority to order treatment of livestock to prevent the spread of disease. The amendment clarifies that if a hazardous substance (the pesticide) was released into the environment in conjunction with this obligatory treatment, a person is not liable under CERCLA section 107.

The purpose of the section is to alleviate the concerns of landowners and real estate financing institutions about the potential liability relating to old pesticide/insecticide application sites. For example, as a result of a Federal quarantine imposed by the U.S. Department of Agriculture in 1906, dipping vats were used in Florida and 14 other States to eradicate ticks from cattle in order to prevent the spread of disease. Participation in this eradication program by livestock producers was mandatory. Dipping vats were lo-

cated throughout the State of Florida on private lands. Dipping vats have not been used since 1961. Nonetheless, the specific sites on which these vats are located are still a cause of concern for lenders and landowners in the context of land sales, due to the uncertainty regarding environmental liability for these vat sites.

None of these sites are currently on the NPL; nor is the Committee aware of any human health problems relating to these sites. Nonetheless, uncertainty regarding potential liability stemming from these vat sites is unnecessarily causing land transaction problems in Florida and other States, including some degree of land devaluation. Thus, the owners of these lands where dipping vats were located are, in effect, now being penalized for their prior cooperation with the Federal and State governments in helping to eradicate disease. This provision is intended to eliminate the unfairness and uncertainty associated with these legally required activities.

SEC. 807. TECHNICAL CORRECTIONS

Summary

This section makes technical corrections to CERCLA section 107(a) to make it consistent with common practice, and more accessible to the reader by inserting headings, and redesignating paragraph numbers and subparagraph letters. It also makes conforming amendments in sections 107(d)(3) and 107(f)(1) where there are references to section 107(a).

Discussion

CERCLA contains numerous drafting errors and frequently fails to follow the standard legislative drafting format. Section 807 is a series of technical corrections intended to make the statute conform with the standard legislative style.

TITLE IX—FUNDING

SEC. 901. AUTHORIZATION OF APPROPRIATIONS FROM THE FUND

Summary

This section authorizes a total of \$7.5 billion for the 5-year period from fiscal year 1999 through fiscal year 2003 for the purposes specified in section 111.

Discussion

The funds authorized by Section 111, are to be appropriated from the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1986.

SEC. 902. ORPHAN SHARE FUNDING

Summary

The section authorizes appropriations for the payment of orphan shares under new section 136, which shall be mandatory direct spending. For fiscal year 1999, \$200 million is authorized; for fiscal year 2000, \$350 million is authorized; for fiscal year 2001, \$300 million is authorized; for fiscal year 2002, \$300 million is authorized; for fiscal year 2003, \$300 million is authorized; and for fiscal

year 2004, and each fiscal year thereafter, \$250 million is authorized.

Discussion

The section adds orphan share funding to the list of purposes in CERCLA section 111(a) for which the Hazardous Substance Superfund may be used.

SEC. 903. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Summary

The section authorizes \$50 million annually for each of fiscal years 1999 through 2003 for the activities of the ATSDR. Any funds not obligated by the end of each fiscal year are to be returned to the Hazardous Substance Superfund.

Discussion

The activities of the ATSDR for which funds are authorized are described in section 104(i).

SEC. 904. LIMITATIONS ON RESEARCH, DEVELOPMENT AND DEMONSTRATION PROGRAMS

The section authorizes \$30 million from the Hazardous Substance Superfund in each of fiscal years 1999 through 2003 for carrying out the applied research, development, and demonstration program for alternative or innovative technologies, and the training program, under CERCLA section 311(b) other than basic research. The funds are to be available until expended.

The section also authorizes funds from the Hazardous Substance Superfund for research, demonstration, and training under CERCLA section 311(a). For fiscal year 1999, \$37 million is authorized; for fiscal year 2000, \$39 million is authorized; for fiscal year 2001, \$41 million is authorized; and for each of fiscal years 2002 and 2003, \$43 million is authorized. No more than 15 percent of these amounts may be used for training under section 311(a) in any fiscal year.

In addition, the section authorizes from the Hazardous Substance Superfund \$5 million per year for each of fiscal years 1999 through 2003 for the University Hazardous Substance Research Centers described in CERCLA section 311(d).

SEC. 905. AUTHORIZATION OF APPROPRIATIONS FROM GENERAL REVENUE

Summary

The section authorizes \$250 million per year to be appropriated from the Treasury to the Hazardous Substance Superfund for each of fiscal years 1999 through 2003. It also authorizes to be appropriated for each fiscal year an amount equal to the environmental taxes received in the Treasury.

Discussion

There are four environmental taxes designated for the Hazardous Substance Superfund: the corporate environmental income tax (In-

ternal Revenue Code (IRC) section 59A), and excise taxes on petroleum (IRC section 4611), 42 listed feedstock chemicals (IRC section 4661), and imported chemical derivatives (IRC section 4671). Reauthorization of these taxes is not under the jurisdiction of the Environment and Public Works Committee, but instead, is under the jurisdiction of the Finance Committee. The ultimate decision over which, if any, of these taxes will be reauthorized is left to the determination of the Finance Committee.

SEC. 906. ADDITIONAL LIMITATIONS

This section adds two limitations to the uses of the Hazardous Substance Superfund. First, it limits the total amount that can be granted to the Community Action Groups established under Title II of the bill to \$15 million for the period from January 1, 1997, to September 30, 2003. Second, it provides that beginning on January 1, 1997, response costs that are recovered by the United States are to be credited as offsetting collections to the Superfund appropriations account.

SEC. 907. REIMBURSEMENT OF POTENTIALLY RESPONSIBLE PARTIES

Summary

The section authorizes the Administrator of EPA to reimburse a party who has paid EPA for response costs that are later disallowed or adjusted.

Discussion

This provision is intended to protect a party who has settled with EPA and paid more than his fair share of cleanup costs. If a Federal audit of response costs finds that the costs are not allowable due to contractor fraud, are not allowable under the Federal Acquisition Regulation, or should be adjusted due to routine contract and EPA response cost audit procedures, then the party may be reimbursed.

HEARINGS

In the 104th Congress, the Subcommittee on Superfund, Waste Control, and Risk Assessment held seven hearings. On March 10, 1995, the subject was general oversight and EPA's administration of Superfund. Testimony was given by the following witnesses: The Honorable Carol Browner, Administrator, U.S. Environmental Protection Agency; Edwin H. Clark II, president, Clean Sites; Don R. Clay, president, Don Clay Associates, Inc.; Lloyd Dixon, RAND Corporation; J. Winston Porter, president, Waste Policy Center; Katherine Probst, senior fellow, Resources for the Future; John Shanahan, policy analyst, Environmental Affairs and Energy Studies, The Heritage Foundation; and Michael Steinberg, Esq., Morgan, Lewis, and Bockius, on behalf of the Hazardous Waste Cleanup Project.

On March 29, 1995, the subject was remedy selection and cleanup standards. Testimony was given by the following witnesses: Rose Augustine, Tucson, AZ; Richard Bunn, president and chief executive officer, UGI Corporation, Reading, PA; Ronald Cattany,

Deputy Director, State of Colorado, Department of Natural Resources; Timothy C. Duffy, executive director, Rhode Island Association of School Committees; James A. Goodrich, executive director, San Gabriel Basin Water Quality Authority; Barry, Johnson, Assistant Administrator, Agency for Toxic Substances and Disease Registry; Patrick Murphy, community liaison, Concerned Citizens of Triumph, Sun Valley, ID; John F. Spisak, president and chief executive officer, Industrial Compliance, Inc.; and Martin Yee, White Spur Dry Cleaners, El Paso, TX.

On April 5, 1995, the subject of the hearing was risk assessment. Testimony was given by the following witnesses: Richard Brown, vice president for remediation technology, Groundwater Technology, Inc.; Robert W. Frantz, manager, Environmental Remediation Program, General Electric Company; Linda Greer, senior scientist, Public Health Program Coordinator, Natural Resources Defense Council; The Honorable Elliott Laws, Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency; Steven J. Milloy, president, Regulatory Impact Analysis Project; Paul Miskimin, senior vice president for Federal programs, Jacobs Engineering Group, Inc.; Philip J. O'Brian, Director, Division of Waste Management, State of New Hampshire, Department of Environmental Services; Michael Parr, remediation program manager, DuPont Company; Milton Russell, director, Joint Institute for Energy and Environment, and professor of economics, University of Tennessee; Curtis C. Travis, M.D., director, Health Sciences Research Division, Oak Ridge National Laboratory; and Marcia Williams, president, Williams and Vanino.

On April 27, 1995, the subject of the hearing was superfund liability issues. Testimony was given by the following witnesses: Jan Paul Acton, assistant director, Congressional Business Office; Robert Burt, chairman and chief executive officer, FMC Corporation, on behalf of the Business Roundtable; Boyd Condie, Council member, City of Alhambra, CA, on behalf of American Communities for Cleanup Equity; Kelvin Herstad, president, United Truck Body, Inc., on behalf of the National Federation of Independent Businesses; Anne Pendergrass Hill, senior counsel, First Interstate Bank of Portland, Oregon, Legal Services Group, on behalf of the American Bankers' Association; Richard F. Leavitt, president, Chelsea Clock, Inc.; R. Brian McLaughlin, Deputy Attorney General, State of New Jersey, on behalf of the National Association of Attorneys General; Mary P. Morningstar, assistant general counsel for environmental affairs, Lockheed Martin Corporation, on behalf of the Electronics Industry Association; Joe J. Palacioz, City Manager, Hutchinson, KS; Peter B. Prestley, attorney, Simpson, Thatcher and Bartlett, on behalf of the American Bar Association; Barbara Price, vice president for health, environment and safety, Phillips Petroleum, on behalf of the American Petroleum Institute; The Honorable Lois Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice; and Richard D. Smith, president, Chubb Corporation.

On May 4, 1995, the subject was the role of State and local governments. Testimony was given by the following witnesses: James C. Colman, Assistant Commissioner, Massachusetts Bureau of Waste Site Cleanup, on behalf of the Association of State and Ter-

ritorial Solid Waste Management Officials; Velma Dunn, Phoenix, AZ; Karen Florini, senior attorney, Environmental Defense Fund; Russell Harding, Deputy Director for Environmental Protection, Michigan Department of Natural Resources; Jonathan B. Howes, Secretary, North Carolina Department of Environment, Health, and Natural Resources; Kent Jeffreys, senior fellow, National Center for Policy Analysis; David R. Tripp, special legal counsel, City of Wichita, KS; and Robert W. Varney, Commissioner, New Hampshire Department of Environmental Services.

On May 9, 1995, the subject was Federal and State roles in Superfund cleanup. Testimony was given by the following witnesses: The Honorable Sherri W. Goodman, Deputy Under Secretary of Defense for Environmental Security, U.S. Department of Defense; The Honorable Thomas Grumbly, Assistant Secretary for Environmental Management, U.S. Department of Energy; Christopher Jones, Chief, Environmental Enforcement Section, Office of the Attorney General, State of Ohio; Mary P. Morningstar, corporate counsel, Lockheed Martin Corporation; Frank Parker, distinguished professor of environmental engineering, Vanderbilt University; Andrew Paterson, managing director, RIMTech; Lenny Siegel, director, Pacific Studies Center; and Barry Steinberg, attorney, National Association of Installation Developers.

On May 11, 1995, the subject was natural resource damages. Testimony was given by the following witnesses: Charles de Saillan, Assistant Attorney General for Natural Resources, State of New Mexico, on behalf of the National Association of Attorneys General; Keith O. Fultz, Assistant Comptroller General, U.S. General Accounting Office; The Honorable Douglas Hall, Assistant Secretary, National Oceanic and Atmospheric Administration, U.S. Department of Commerce; Jerry Hausman, McDonald Professor of Economics, Massachusetts Institute of Technology; Kenneth D. Jenkins, director, Molecular Ecology Institute, California University at Long Beach; Kevin L. McKnight, manager, Environmental Remediation Projects, Aluminum Company of America; Keith Meiser, senior counsel, CSX Transportation, Inc.; and Chris Tweeten, Chief Deputy Attorney General, State of Montana.

Also in the 104th Congress, the Committee on Environment and Public Works held 2 days of hearings related to the modification of S. 1285 by Senate Amendment No. 3563. On April 23, 1996, testimony was given by the following witnesses: The Honorable Carol M. Browner, Administrator, U.S. Environmental Protection Agency; Karen Florini, senior attorney, Environmental Defense Fund; The Honorable Sherri W. Goodman, Deputy Under Secretary of Defense for Environmental Security, U.S. Department of Defense; The Honorable Thomas P. Grumbly, Assistant Secretary for Environmental Management, U.S. Department of Energy; The Honorable Douglas K. Hall, Assistant Secretary for Oceans and Atmosphere, U.S. Department of Commerce; Barbara Price, vice president for health safety, and the environment, American Petroleum Institute; The Honorable Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice; John F. Spisak, president and chief executive officer, Terranext, Inc.; and J. Lawrence Wilson, chairman and chief executive officer,

Rohm and Haas Company, on behalf of the Chemical Manufacturers Association.

On April 24, 1996, testimony was given by the following witnesses: Andrew H. Card, president and chief executive officer, American Automobile Manufacturers Association; Sarah Chasis, senior attorney, Natural Resources Defense Council, Inc., New York, NY; James D. Coleman, Assistant Commissioner for Waste Site Cleanup, Massachusetts Department of Environmental Protection, on behalf of the Association of State and Territorial Solid Waste Management Officials; Michael Farrow, director, Department of Natural Resources, Confederated Tribes of the Umatilla Indian Reservation; Christine O. Gregoire, Attorney General, State of Washington, on behalf of the National Association of Attorneys General; The Honorable Rick Santorum, Senator from the Commonwealth of Pennsylvania; Velma Smith, executive director, Friends of the Earth; Richard B. Stewart, professor, New York University Law School, on behalf of the Natural Resource Damages Coalition; Robert Stickles, Administrator, Sussex County, Delaware, on behalf of the National Association of Counties, National League of Cities, American Communities for Cleanup Equity, National Association of Towns and Townships, International City/County Management Association, National School Boards Association, and the United States Conference of Mayors; Marion Trieste, president, Saratoga Springs Hazardous Waste Coalition; Michael Szomjassy, senior vice president, OHM Remediation Services Corporation; Robert E. Vagley, American Insurance Association; Robert Varney, Commissioner, New Hampshire Department of Environmental Services, on behalf of the National Governors' Association; and Barbara Williams, owner, Sunnyray Restaurant, Gettysburg, PA, on behalf of the National Federation of Independent Business.

At the beginning of the 105th Congress, during March 1997, the Subcommittee on Superfund, Waste Control, and Risk Assessment held two Superfund-related hearings. On March 4, 1997, the Subcommittee heard testimony on brownfields from the following witnesses: Christian J. Bollwage, Mayor, Elizabeth NJ, on behalf of the United States Conference of Mayors; Timothy Fields, Acting Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency; Peter F. Guerrero, Director for Environmental Protection Issues, Resources, Community and Economic Development Division, U.S. General Accounting Office; Lorrie Louder, director of industrial development, St. Paul Port Authority, on behalf of the National Association of Local Government Environmental Professionals; William J. Riley, general manager for environmental affairs, Bethlehem Steel Corporation, on behalf of the American Iron and Steel Institute; Peter J. Scherer, senior vice president and counsel, Taubman Company, on behalf of the National Realty Committee; James M. Seif, Secretary of Environmental Protection, Pennsylvania Department of Environmental Protection; and William K. Wray, senior vice president, Citizens Bank, Providence, RI.

On March 5, 1997, the Subcommittee on Superfund, Waste Control, and Risk Assessment received testimony from the following witnesses: Linda Biagioni, vice president of environmental affairs, Black and Decker Corporation, on behalf of the Superfund Action

Alliance; The Honorable Carol M. Browner, Administrator, U.S. Environmental Protection Agency; Charles de Saillan, Assistant Attorney General, Natural Resources, Environmental Enforcement Division, State of New Mexico; Karen Florini, senior attorney, Environmental Defense Fund; Terry Garcia, Acting Assistant Secretary, National Oceanic and Atmospheric Administration, U.S. Department of Commerce; Richard Gimello, Assistant Commissioner for Site Remediation, New Jersey Department of Environmental Protection, on behalf of the National Governors' Association; Rich A. Heig, senior vice president, Engineering and Environment, Kennecott Energy Company; Larry L. Lockner, manager for regulatory issues, Shell Oil Company, on behalf of the American Petroleum Institute; Karen O'Regan, Environmental Programs Manager, City of Phoenix, on behalf of American Communities for Cleanup Equity, International City County Management Association, National League of Cities, National Association of Counties, U.S. Conference of Mayors, and National School Board Association; Robert Spiegel, director, Edison Wetlands Association, and Barbara Williams, owner, Sunnyray Restaurant, Gettysburg, PA, on behalf of the National Federation of Independent Business.

On September 4, 1997, the Committee held a hearing on a revised draft of S. 8. Testimony was given by the following witnesses: The Honorable Carol M. Browner, Administrator, U.S. Environmental Protection Agency; Robert N. Burt, chairman and chief executive officer, FMC Corporation on behalf of the Business Roundtable; Susan Eckerly, director for Federal Government relations, National Federation of Independent Business; Karen Florini, Senior Attorney, Environmental Defense Fund; Gordon J. Johnson, Deputy Bureau Chief, Environmental Protection Bureau, New York State Attorney General's Office, on behalf of the National Association of Attorneys General; George Mannina, executive director, Coalition for NRD Reform; E. Benjamin Nelson, Governor, State of Nebraska, on behalf of the National Governors' Association; James P. Perron, Mayor, Elkhart, IN, on behalf of the U.S. Conference of Mayors; and Wilma Subra, president, Subra Company, New Iberia, LA.

ROLLCALL VOTES

Section 7(b) of rule XXVI of the Standing Rules of the Senate and the rules of the Committee on Environment and Public Works require that any rollcall votes taken during the Committee's consideration of a bill be noted in the report.

The Committee met to consider S. 8 on March 24, 25, and 26, 1998, and held the following rollcall votes:

On March 25, 1998, an amendment by Senator Lautenberg (which had been offered in the markup session of March 24), to delete the provision establishing the voluntary cleanup program, was defeated by 7 yeas and 11 nays. Voting in favor were Senators Baucus, Boxer, Lautenberg, Lieberman, Moynihan, Reid, and Wyden; and voting against were Senators Allard, Bond, Chafee, Graham, Hutchinson, Inhofe, Kempthorne, Sessions, Smith of New Hampshire, Thomas, and Warner.

On March 25, 1998, an amendment offered by Senator Baucus, to ensure that Federal authorities are not limited if a State vol-

untary response program fails to contain basic elements, was defeated by 7 yeas and 11 nays. Voting in favor were Senators Baucus, Boxer, Lautenberg, Lieberman, Moynihan, Reid, and Wyden; and voting against were Senators Allard, Bond, Chafee, Graham, Hutchinson, Inhofe, Kempthorne, Sessions, Smith of New Hampshire, Thomas, and Warner.

On March 25, 1998, an amendment offered by Senator Kempthorne on Natural Resource Damages was approved by 11 yeas, 4 nays, and 3 not voting. Voting in favor were Senators Allard, Bond, Chafee, Graham, Hutchinson, Inhofe, Kempthorne, Sessions, Smith of New Hampshire, Thomas, and Warner; voting against were Senators Baucus, Boxer, Lautenberg, and Moynihan; not voting were Senators Lieberman, Reid, and Wyden.

On March 26, 1998, an amendment offered by Senator Chafee, in the form of a manager's amendment, was approved by 11 yeas, 6 nays, and 1 not voting. Voting in favor were Senators Allard, Bond, Chafee, Graham, Hutchinson, Inhofe, Kempthorne, Sessions, Smith of New Hampshire, Thomas, and Warner; voting against were Senators Baucus, Boxer, Lautenberg, Moynihan, Reid, and Wyden; and not voting was Senator Lieberman.

On March 26, 1998, an amendment offered by Senator Boxer on uncontaminated ground water was defeated by 7 yeas and 11 nays. Voting in favor were Senators Baucus, Boxer, Lautenberg, Lieberman, Moynihan, Reid, and Wyden; and voting against were Senators Allard, Bond, Chafee, Graham, Hutchinson, Inhofe, Kempthorne, Sessions, Smith of New Hampshire, Thomas, and Warner.

On March 26, 1998, an amendment offered by Senator Lautenberg on the community role in decisionmaking was defeated by 8 yeas and 10 nays. Voting in favor were Senators Baucus, Boxer, Graham, Lautenberg, Lieberman, Moynihan, Reid, and Wyden; and voting against were Senators Allard, Bond, Chafee, Hutchinson, Inhofe, Kempthorne, Sessions, Smith of New Hampshire, Thomas, and Warner.

On March 26, 1998, an amendment offered by Senator Baucus on preference for treatment was defeated by 7 yeas and 11 nays. Voting in favor were Senators Baucus, Boxer, Lautenberg, Lieberman, Moynihan, Reid, and Wyden; and voting against were Senators Allard, Bond, Chafee, Graham, Hutchinson, Inhofe, Kempthorne, Sessions, Smith of New Hampshire, Thomas, and Warner.

On March 26, 1998, the S. 8 was ordered reported, as amended by the Committee, by 11 yeas and 7 nays. Voting in favor were Senators Allard, Bond, Chafee, Graham, Hutchinson, Inhofe, Kempthorne, Sessions, Smith of New Hampshire, Thomas, and Warner; and voting against were Senators Baucus, Boxer, Lautenberg, Lieberman, Moynihan, Reid, and Wyden.

REGULATORY IMPACT

In compliance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact of the bill. In general, the bill is expected to reduce the regulatory burdens and costs of potentially responsible parties at facilities listed on the NPL. The bill will also reduce regulatory burdens and costs at the numerous sites with potential

or real hazardous substance contamination that are not listed on the NPL, but are cleaned up under other Federal or State authority. EPA has identified over 41,000 such sites since Superfund's inception, and estimates of the total number of such sites nationwide are as high as 400,000. The bill will not affect the personal privacy of individuals.

Superfund is not a traditional regulatory program such as the Clean Air Act or the Federal Water Pollution Control Act. Those statutes establish national regulatory regimes that govern all entities engaged in specified activities. Superfund is essentially an enforcement program; its requirements apply at sites that are of interest to the Federal Government. Superfund cleanup regulations only apply to those sites that are nominated and added to the NPL after a public notice and comment period, or at sites that are the subject of some other Federal enforcement action, response action, or natural resource damage restoration. A Federal cause of action under Superfund exists at any facility where a party incurs response costs. However the liability allocation system, exemptions, and limitations in the bill only apply at NPL facilities.

The potential universe of sites affected by the bill's regulatory changes is therefore largely a function of the Federal Government's enforcement discretion. The current universe of NPL facilities is 1,197, with 54 listings proposed but not final. EPA has used Superfund authority to conduct an additional 5,000 removal action. Some of the removal actions have occurred at facilities subsequently listed on the NPL, and some facilities have been the subject of multiple removal actions.

The bill requires the President to make significant revisions to the existing Superfund program. This will include revisions to the National Contingency Plan and regulations regarding the assessment of damages to natural resources. New regulations will be required to implement the brownfield and State voluntary cleanup assistance programs in Title I, delegation and authorization of State programs in Titles II and VI, expansion of community participation in Title III, allocation system in Title V.

The regulatory changes required by the bill are expected to speed up the process of cleaning up Superfund sites and reduce some of the burdens associated with the conduct of a cleanup and the resolution of liability for cleanup. The changes in the National Contingency Plan will result in less costly cleanups due to the elimination of burdensome requirements in existing law, coupled with additional flexibility for the remedial decisionmaker to select cost-effective remedies that protect human health and the environment.

Liability system changes include an allocation system that will provide orphan share funding paid from a segregated direct spending account, plus other policy-based exemptions or limitations from liability. No individual party's liability burden will increase under the bill, though the liability of many parties will be reduced or eliminated. The bill establishes several temporary moratoria on litigation to recover response costs during the settlement or allocation process. It is expected that the costs to the private sector due to the litigation moratoria will be negligible, and that the benefits of the exemptions, limitations and orphan share funding will far outweigh any short-term costs incurred.

The bill will not result in any increased paperwork burden for individuals. The current liability system requires individuals to produce evidence to establish defenses to liability, demonstrate eligibility for participation in de minimis settlements, or provide information needed by the Federal Government or a Court to develop or evaluate settlements. The bill does not affect these requirements.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), the Committee makes the following evaluation of the Federal mandates contained in the bill. Title V of the bill limits or eliminates liability for certain parties under Federal and State laws for future cleanup costs at Superfund sites. Currently, States can sue PRPs at a Superfund site under their own hazardous waste cleanup laws, and PRPs can pursue other PRPs under State cost recovery laws. The bill preempts the application of State law to future cleanup costs subject to an allocation. However, the costs of meeting this requirement are not significant.

The purpose for preempting State law for costs subject to a liability allocation is to provide certainty to the parties who participated in the allocation. These allocations will be more successful if PRPs can be assured that the liability share they received will not be disturbed by a party seeking a different outcome under State law. Since States and PRPs rarely undertake actions against PRPs at Superfund sites under State laws, the impacts of this provision are not significant. Similarly, those States whose cleanup laws establish joint and several liability could in many cases recover their costs from other PRPs at the site. Therefore, the costs of meeting this requirement are not significant.

Section 506 of the bill contains a national uniform negligence standard for the activities of a response action contractor. This provision would constitute an intergovernmental mandate under UMRA. Nonetheless, this provision contains language that prevents the application of the national uniform negligence standard in those cases where a State has adopted, by statute, a law determining the liability of a response action contractor (RAC). The practical effect of this language is to clarify that State law would not be preempted where a State has an existing or future statute regarding RAC liability, but would result only in the preemption of common law RAC negligence standards. Because a State would be free to apply its own statutes, the cost of meeting this requirement is not significant.

While the bill does contain the aforementioned preemptive elements, they are not significant, and do not exceed the threshold established in UMRA (\$50 million in 1996, indexed annually for inflation). Finally, the bill does not have any discernible effect on the competitive balance between the public and private sectors.

COMMENT FROM THE GENERAL ACCOUNTING OFFICE

The Committee sought comment from the U.S. General Accounting Office on the status of the Superfund Trust Fund. The response follows:

B-279673
U.S. GENERAL ACCOUNTING OFFICE,
Washington, DC, April 16, 1998.

HON. JOHN H. CHAFEE, *Chairman,*
Committee on Environment and Public Works,
United States Senate.

HON. ROBERT C. SMITH, *Chairman,*
Subcommittee on Superfund, Waste Control, and Risk Assessment,
Committee on Environment and Public Works,
United States Senate.

SUBJECT: SUPERFUND: STATUS OF THE SUPERFUND TRUST FUND

In 1980, the Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which created the Superfund program to clean up hazardous waste sites. Under the act, the Environmental Protection Agency (EPA) has the authority to compel the parties responsible for the contamination to perform the cleanup. EPA may also pay for the cleanup and attempt to recover the cleanup costs from responsible parties. CERCLA also established the Hazardous Substance Superfund (commonly referred to as the Superfund Trust Fund) to provide EPA the resources needed to clean up hazardous waste sites. The Trust Fund has been financed primarily by a tax on crude oil and certain chemicals and by an environmental tax on corporations. However, these taxes expired in December 1995. Other sources of revenue for the Trust Fund include amounts recovered from the private parties responsible for the hazardous waste sites, interest earned on the unexpended balance in the fund, fines and penalties and appropriations made available from general revenues (*i.e.*, from Treasury's General Fund).

Given the expiration of the crude oil, chemical, and environmental taxes in December 1995, you asked us to report on the status of the Trust Fund. Specifically, you asked us to report on (1) the amount of Trust Fund resources available for appropriation in future years if the taxes that expired in 1995 are not reinstated and (2) the existence of any impediments to funding the Superfund program from general revenues.

In summary, we found the following:

- As of September 30, 1997, the unappropriated balance in the Trust Fund was about \$2.63 billion. For fiscal year 1998, the Congress made \$1.5 billion available for the Superfund program—\$1.25 billion from the unappropriated Trust Fund balance and \$250 million from general revenues—leaving a balance of about \$1.38 billion potentially available for future appropriations. In addition, the Trust Fund is projected to receive income (primarily from interest and recoveries) during fiscal year 1998 of about \$396 million. With this projection, about \$1.78 billion may be available in the Trust Fund for future appropriations by the end of fiscal year 1998. The

availability of Trust Fund resources for appropriation beyond fiscal year 1999 is less certain and depends on variables such as the amount actually made available to EPA for fiscal year 1999, and the actual amount of interest and recoveries realized in fiscal years 1998 and 1999.

- Our discussions with executive and legislative branch officials and our own research did not identify any provision in law or the congressional budget agreement that would preclude funding the Superfund program entirely from general revenues.

BALANCES IN THE SUPERFUND TRUST FUND

EPA's audited financial statements for fiscal year 1997 show that, as of September 30, 1997, the Trust Fund had an unappropriated balance of \$2.63 billion. For fiscal year 1998, the Congress made \$1.5 billion available to the Superfund program (\$1.25 billion from the Trust Fund plus \$250 million from general revenues), leaving \$1.38 billion potentially available for future appropriations. Although the taxes that were the major source of income for the Trust Fund expired in December 1995, the fund continues to receive income, primarily from interest on the unexpended balance and recoveries from private parties who are responsible to reimburse EPA for cleanup costs at hazardous waste sites. The amount potentially available for appropriation from the Trust Fund for fiscal year 1999 includes the \$1.38 billion mentioned above plus income realized during fiscal year 1998.

The President's fiscal year 1999 budget estimates that the Superfund Trust Fund will earn about \$396 million during fiscal year 1998—\$217 million in interest and \$175 in recoveries, plus \$4 million in fines and penalties. We obtained actual income information from the Department of the Treasury, which maintains the Trust Fund accounts and processes all of EPA's receipts and disbursements. The income statement for the Trust Fund shows that in the first 5 months of fiscal year 1998 (October 1997 through February 1998), the Trust Fund earned about \$226 million in interest, recoveries, and fines and penalties (or 57 percent of the amount estimated for the entire year). While there is uncertainty about the amount of income that the Trust Fund will earn for the remainder of fiscal year 1998, particularly from recoveries, which flow into the fund on an uneven basis, it appears that the total income may be somewhat higher for fiscal year 1998 than projected in the budget estimate.

In addition to the amount potentially available for appropriations from the Trust Fund (\$1.38 billion) and the income being earned in fiscal year 1998, the President's budget for fiscal year 1999 estimates additional support of \$250 million from general revenues. Taken together, these revenue sources total over \$2 billion that may be available to fund the Superfund program for fiscal year 1999. The President's fiscal year 1999 budget anticipates that \$2.093 billion will be available for the program for fiscal year 1999.

The amount of the unappropriated balance in the Trust Fund to fund the program beyond fiscal year 1999 is uncertain. The balance depends on whether the additional \$650 million provided for in the fiscal year 1998 appropriations act is made available to EPA in 1999, the actual level of appropriations for fiscal year 1999, and the

actual amount of income (primarily, interest and recoveries) that will be realized in fiscal years 1998 and 1999.

FUNDING THE SUPERFUND PROGRAM FROM GENERAL REVENUES

Our discussions with officials from the Congressional Budget Office, EPA, and the Office of Management and Budget did not identify any provisions of law or the congressional budget resolution that would preclude funding the Superfund program entirely from general revenues. Similarly, in July 1996, the Congressional Budget Office reported to the Congress that if the Trust Fund runs short of cash, the Congress could choose to fund the program from the General Fund indefinitely. Additionally, our review of pertinent legislation and the concurrent resolution on the budget for fiscal year 1998 (which established budget levels for fiscal years 1998 through 2002) confirmed these views.

AGENCY COMMENTS

We provided EPA with a draft of this report for its review and comment. We met with EPA officials, including the Branch Chief of the Trust Funds and Administration Analysis Branch in EPA's Office of the Comptroller, to obtain their comments. These officials said that overall the report provides a fair treatment of the facts. EPA also provided a few technical clarifications, which have been incorporated in this report, as appropriate.

SCOPE AND METHODOLOGY

To prepare this report, we held discussions with, and obtained and analyzed information provided by, officials from EPA, the Department of the Treasury, the Office of Management and Budget, and the Congressional Budget Office.

To identify the amount of Superfund Trust Fund resources available for future appropriations, we reviewed the audited financial statements prepared by EPA's Office of Inspector General for the end of fiscal year 1997. To update these figures, we obtained the most current income statement for the Trust Fund from the Department of the Treasury. To identify projected recoveries, we spoke to EPA's Office of Enforcement and Compliance Assurance. We also discussed other line items in the Superfund Trust Fund budget with an official at the Office of Management and Budget. We discussed our methodology with the Congressional Budget Office's Division of Natural Resource and Commerce, Division of Budget Analysis, and Division of Tax Analysis.

To address the issue of funding the program entirely out of general revenues, we spoke to the same officials at the Congressional Budget Office, the Office of Management and Budget, and EPA. We also reviewed pertinent Superfund legislation and congressional budget resolutions. We conducted our review in March and April 1998 in accordance with generally accepted government auditing standards.

Major contributors to this report were Charles Barchok, Karen Kemper, and Richard Johnson.

LAWRENCE J. DYCKMAN,
Associate Director, Environmental Protection Issues.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of the reported bill, prepared by the Congressional Budget Office, be included in the report. That statement follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 4, 1998.

Hon. JOHN H. CHAFEE, *Chairman,*
Committee on Environment and Public Works,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 8, the Superfund Cleanup Acceleration Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts for Federal costs are Kim Cawley, who can be reached at 226-2860, and Perry Beider, who can be reached at 226-2940. The contact for the State and local impact is Pepper Santalucia, who can be reached at 225-3220, and the contacts for the private-sector impact are Patrice Gordon and Perry Beider, both of whom can be reached at 226-2940.

Sincerely,

JUNE E. O'NEILL,
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 8, Superfund Cleanup Acceleration Act of 1998, as ordered reported by the Senate Committee on Environment and Public Works on March 26, 1998.

Summary

S. 8 would amend and reauthorize spending for the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), commonly known as the Superfund Act, which governs the cleanup of sites contaminated with hazardous substances. Because the bill would affect direct spending, pay-as-you-go procedures would apply.

The Superfund program is administered by the Environmental Protection Agency (EPA), which evaluates the need for cleanup at sites brought to its attention, identifies parties liable for the costs of cleanup, and oversees cleanups conducted either by its own contractors or by the liable parties. These EPA activities are currently funded by appropriations from the Hazardous Substance Superfund Trust Fund and from the general fund of the Treasury.

The bill would authorize appropriations of about \$8 billion over the 1999-2003 period for the Superfund program. In addition, S. 8 would provide direct spending authority of about \$1.3 billion over the same period for EPA to compensate certain private parties for completing cleanup activities for which they are not liable. Such cleanup costs would be defined as "orphan share" spending under

S. 8. Finally, the bill would result in a decrease in the amounts recovered by EPA from private parties who are liable for cleanup expenses incurred by that agency and would authorize EPA to spend the recovered sums without further appropriation. (Under current law, such recoveries are deposited in the Superfund Trust Fund, and any spending authority is subject to appropriation action.) New direct spending related to those recoveries would total about \$1.2 billion over the 1999–2003 period.

S. 8 would impose intergovernmental mandates as defined in Unfunded Mandates Reform Act of 1995 (UMRA). However, CBO estimates that the costs of complying with these mandates would not be significant and would not exceed the threshold established in the law (\$50 million in 1996, indexed annually for inflation).

S. 8 also would impose private-sector mandates as defined in UMRA by setting a temporary moratorium on certain lawsuits. CBO estimates that the direct costs of complying with these mandates would be well below the statutory threshold specified in UMRA (\$100 million in 1996 dollars adjusted annually for inflation). Overall, the bill would tend to lower the costs to the private sector of complying with regulations under CERCLA.

Estimated Cost to the Federal Government

The estimated budgetary impact of S. 8 is shown in the following table. The costs of this legislation fall within budget function 300 (natural resources and environment).

By fiscal year, in millions of dollars						
	1998	1999	2000	2001	2002	2003
SPENDING SUBJECT TO APPROPRIATION						
Superfund Spending Under Current Law.						
Budget Authority ¹	1,500	650	0	0	0	0
Estimated Outlays	1,428	1,237	774	355	143	38
Proposed Changes.						
Estimated Authorization Level	0	1,609	1,609	1,609	1,609	1,609
Estimated Outlays	0	408	987	1,308	1,458	1,533
Superfund Spending Under S. 8.						
Estimated Budget Authority/Authorization Level ¹	1,500	2,259	1,609	1,609	1,609	1,609
Estimated Outlays	1,428	1,645	1,761	1,663	1,601	1,571
CHANGES IN DIRECT SPENDING						
Spending for Orphan Shares.						
Estimated Budget Authority	0	91	350	300	300	300
Estimated Outlays	0	91	350	300	300	300
Changes to Superfund Recoveries.						
Estimated Budget Authority	0	350	300	300	300	250
Estimated Outlays	0	88	209	267	307	293
Total Changes in Direct Spending.						
Estimated Budget Authority	0	441	650	600	600	550
Estimated Outlays	0	179	559	567	607	593

¹ The 1998 level is the amount appropriated for that year; the 1999 level reflects an advance appropriation for 1999 made in 1998.

BASIS OF ESTIMATE

For purposes of this estimate, CBO assumes that S. 8 will be enacted by the end of this fiscal year, and that all funds authorized by the bill will be appropriated in equal annual amounts over the

next 5 years. Estimated outlays are based on the historical spending patterns of the Superfund program.

Spending Subject to Appropriation

Superfund Program. Title IX would authorize appropriations totaling \$7.5 billion over the 1999–2003 period for EPA activities in support of the Superfund program. In addition, this title would authorize appropriations of \$15 million over the 1999–2003 period for technical assistance grants to community action groups affected by a Superfund site. Title I would authorize the appropriation of \$75 million annually over the 5-year period for grants to be used for site characterization, assessment, and cleanup actions at brownfield facilities. (Brownfield facilities are properties where the presence, or potential presence, of a hazardous substance complicates the expansion or redevelopment of the property.) These funds could also be used by States and local governments to establish revolving loan funds to provide money for eligible work at brownfield facilities. Title I also would authorize the appropriation of \$25 million annually over the 1999–2003 period for grants to States to establish programs to facilitate the voluntary cleanup of properties contaminated with hazardous materials.

Coeur d'Alene Basin. Title VII would authorize the appropriation of \$5 million to Idaho to develop and implement a plan to restore, manage, and enhance the natural recovery of the Coeur d'Alene basin in Idaho. In addition, this title would authorize the appropriation of such sums as are necessary to the Federal trustees within the Coeur d'Alene basin to pay for the Federal costs associated with implementing a plan to restore the basin. We estimate that those costs would total about \$20 million over the next 5 years, but that over the long term, total restoration costs could be much greater.

Federal land managers (the Federal trustees) in this region include the Fish and Wildlife Service and the Forest Service. The basin in northern Idaho is over 3,000 square miles in size. Parts of this region have been contaminated with millions of tons of mining tailings and contaminated sediments from metals mining and ore processing activities in this area. The basin area includes one current Superfund site.

S. 8 would require the Coeur d'Alene Basin Commission (an existing group that includes representatives of industry and of Federal, State, and local governments) to prepare a plan within 2 years to restore, manage, and enhance the natural recovery of the basin. The amount and the timing of Federal funds that would be needed to implement such a plan is uncertain because it is unclear how much the plan would emphasize the enhancement of the natural recovery of the basin instead of traditional remedial actions to restore the basin. Also, until the plan is completed, CBO does not know which parts of the basin would be targeted for restoration. Preliminary estimates of the cost to restore the area range from less than \$100 million to \$1 billion. Currently, the commission spends about \$3 million annually on planning and restoration activities. It is also unclear how much of the cost the plan would assign to Federal agencies with responsibilities within the basin.

CBO estimates that, over the next 5 years, the Federal contribution to implementing the basin restoration plan would be \$5 million annually. In the decades ahead, however, Federal costs could be much larger, depending on the size of the region targeted and the approach to restoration that is adopted under the plan. Any Federal funds provided for restoring the basin would be subject to future appropriation acts.

Superfund Cleanup Costs At Federal Sites. S. 8 would amend the procedures EPA uses to select appropriate cleanup solutions (known as remedies) at each Superfund site. Title IV would require EPA to consider future land use at a site when selecting an appropriate remedy, and would add reasonable cost as a factor to consider in remedy selection. The bill would also allow EPA to delegate oversight of the Superfund program for Federal facilities to individual States that choose to undertake this work. These changes in the remedy selection procedures and oversight could change the cost of future cleanup projects at Federal facilities. However, any savings or increases in costs would be small in the next 5 years because the changes would not dramatically affect spending at sites where remediation has begun.

Direct Spending

Reimbursement for Orphan Share Spending. Title V would establish an entitlement to reimbursement from the Federal Government for certain Superfund cleanup expenditures made by private parties who are not liable for such costs. Title 9 would limit the amount of such reimbursements to \$200 million in 1999, \$350 million in 2000, \$300 million a year from 2001 through 2003, and \$250 million a year in 2004 and thereafter. Based on information from EPA, CBO estimates Government reimbursements would be about \$ 1.3 billion over the 1999–2003 period. Specifically, we expect that the new orphan share spending would be at the annual caps for 2000 through 2003, but significantly below the cap in the initial year of 1999.

Title V would make several important changes to current law concerning Superfund liabilities of private parties and the procedures for allocating cleanup responsibilities equitably among the multiple “potentially responsible parties,” or PRPs (site owners and operators, and offsite parties that contributed hazardous substances), involved in a cleanup project. Section 504 defines how an independent “allocator,” chosen by EPA and the PRPs at a site, would determine the share of the cleanup costs that each PRP must contribute.

The allocator would also be charged with determining the size of any “orphan shares” at a given site. Under S. 8, orphan shares consist primarily of two components, any liability assigned to defunct or insolvent private parties, and any liability that is eliminated or reduced by the provisions of the bill. In addition, S. 8 would eliminate, limit, or reduce the cleanup liability for some PRPs—notably small businesses, municipal governments that owned or operated landfills, and generators and transporters of municipal solid waste or recyclable materials. The difference between the cleanup cost attributed to a party by the allocator and a smaller amount actually paid by the party, because of a liability exemption, reduction, or

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

By preempting State laws and setting out new requirements for the State of Idaho, S. 8 would impose intergovernmental mandates as defined in UMRA. However, CBO estimates that the costs of complying with these mandates would not be significant and would not exceed the threshold established in the law (\$50 million in 1996, indexed annually for inflation). The bill would also benefit State, local, and tribal governments by reducing their share of cleanup costs.

Intergovernmental Mandates

Preemption of State Liability Laws. Title V of the bill would limit or eliminate the liability of certain parties under Federal and State laws for future cleanup costs at Superfund sites. Parties receiving some liability relief would include generators and transporters of municipal solid waste and municipal owners or operators of certain landfills. Currently, States can sue PRPs at a Superfund site under their own hazardous waste cleanup laws. These preemptions of State laws would constitute intergovernmental mandates as defined in UMRA. However, according to EPA and State officials, States rarely take actions against PRPs at a Superfund site under their own laws. In addition, those States whose cleanup laws establish joint and several liability could in many cases recover their costs from other PRPs at the site. Therefore, COO estimates that the cost to States to comply with the mandates would not be significant.

New Requirements for Idaho. Section 705 of the bill would require the Coeur d'Alene Basin Commission, an advisory committee of Idaho's environmental protection agency, to develop and submit to the Governor a plan to clean up the Coeur d'Alene river basin, which contains a Superfund site and has other environmental problems. The committee would have 2 years to submit the plan and the Governor would be required to finalize and implement the plan by negotiating enforceable agreements with responsible parties. The section would authorize appropriations of \$5 million for the State to pay for the development and implementation of the plan. Under current law, the State is paying 10 percent of the costs of cleaning up a portion of the Superfund site in the river basin. It is unclear how much of the costs of implementing the plan the State would pay.

Other Impacts on State, Local, and Tribal Governments

Enactment of S. 8 would benefit State, local, and tribal governments by creating new grant programs for States, affording States greater participation in cleanups, and relieving local governments from certain costs and liability under current law.

New Grant Funding. Title I of the bill would create three new grant programs to fund State voluntary response programs and the assessment and cleanup of brownfield sites. States or localities would have to match some of the funds and pay for administering one of the programs. A total of \$100 million for each of fiscal years 1999 through 2003 would be authorized for these programs.

Expanded State Role. S. 8 would amend the current Superfund program to allow greater participation by the States. Under current law, States can enter into cooperative agreements with EPA to carry out most cleanup activities on a site-by-site basis, but only EPA has the authority to select the method of cleanup at each site. Under this bill, States could be granted the authority to apply their own cleanup requirements at Superfund sites within their borders or to perform certain regulatory activities under Federal law at the sites. States could also obtain the authority to oversee cleanups at federally owned Superfund sites. EPA would be authorized to provide grants to States or to enter into contracts or cooperative agreements with them. States receiving the authority to recover cleanup costs from responsible parties on behalf of the Federal Government would be allowed to retain 25 percent of any Federal response costs recovered, as well as amounts equal to the States' own response costs.

Lower State Cost-Share for Cleanups. S. 8 would lower the share of cleanup costs that State governments pay. Under current law, when the Federal Government conducts a site cleanup, the State in which the site is located must pay 10 percent of the costs. If the site was owned or operated by the State or a local government, the State's share of the costs rises to at least 50 percent. States also must pay all operation and maintenance costs at a site after the cleanup is completed. S. 8 would amend the current arrangement to require States to pay 10 percent of all costs, including those for operation and maintenance. The bill would also lower States' share of the costs at sites owned or operated by State or local governments to 10 percent.

Liability Relief for Local Governments. Two titles of the bill would limit or eliminate various parties' liability for cleanup costs. Title V would cap the liability of parties (including local governments) that generated or transported municipal solid waste or sewage sludge to a landfill that also accepted other wastes and that became a Superfund site. These landfills are known as "co-disposal" landfills. If they are not otherwise exempted from liability by the bill, these parties would have a total aggregate liability of 10 percent of cleanup costs.

Title V would also cap the liability of municipalities that owned or operated co-disposal landfills on the NPL. Roughly 160 (65 percent) of the approximately 250 co-disposal landfills on the NPL have at least one municipal owner or operator. With some exceptions, large municipalities would be held liable for no more than 20 percent of future cleanup costs, and small municipalities would be responsible for no more than 10 percent of the costs. Under current guidance, EPA can cap the liability of municipalities at 20 percent of estimated cleanup costs, although that percentage can be adjusted up or down for site-specific factors. This title would also limit the liability of various local entities for cleanup costs at certain Superfund sites and would create an expedited settlement process for certain parties, including municipalities with a limited ability to pay.

Limits on Natural Resource Damages. S. 8 would amend Federal law to limit the amount of money that the Federal Government, States, and Tribes could seek for damages to natural resources.

Currently, governmental or tribal trustees can sue under Federal law for injury to, destruction of, or loss of natural resources. While this change could lower future damage awards that States and Tribes receive, many States could instead sue for damages under their own laws. As of 1995, 28 States had laws allowing such suits.

Lawsuit by the Coeur d'Alene Tribe. The bill could prevent the Coeur d'Alene Indian Tribe of Idaho from pursuing their pending lawsuit against several mining companies for damages to natural resources. The Tribe is seeking over \$1 billion in damages. Section 705 would require the Governor of Idaho to seek to negotiate enforceable agreements with responsible parties in the Coeur d'Alene river basin regarding cleanup costs. Any party that settles with the Governor within 2 years would be protected from lawsuits under Federal environmental laws. Since the Tribe is suing the companies under CERCLA, this would preclude them from continuing their lawsuit. CBO cannot predict how much the Tribe would receive either from the pending lawsuit or from the agreements authorized by this bill.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

S. 8 would impose private-sector mandates by setting a temporary moratorium on litigation to recover response costs during the negotiation phase of an expedited settlement and during the determination phase of the allocation process. Section 503 would impose a temporary moratorium (for up to 1 year) on litigation against parties engaged in an expedited settlement with the Federal Government. Under the bill, the Government would seek an expedited settlement in certain cases in which parties have a limited ability to pay or have made a small contribution to the hazardous substances (or toxic effect) at a site. Most of the parties that would be eligible for an expedited settlement under S. 8 would likely be protected from further liability under the expedited settlements granted under current law. Therefore, the cost of delaying potential litigation against such parties should be small.

S. 8 would establish a new process for allocating liability at sites on Superfund's National Priorities List that meet certain criteria. The bill would impose a private-sector mandate by setting a temporary moratorium on litigation aimed at recovering response costs during the determination phase of the allocation process. Specifically, section 504 would prohibit anyone from asserting a claim until 4 months after the release of a final allocation report. (At the same time, the bill would allow potentially responsible parties to nominate other parties for consideration in the allocation process.) An allocation report would be released at the end of the determination phase, and would contain a list of parties deemed to be responsible for recovery costs at a Superfund site. CBO expects that the costs of delaying a claim to recover cleanup costs would be negligible, primarily because post-moratorium litigation is likely to be rare in view of the incentives to settle for the allocated share under the new process.

Under current law, the liability standard for a Superfund site is retroactive, strict, and generally joint and several. Liability is retroactive because it applies to contamination caused by activities that took place before CERCLA was enacted in 1980. Liability is

strict because a responsible party is liable even if it was not negligent. Liability is joint and several in cases where the responsibility for contamination at a site is not easily divisible. In such cases, the Government can hold one or more parties liable for the full costs of cleanup, even if other parties at the site are liable. Current law also permits third-party lawsuits, in which parties held responsible by EPA (or by other responsible parties) may sue others who do not settle with the Government for contribution.

Generally, provisions of the bill are meant to speed up the process of cleanup at Superfund sites and reduce some of the burdens of compliance. S. 8 would direct the Government to identify the costs attributed to responsible parties exempted under the bill (orphan shares) and to cover the balance of costs left over when allocation shares have been capped or limited according to the rules specified in the bill. Projects covered by the allocation process would include new cleanup projects and ongoing projects that fit certain criteria in the bill. Potentially responsible parties at cleanup projects at certain other Superfund sites would be allowed to request the new allocation process, but an orphan share allocation would not apply in those cases. Because the Government would be responsible for covering the costs of the orphan shares, the portion of cleanup costs allocated to the private sector under the new allocation process would be lower than under current law.

Estimate Prepared by: Federal Costs: Kim Cawley (226–2860) and Perry Beider (226–2940); Impact on State, Local, and Tribal Governments: Pepper Santalucia (225–3220); Impact on the Private Sector: Patrice Gordon and Perry Beider (226–2940).

Estimate Approved by: Paul N. Van de Water, Assistant Director for Budget Analysis.

ADDITIONAL VIEWS OF SENATOR KEMPTHORNE

One of the most difficult issues to resolve on Superfund reauthorization has been the restoration of natural resources. Natural resource damages are a battleground where the two sides have lined up on opposite sides of the courtroom. Unfortunately, with such a gulf separating the parties, both the environment and common sense have wound up the loser.

The focus of the natural resource damages program now is on collecting large sums of money a "mad dash for cash" and that leads to endless litigation without benefit to the environment.

Instead, we need to focus on doing what needs to be done to restore resources. That doesn't necessarily mean that you have to remove every molecule of a contaminant, but you should have to restore fully functioning ecosystems for the public.

The bill reflects our commitment both to restoring natural resources that are injured or destroyed and our appreciation of the value of our natural resources.

Intrinsic Values

I believe that a person who has injured or destroyed a natural resource, whether it's a stream or a lake or a population of endangered swans, should be responsible for fully restoring the resource to the conditions that existed before the damage occurred. I also believe that a person should have to provide alternative, replacement resources to make up for the lost services that would have been provided by the resource. If you destroy a trout stream in a national park, you should have to provide alternative fishing opportunities until the original resource is restored. And where a natural resource has unique intrinsic values, as a wilderness area or endangered species does, trustees should be able to consider those values to accelerate or enhance the restoration to bring back those unique intrinsic values.

Certain places and certain things have unique intrinsic values. Wilderness areas, national monuments, endangered and threatened species should be considered to have unique intrinsic value. A unique intrinsic value is that thing which is so important and so separate from the general natural world that it distinguishes itself from other places or things.

Section 107(f)(3)(B) provides that in selecting the appropriate measure to restore, replace or acquire the equivalent of a natural resource injured or destroyed, the trustee may take into consideration the "unique intrinsic values" as a factor in determining how restoration should take place. This scaling factor can be used to select either a faster timetable for restoration than might otherwise be called for if those unique intrinsic values had not been injured or destroyed or to enhance the restoration of the natural resource to "replace the intrinsic values lost." Replacing "the intrinsic values lost" is a key factor that should not be overlooked.

It is common practice now for a natural resource damage claim to seek restoration above a fully restored and fully functioning ecosystem. The monetary valuation of that excess over restoration is often used for functions which do not contribute or replace the uniqueness that has been lost. For example, providing additional

public access to the natural resource is a typical use of these funds. Under the bill, if a unique intrinsic value has been lost the trustee may seek to use it as a scaling factor for a quicker restoration or to enhance the restoration to replace the intrinsic values lost. But, the enhancement of restoration of the lost intrinsic values must take place on the property injured or destroyed and must be such that it actually replaces the intrinsic values lost. Adding public access to an isolated wilderness may not be appropriate if the unique intrinsic value lost was not a public access loss. The key point is that rather than use natural resource damages as a “cash cow” for pet projects, enhancement should be concentrated on the resource lost and not for laundry list of projects which do nothing to restore that which was lost.

The Bunker Hill Superfund Site

The Bunker Hill Superfund Site in Idaho remains locked in a litigation morass. The parties have no incentive to come together in a collaborative spirit. They seem unable to resolve the problem because of the legal exposure inherent in Superfund.

Because of the fear created by this litigation the parties are polarized by the consequences of the litigation. They have jointly sought participation in non-binding mediation but continued suspicion over the acts of some Federal agencies may have “poisoned the well” for cooperation.

I think we should take a new approach and try to resolve this matter in the spirit of collaborative decision making for the good of the people of Idaho. That’s why I have introduced this amendment to try to bring cooperation where there is polarization—to try to bring results where there is little to show for all of the efforts made to resolve this dispute.

There exists now in Idaho a unique opportunity for the parties to come together in a real spirit of doing right by the State, the people and the land. That is the purpose of this amendment. Led by the Governor of the State of Idaho, a commission comprising State and local officials, citizens and industry, trustees, Federal agencies and the affected tribal representatives already exists and can be delegated this task.

This broadly representative group will be charged with coming up with a plan for restoring the Coeur D’Alene Basin and determining the costs to be assessed against responsible parties.

Once these agreements have been reached they will be submitted to the appropriate Federal district court for its approval to determine if the agreements are fair, reasonable and in the public interest. No one’s interests will be foreclosed.

Our interest should be to resolve costly litigation that wastes funds which could be used to heal the land. A State-led consensus-based alternative to the waste that is Superfund could only serve the purposes of the people and the land.

ADDITIONAL VIEWS OF SENATOR CHRISTOPHER S. BOND

In my opinion, what the public wants is a Federal Government that is more effective and cost-conscious in performing its responsibilities; therefore, government agencies, Federal bureaucrats, and Congress must stop protecting some of the most troubled and inefficient programs in government from meaningful reform. The Superfund program is one of those. Status quo is not acceptable.

There is no dispute that the law is broken. It was enacted in a bipartisan effort to ensure that contaminated sites were identified and cleaned up as soon as possible. Unfortunately, it has been far more effective at disposing of public and private dollars than it has in solving hazardous waste problems. Even the General Accounting Office has identified the Superfund program as one of the Federal Government's high risk programs—meaning the levels of waste fraud, abuse and mismanagement are intolerable.

As a member of the Environment and Public Works Committee and as Chairman of the Environmental Protection Agency's appropriations subcommittee I believe that it is imperative that, as we both authorize and appropriate scarce Federal resources—taxpayer dollars—for the Superfund program, we reform the program to ensure that those taxpayer resources are not wasted and that real risks to our citizens and the environment are rapidly reduced. The leadership provided by Senators Chafee and Smith that produced the legislation reported from the Committee moves the Superfund program in the right direction.

S. 8 will make the Superfund program more reasonable and workable. S. 8 will not relieve polluters of their responsibility, but it will take a fairer approach to assigning responsibility for cleanup and restoration of damaged public natural resources. In addition, the legislation bases cleanup decisions on protecting health and the environment by reducing real risks under actual conditions encountered at each site. These reforms, along with the many others contained in the legislation, will encourage responsible parties to step up to the task at hand and discourage excessive litigation.

There is a section of the bill that I believe needs some more attention—brownfields.

Brownfields are undevelopable tracts of land that could contain real or just perceived environmental contamination. As the U.S. Conference of Mayors pointed out in their reports, brownfields exist in every region of our country. However, the majority appear to be located in older industrial cities in the Northeast and the Midwest.

Brownfields contribute to the urban sprawl that has occurred across the country. Industry, private citizens, not-for-profits, etc. shy away from these sites because of potential liability under the Superfund program. We must work to address the funding and liability issues associated with brownfields to get the maximum return for the Federal investment and to assist in the revitalization of these properties.

I support the creation of a revolving loan fund for brownfields. I believe that by capitalizing Federal funds we can leverage State, local, and private sector funds which will maximize the use of the resources provided and result in more assessments and response actions at brownfield sites. I agree that flexibility for grants needs

to be included. Consistent with the revolving loan funds for the Clean Water and Safe Drinking Water programs, there will be special "need" cases where loan fund dollars will not be appropriate. However, the focus should stay on revolving loan funds.

I am concerned that the provisions included in the bill for a Brownfield Revolving Loan Fund are too bureaucratic and cumbersome. In addition, I believe that the 1 million population minimum for a city or area to create their own revolving loan fund with seed money from the Federal Government may be too high.

As S. 8 moves forward I look forward to working out a more suitable process for a Brownfield Revolving Loan Fund. It is important that this issue is addressed so we can return old industrial sites to productive use.

SUPPLEMENTAL VIEWS OF SENATORS ALLARD AND
WYDEN

On September 26, 1997, we introduced S. 1224, legislation to amend the Comprehensive Environmental Response, Compensation, and Liability Act to ensure Federal agency compliance with that law. On March 25 the Committee on Environment and Public Works accepted S. 1224 in the form of an amendment to the Superfund Cleanup Acceleration Act of 1998. This language is supported by the Association of State and Territorial Solid Waste Management Officials, the National Governors Association, the National Association of Attorneys General, and the State of Washington Department of Ecology.

The Federal Government has a long and undistinguished clean up record at facilities that they have owned and/or operated. This was recognized in Section 120 of the Superfund Amendments and Reauthorization Act of 1986 (SARA) which stated, "Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity" The author of this section, Senator Stafford of Vermont, stated on the floor at the time of SARA's passage that, "In 1980, the Congress went to great pains to assure that the U.S. government was treated, in all respects, like any other responsible party. The law's definition of a person accords no special treatment for the United States . . . [b]ut no loophole, it seems, is too small to be found by the Federal Government." Senator Stafford's remarks at the time were prescient: since then Federal agencies have had some degree of success in fighting attempts to ensure that there is adequate independent oversight of Federal facilities. Furthermore, they have often not lived up to the standards required of private parties and State and local officials with respect to cleanup. The Allard/Wyden amendment should finally eliminate procedural arguments and ensure that Federal agencies concentrate on cleaning up the environment and protecting human health at Federal sites on the National Priority List instead of trying to avoid their responsibilities. This amendment will also ensure that there is an arms length regulator who can ensure the protection of human health and the environment when Federal facilities are cleaned up.

This amendment is not targeted at one Federal agency, many have been guilty of implementing a lower standard of cleanup than is required of private parties. Many cases are glaring, like the treatment of the Colorado School of Mines. On January 25, 1992 a city water main burst near a facility called the Colorado School of Mines Research Institute (CSMRI) spilling water into and through a holding pond containing various residues of material from research done at the site in previous years into Clear Creek. Subsequent water testing showed no degradation of the water, however, EPA issued a Unilateral Administrative Order (UAO) for disposal of 22,000 cubic yards of material.

The School of Mines and the State of Colorado accepted responsibility for the cleanup. Unfortunately, that cannot be said of Fed-

eral facilities who contributed to the stockpile that was subject of the order. Those Federal agencies include the Department of Defense, the Department of Energy, the Bureau of Mines, and the Environmental Protection Agency. While they participated in the research that caused the residue of material subject to the removal order, they did not participate in the removal efforts.

This is a glaring example of the Federal Government's double standard. While the State-run School of Mines and several private companies were forced to pay for cleanup, Federal agencies which also did work at CSMRI escaped any liability. This forced the state of Colorado to pick up the Federal Government's share of the removal action, taking state dollars away from other priorities.

The Allard/Wyden amendment would eliminate this double standard by requiring Federal agencies to comply with all Federal, State, and local laws, ". . . in the same manner, and to the same extent as any non-governmental entity."

Our amendment would also address one of the most egregious examples of how this double standard has been applied at the Hanford cleanup site. One Federal court decision that applied to Hanford, the Heart of America case, would allow Hanford to pollute the air and water and also contaminate the soil for decades. The Hanford site would also be immunized for any violations that occur before the cleanup is completed sometime in the next century.

This court ruling further allowed the interagency agreement among the Department of Energy, the Environmental Protection Agency, and the Washington Department of Ecology that governs the Hanford cleanup to be used as shield to block an enforcement action against the Department of Energy for violations of the Clean Water Act. The Superfund law only authorizes interagency agreements for Federal facilities; there is no comparable immunity from enforcement for private sector sites.

The Allard/Wyden amendment would put an end to the double standard, two examples of which we have illustrated. The amendment makes clear that Federal agencies and Federal facilities are subject to the law now, not sometime off in the future. It is our view that it is not possible for the Federal Government to regulate itself. We believe the public health and the environment are best served by having an independent regulator ensuring that cleanup at Federal Superfund sites is done to applicable local, State, and Federal levels. This amendment will accomplish both goals.

MINORITY VIEWS OF SENATORS BAUCUS, LAUTENBERG,
MOYNIHAN, LIEBERMAN, BOXER, AND WYDEN

We support legislation to improve the Superfund program. But we cannot support this bill.

In 1994, we voted for a reform bill that was supported by everyone from the Chemical Manufacturers Association to the National Federation of Independent Businesses to the Sierra Club. Unfortunately, that bill was not enacted into law. Since then, the Administration has undertaken a series of important reforms. The Superfund program is now more effective than it was 4 years ago. Even so, we continue to believe that Congress should go further, to reform the Superfund law itself, to make its implementation more efficient, effective, and fair.

More specifically, we support changes to the liability provisions that would take small parties out of the liability system and allow an allocation process, including the provision of orphan share funding, for the parties that remain in the system and agree to perform the site cleanup. We support a series of changes to the remedy selection provisions to make cleanups faster and less costly, without compromising protection of public health and the environment. We support a shift in the natural resource damages program to focus on restoring resources rather than monetizing claims. We support the appropriate codification of the Administration's reforms. We support changes to increase community participation in the remedy selection process. We support increased attention to public health concerns, especially the health of children, particularly if remedy reforms will result in fewer permanent remedies and more hazardous wastes left in place. We support an increased role for States, commensurate with their abilities. And we support incentives for the redevelopment of "brownfields," to help rebuild communities and create jobs.

Provisions in S. 8 address these issues, sometimes successfully. For example, Senator Boxer's amendment providing that remedies must ensure the protection of children and other vulnerable subpopulations was approved by the Committee. Unfortunately, in addition to constructive reforms, the bill contains many provisions that would weaken current law, in ways that threaten public health and the environment.

The new cleanup standards in the bill would reduce the level of public health protection. For example, the bill would so limit the current preference for cleanups that involve the treatment of hazardous waste that this preference would seldom if ever apply. As a result, many dangerous substances would be left in place, untreated, creating dangers to public health and the environment. Senators Baucus, Moynihan and Boxer offered an amendment to replace this provision with one that took a more moderate approach, but the amendment was defeated.

The cleanup provisions also would make it more likely that clean groundwater will be contaminated. Senators Boxer, Moynihan and Wyden offered an amendment providing that cleanups must protect uncontaminated ground water and surface water unless doing so is technically infeasible (or limited migration of contamination is nec-

essary to facilitate restoration of ground water to beneficial use), but the amendment was defeated.

We support giving States a greater role in the Superfund program, especially at “brownfields” sites that do not present high risks to public health and the environment. But the bill would turn key elements of the Superfund program over to States, without adequate safeguards. We believe that we should take a balanced approach, along the lines that have worked with other environmental laws, like the Clean Water Act and the Safe Drinking Water Act. Senators Lautenberg, Moynihan and Baucus offered amendments to provide balance by requiring State voluntary clean-up programs to meet minimum criteria and by restoring EPA’s authority to take action when there is imminent and substantial endangerment, but the amendments were defeated.

The natural resource damages provisions would make it less likely that damaged natural resources will be fully restored. Most significantly, the bill would limit the ability of Federal agencies, States, and Tribes to account for the intrinsic value of rivers, lakes, forests, and other damaged natural resources. Senators Baucus and Moynihan offered an amendment to allow the full consideration of intrinsic values, but the amendment was defeated.

The liability provisions would reopen settled cases. This would divert resources away from sites that are not yet being cleaned up, introduce a new set of complexities that create litigation and other transaction costs, drain money from the Superfund, create incentives for the harassment of small parties by other PRPs, and potentially give a windfall to certain companies. Senators Baucus and Lautenberg offered an amendment to delete the provision reopening settled cases, but the amendment was defeated.

The brownfields grants provisions would bring EPA’s successful brownfields grants program to a halt. They would transform EPA’s current practice—under which EPA awards grants mostly to cities and towns—and require that EPA give grants to States for redistribution to cities and towns. This would add a layer of bureaucracy and complexity to the process, and would slow things down. Senator Lautenberg filed an amendment that would restore EPA’s ability to deal directly with cities, towns, or States, but did not offer the amendment, in response to Senators Chafee and Smith’s offer to try to resolve these issues before the bill gets to the floor.

Given these and other provisions, we believe that the bill, taken as a whole, would make the Superfund program worse, not better. It would reduce the protection of human health and the environment, impede the full restoration of damaged natural resources, and, in important respects, unnecessarily promote or continue litigation.

In any event, it is unlikely that the bill can become law in anything like its present form. Before the Committee markup, the Secretary of the Interior, the Secretary of Agriculture, the Administrator of the Environmental Protection Agency, the Chairman of the Council on Environmental Quality, the Assistant Commerce Secretary for Oceans and Atmosphere, and the Acting Assistant Attorney General for Legislative Affairs all wrote letters strongly opposing the bill. After the Committee voted to report the bill, Vice President Gore issued a statement saying that the bill “would sac-

rifice our environment and public health to the interests of polluters.” (The letters and statement are attached.)

Time is running out this Congress. Unless we resume negotiations and develop a bill that reflects a broad bipartisan consensus, we fear that, regrettably, the enactment of legislation to improve the Superfund program will once again elude us.

OFFICE OF THE VICE PRESIDENT,
THE WHITE HOUSE,
March 26, 1998.

STATEMENT OF VICE PRESIDENT GORE ON SENATE SUPERFUND LEGISLATION

The Republican Superfund bill that the Senate Environment and Public Works Committee approved today would sacrifice our environment and public health to the interests of polluters.

The Committee is doing more than producing Superfund legislation that we strongly oppose. Because current law bars the release of critical 1999 cleanup funds until Superfund legislation is enacted, the Republican Congress is trying to force the Administration to accept legislation that lets polluters off the hook. I urge Congress to reject this misguided legislation. But regardless of this bill's fate, I also urge Congress to release these critical cleanup funds without delay. Communities living under the threat of toxics should not have to wait any longer.

This bill is part of a disturbing anti-environmental trend emerging in this Congress. On issues ranging from takings legislation to national forests to clean air, the 105th Congress appears all too willing to trade away hard-won environmental protections.

This Administration has made its goals for Superfund legislation clear: speeding cleanups, cutting litigation, and making polluters pay for the harm they cause. At the start of this Congress, the President and I met with the Congressional leadership to convey our strong view that the Senate bill would move in exactly the wrong direction, weakening cleanup standards and abandoning the “polluter pays” principle.

Chairman Chafee sought to develop consensus reforms, but the Committee has produced a terrible product. It incorporates extreme proposals advanced by an army of special-interest lobbyists seeking to weaken Superfund or erase the cleanup obligations of particular companies. These proposals are the result of a lobbying effort that began in the 104th Congress and has stymied the cause of commonsense Superfund reform ever since.

We will continue to search for common ground on Superfund reform. But I once again urge Congress to disavow proposals that would weaken, instead of strengthen, the Superfund law.

THE ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Washington, DC 20460, March 24, 1998.

HON. MAX BAUCUS,
United States Senate,
Washington, DC 20510.

DEAR MR. BAUCUS: I am writing to voice my concerns on the latest version of S. 8 that will be marked up by the Senate Environment and Public Works Committee on March 24.

I appreciate the hard work that you and Senators Smith, Chafee, and Lautenberg, other Committee members, and majority and minority staff have devoted to Superfund reform legislation. The new Chairman's mark has addressed some of the areas of concern I identified at the September 4, 1997 hearing before the Subcommittee on Superfund, Waste Control, and Risk Assessment. The new Chairman's mark also incorporates several of the agreements that we reached during negotiations last fall. However, the Administration continues strongly to oppose S. 8. The bill would still weaken public health and environmental protection, generate new litigation, delay cleanups, and inappropriately shift cleanup costs from parties that created toxic waste sites to the Superfund Trust Fund. Clearly, some of the provisions in the bill fail to meet the Administration's Superfund legislative principles released on May 7, 1997.

Of particular concern are provisions that:

1. limit the treatment of toxic waste, fail to adequately protect uncontaminated ground water, and inappropriately elevate the use of engineering and institutional controls rather than actual cleanup;
2. severely limit Federal authority to clean up toxic waste sites or respond to toxic chemical spills;
3. reopen hundreds of final consent decrees and provide Federal payments to parties that created toxic waste sites;
4. contain undefined or confusing new terms and procedures that will generate new rounds of expensive and time consuming disputes and litigation and slow down cleanups.
5. replace existing brownfields grant programs, rather than supplementing them, with a revolving loan program for communities.

I still believe it is possible to reach consensus on Superfund reform legislation that builds upon the significant improvements we have been able to achieve through EPA's administrative reforms. As always, I remain ready to work with you and all of the members of the Environment and Public Works Committee to enact responsible Superfund reform legislation this year.

The Office of Management and Budget has advised that there is no objection to the Agency's views on S. 8 from the standpoint of the Administration's program.

Sincerely,

CAROL M. BROWNER.

SECRETARY OF THE INTERIOR,
Washington, March 24, 1998.

HONORABLE JOHN H. CHAFEE, *Chairman,*
Committee on Environment and Public Works,
United States Senate,
Washington, DC 20510.

DEAR MR. CHAIRMAN: In anticipation of your Committee's markup on S. 8, the Superfund Cleanup Acceleration Act, beginning March 24, the Department of the Interior would like to voice its concerns with the bill. We appreciate the Senate Environment and Public Works Committee's efforts to move the Superfund reauthorization process forward. We strongly oppose S. 8 as currently drafted, but we are interested in continuing to work with the Committee in an effort to improve the legislation.

As a natural resource damage (NRD) trustee, the Department of the Interior believes that the natural resource damage provisions of S. 8 would leave injured resources unrestored and would deprive the public of full compensation for the loss of injured resources. We also fear that these provisions would generate high transaction costs by promoting increased litigation. The bill also fails to address several key reform issues, including the statute of limitations and record review, the role of tribal governments, and impacts to tribal cultural values and natural resources. We are troubled that the Committee has retreated from S. 8 as originally introduced, which did provide for judicial review on an administrative record.

We are also concerned over the bill's potential impacts on cleanups on public lands. Any provisions in legislation addressing this issue should be certain to retain the primary authority that Federal land management agencies have to manage, clean up, and take enforcement actions on public lands that they manage.

While we have significant concerns about other provisions of the bill, including those relating to liability and remedy, we understand other agencies will be commenting on these provisions. We welcome the opportunity to work with you and your staff to develop mutually acceptable language for reforming CERCLA.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

BRUCE BABBITT.

SECRETARY OF AGRICULTURE,
U.S. DEPARTMENT OF AGRICULTURE,
Washington, DC 20250, March 24, 1998.

HONORABLE JOHN H. CHAFEE, *Chairman,*
Committee on Environment and Public Works,
United States Senate,
Washington, DC 20510.

DEAR MR. CHAIRMAN: In light of your Committee's upcoming markup of S. 8, the "Superfund Cleanup Acceleration Act," I would like to provide you with an overview of the Department of Agriculture's (USDA) concerns with the bill. We appreciate the Committee's efforts to move the Superfund reauthorization process forward. Though we strongly oppose S. 8 as currently drafted, we remain interested in working with the Committee in an effort to improve the legislation. The following is a discussion of some of our issues.

As a Natural Resource Damage (NRD) trustee, USDA believes that the NRD provisions of S. 8 would prevent restoration of critical resources and would deprive the public of full compensation for the loss of resources. We also fear that these provisions would generate high transaction costs by promoting increased litigation.

In addition, USDA is troubled that S. 8 would seriously undermine the ability of the Federal Government to protect Federal facilities and manage public lands. The transfer of authority to the States and the treatment of Federal facilities proposed under S. 8 would restrict the ability of the Federal Government to respond to environmental hazards when the Federal Government is in the best position to ensure that such hazards are addressed effectively and efficiently.

For these reasons, we must strongly oppose S. 8 as currently written. However, we would welcome the opportunity to work with you and your staff more closely to develop mutually acceptable language for reforming CERCLA consistent with the Administration's principles.

The Office Of Management and Budget has advised that there is no objection to the Department's views on S. 8; from the standpoint of the Administration's program.

Sincerely,

DAN GLICKMAN,
Secretary.

U.S. DEPARTMENT OF JUSTICE,
Washington, DC 20530, March 23, 1998.

HON. JOHN H. CHAFEE, *Chairman,*
Committee on Environment and Public Works,
United States Senate,
Washington, DC 20510.

DEAR MR. CHAIRMAN: I am writing to express the Department of Justice's concerns with S. 8, the "Superfund Cleanup Acceleration Act of 1997," which we understand your Committee will consider this week. As you know, the Department of Justice remains committed to responsible Superfund reform that will make cleanups faster, fairer, and more efficient. The Department has recently reviewed a revised version of S. 8. We appreciate the changes you have made to the bill in order to address concerns previously expressed by the Department and others. Unfortunately, despite your recent revisions, the Department continues to believe that S. 8 would significantly increase litigation and would substantially impair the government's ability to ensure that the parties responsible for the contamination are also responsible of cleanup of those sites, and for this reason, we strongly oppose the bill.

The Department of Justice is particularly concerned about provisions in S. 8 that would reopen past cleanup settlements that were negotiated with potentially responsible parties (PRPs) and entered as consent decrees by the courts. These prior settlements were intended to ensure that sites were cleaned up, legal and factual disputes with the settling PRPS were resolved, and the cost and burden of discovery and trial were avoided. S. 8 would undo many of those benefits by reopening these disputes for litigation in an elaborate allocation process, for the purpose of reimbursing PRPs for cleanup costs that they previously committed to pay. Inevitably, legal and technical resources that should be devoted to obtaining new settlements for new cleanups would be diverted to this massive PRP reimbursement project, resulting in more lawyer time, fewer new consent decrees, and a slower pace of cleanup.

As you know, the Superfund process is settlement-driven. One of the great successes of the current program is the high proportion of cleanups now being performed efficiently by PRPs under settlements that resolve litigation and conserve the Superfund for use at sites for which no responsible party can be located. Unfortunately, the allocation provisions of S. 8 would reward recalcitrance and undermine incentives for PRPs to agree to cleanup settlements. Under S. 8, a recalcitrant PRP that refuses to enter into a cleanup settlement after an allocation may be treated better than a cooperative PRP that enters into a settlement and assumes responsibility for cleaning up the site. EPA's option for dealing with such a recalcitrant

is to issue an Administrative Order under Section 106 requiring such a party to perform the cleanup. Under S. 8, the taxpayers must then reimburse the recalcitrant party for 100 percent of the costs such a party incurs in excess of his "share" as determined by the allocator. On top of this financial reward, the recalcitrant PRP is free to continue to litigate its liability, to challenge the remedy, to seek reimbursement from the Superfund for all of its costs at some point in the future, and to challenge settlements between the United States and other PRPs. Far from reducing litigation, S. 8 promotes it by undermining the incentives for settlement.

As another example, S. 8 introduces unnecessary new legal obstacles for the Federal Government to take action to address an "imminent and substantial endangerment" at sites where a response action is proceeding under State law. Instead of using the well-established standard of "imminent and substantial endangerment," S. 8 would determine this issue according to the following new, undefined statutory criteria: (a) whether the State is "unwilling or unable" to take action to cure a "public health or environmental emergency;" (b) whether the site presents a "public health or environmental emergency;" and (c) whether the facility presents a "substantial risk requiring further remediation to protect health and environment." These undefined terms may interfere with the ability of the government to protect human health and the environment, and will spawn new litigation by displacing the now well-established caselaw under the existing statutory criteria for Federal action.

As stated above, the Department remains committed to achieving responsible reform of the Superfund program. We cannot, however, support legislation that would lead to more litigation and fewer cleanups. For that reason, we must continue to oppose S. 8 strongly. We remain willing to work with you to correct these problems and to accomplish consensus Superfund reauthorization.

The Office of Management and Budget has advised that there is no objection to the Department's views on S. 8 from the standpoint of the Administration's program.

Sincerely,

ANN HARKINS,
Acting Assistant Attorney General.

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, DC 20503, March 24, 1998.

HON. MAX BAUCUS, *Ranking Member,*
Committee on Environment and Public Works,
United States Senate,
Washington, DC 20510.

DEAR SENATOR BAUCUS: I am writing to express the Administration's views on the Chairman's mark to S. 8, "The Superfund Cleanup Acceleration Act of 1998," in anticipation of a markup beginning on March 24, 1998.

As you are aware, the Clinton Administration has long supported common-sense reforms to the Superfund law through a responsible reauthorization bill that ensures continued support for cleanups. At the same time, we must recognize and protect the impressive progress that the Environmental Protection Agency (EPA) and other Federal agencies have made in accelerating the cleanup process, restoring natural resources, and promoting better coordination between response and natural resource agencies. In the past 5 years, EPA has completed many more cleanups than were completed in the preceding 12, and will have made final cleanup decisions at 85 percent of the sites it oversees by the end of this fiscal year. Cleanup at two-thirds of EPA's national priority list sites will be completed by 2001. This progress has been achieved while implementing reforms that have ensured greater fairness in administering the liability system.

Major progress also has been made in accelerating Superfund cleanups at Federal facilities through administrative reforms. In addition, natural resource trustees have been successful in reforming the natural resource damage programs under Superfund to focus on restoration, rather than monetization and protracted litigation to recover damages.

We share your view that, despite this progress, there are areas where statutory reform continues to be needed and appropriate. We need to ensure, however, that any statutory change truly improves the Superfund program, enhances and accelerates restoration of natural resources, and eliminates rather than encourages excessive litigation. We regret that S. 8 does not meet this standard and threatens to stymie the progress that the Clinton Administration has made to date.

We have expressed these concerns since the introduction of S. 8 at the start of the 105th Congress. We regret that your efforts over the past year to negotiate reasonable compromises on the issues that have divided us have been unavailing. As revised in the Chairman's mark, the bill still falls far short of one that would improve the Superfund program and has generated strong objections from an array of Federal agencies and the communities with which they work.

Accordingly, the Administration would strongly oppose the bill if it is reported in its current form. We are particularly concerned about provisions in the bill that would encourage excessive litigation, undermine the ability of our Federal natural resource trustees fully to restore injured natural resources to our communities, and increase costs to parties performing cleanups. Regrettably, several of the provisions in S. 8 continue to reflect proposals advocated by a small set of companies seeking to create new and unwarranted obstacles to restoration at particular sites.

I hope that you will afford the Administration a further opportunity to work with you to improve the provisions of the bill that are of concern to us. The Office of Management and Budget advises me that there is no objection to this letter from the standpoint of the President's program.

Sincerely,

KATHLEEN A. MCGINTY,
Chairman.

ASSISTANT SECRETARY FOR OCEANS AND ATMOSPHERE,
U.S. DEPARTMENT OF COMMERCE,
Washington, DC 20230, March 24, 1998.

THE HONORABLE JOHN H. CHAFEE, *Chairman,*
Committee on Environment and Public Works,
United States Senate,
WASHINGTON, DC 20510-6175.

DEAR MR. CHAIRMAN: The National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce appreciates your efforts to reform Superfund during the 105th Congress. Nevertheless, after reviewing the natural resource damage provisions of the Chairman's mark, we maintain our strong opposition to S. 8: The Superfund Cleanup Acceleration Act. The most serious problems with this legislation include restrictions on the range of values that trustees may consider in achieving full restoration and its failure to clearly address the Administration's concerns regarding the statute of limitations and record review. NOAA is committed, as are all the Federal natural resource trustees, to restoring natural resources that have been injured by releases of hazardous materials, thereby preserving America's natural resource heritage for future generations. We are concerned that S. 8 would leave injured resources unrestored and generate extremely high transaction costs.

We urge you to include in S. 8 provisions to clarify that natural resource damage claims are to focus on restoration and be presented in a more timely and orderly fashion than is currently required by law, thereby discouraging premature litigation and enhancing coordination and integration of remedy and restoration. We are strongly opposed to S. 8 in its present form because it would seriously curtail the ability of trustees to recover natural resource damages, thereby depriving the people of this Nation of the right to have their natural resources fully restored to health and productivity.

NOAA stands ready to meet with you and your staff to discuss our objections and work on alternative language. Again, NOAA appreciates your efforts to develop CERCLA reform legislation acceptable to all stakeholders, and we look forward to working with you during the remainder of the 105th Congress.

Sincerely,

TERRY D. GARCIA.

MINORITY VIEWS OF SENATORS BAUCUS AND
LAUTENBERG

INTRODUCTION

We have written these additional Minority views in order to provide further background and detail about why we oppose S. 8.

The Superfund program plays a unique and important role among our environmental protection laws. At the end of the 20th century, we have confronted one of the century's unfortunate legacies. Industrial development dramatically increased our standard of living. But it left a legacy of hazardous waste sites, all across the country: chemical waste dumps in New Jersey; mine tailings that dot the landscape of the mountain west; the residue of huge Federal complexes at Rocky Mountain Arsenal in Colorado and Hanford, Washington. In 1980, this Committee found that "[c]hemical spills capable of inflicting environmental harm occur about 3,500 times each year," and that "[m]ore than 2,000 dumpsites containing hazardous chemicals are believed by the Environmental Protection Agency to pose threats to the public health."

These sites pollute drinking water, expose children to toxic chemicals, and destroy neighborhoods. In 1997, Senator Lautenberg said that:

data from the Agency for Toxic Substances and Disease Registry shows troubling trends in my home State of New Jersey. The data show that in all but 1 of 21 counties, cancer rates in areas around hazardous waste sites exceed the national average. Studies from other parts of the country—Idaho, Illinois, Kansas, Missouri, Pennsylvania, California—also suggest that those living near toxic waste sites, particularly children, suffer disproportionately from serious health problems

In 1980, with the leadership of this Committee, Congress addressed the problem by enacting the Superfund program. Superfund complements pollution control laws, like the Clean Water Act and the Solid Waste Disposal Act, by providing for, in the words of the Act's preface, "liability . . . cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." By 1993, there were more than 1200 sites on the National Priorities List, slated for long-term cleanup actions, and construction had been completed at 164 sites. In addition, EPA had taken more than 3300 removal actions at nearly 2600 sites.

By 1993, however, there was a growing sense that the Superfund program was not working as well as it should. Cleanups were too slow, and sometimes too costly. Litigation and other transaction costs were too high. Small businesses, scout troops, and residential homeowners were inappropriately caught up in the liability system. Local communities were not fully involved in important decisions about cleanup plans. The Federal-State relationship was strained.

In his first address to Congress, President Clinton acknowledged these problems. Soon thereafter, EPA initiated a process to seek consensus among a wide range of interested parties, under the aus-

pices of the National Advisory Committee on Environmental Policy and Technology (NACEPT); the Keystone Center and the University of Vermont Law School established a complementary group, the National Commission on Superfund. Around the same time, the Superfund Subcommittee began a series of hearings on the major issues facing the Superfund program.

NACEPT and the Superfund Commission made their recommendations in late 1993. In February 1994, the Administration proposed legislation that embodied many of the recommendations of the two groups, and we introduced the Administration's proposal as S. 1834, The Superfund Reform Act of 1994. The Subcommittee and full Committee held several further hearings on the bill and, in August 1994, the Committee reported the bill by a vote of 13-4.

S. 1834 wasn't perfect. But it did make several important changes to the Superfund program: reducing cleanup costs, taking small parties out of the liability system, streamlining the system for others, and increasing community participation. Overall, EPA estimated that the bill would reduce cleanup costs by 25 percent and litigation costs by 50 percent. The bill had broad bipartisan support, and was endorsed by groups ranging from the Chemical Manufacturers' Association to the National Federation of Independent Businesses to the Sierra Club.

However, for a variety of reasons, S. 1834 was not enacted into law.

Nevertheless, the Superfund program was changing, for the better. Not because of a new law, but because of improved implementation of the existing law. The improvements began under President Bush and EPA Administrator William Reilly. After S. 1834 was not enacted, EPA Administrator Browner and others in the Clinton Administration aggressively undertook a series of major administrative reforms. EPA established a remedy review board to review complex and high-cost cleanup plans. It began systematically offering "orphan share" funding to encourage settlements. It used its settlement authority to remove small volume waste contributors from the liability system. It negotiated memoranda of understanding with several States, whereby States take the lead in site assessment and cleanup. And it developed a "Brownfields Action Agenda" to promote cleanup and economic redevelopment.

These and other reforms have had a significant effect. In September 1997, EPA Administrator Browner testified that:

proof of a fairer, faster Superfund can be found in several simple indicators. We have completed cleanup at 447 sites on the National Priorities List, and 500 more are in construction. We have reduced by more than a year the average duration of the long-term cleanup process, with much faster cleanups, at sites using presumptive remedies Our most recent analysis makes us optimistic that we can continue to accelerate the pace of cleanups and achieve our goal of a 20 percent reduction, or 2 years, in the total cleanup process time. Additionally, responsible parties are performing or funding approximately 70 percent of Superfund long-term cleanups, saving taxpayers more than \$12 billion.

Meanwhile, EPA has succeeded in removing over 14,000 small contributors from the liability system, 66 percent of these in the last 4 years. We offered orphan share compensation of over \$57 million last year to responsible parties willing to negotiate long-term cleanup settlements, and continued the process this year at every eligible site. Finally, costs of cleanups are decreasing because of a number of factors, including: the use of reasonably anticipated future land use determinations, which allow cleanups to be tailored to specific sites; the use of a phased approach to defining objectives and methods for groundwater cleanups; and EPA's 15-plus years of implementing the program providing greater efficiencies and lower costs when selecting cleanup options.

In the first session of the 104th Congress, most of the Majority members of the Committee introduced S. 1285, which contained provisions that went significantly beyond those of S. 1834. For example, the bill would have given companies a 50 percent tax credit for their pre-1980 cleanup costs, shifting a significant share of cleanup costs from potentially responsible parties to the general public. The bill also contained provisions that would have reopened potentially hundreds of settled cleanup decisions; completely eliminated the preference for remedies that treat hazardous waste (rather than leave it in place); repealed the requirement that cleanups meet applicable Federal and State standards; prohibited the consideration of the intrinsic value of damaged natural resources when determining how to restore those resources; allowed States to assume responsibility for the program with minimal review and oversight; and imposed an arbitrary cap on the number of Superfund sites on the National Priorities List. The bill was, in a word, extreme. Many of us who had supported the previous reform effort concluded that we had no choice but to strongly oppose S. 1285.

After S. 1285 was introduced, Senators Chafee and Smith invited us to begin negotiations seeking a bipartisan compromise, and we agreed. Throughout 1996 and most of 1997, the negotiations continued. We made significant progress, resolving some important issues. Several revised versions of the bill were introduced or circulated, including S. 8; in most respects, each was an improvement. However, despite the good faith efforts of all parties, many important issues remained unresolved, including issues regarding cleanup standards, liability relief, community participation, the State role in the program, and natural resource damages.

The Majority decided that, rather than seeking to resolve the remaining differences through continued negotiation, the Committee would proceed to markup. At the markup, we filed a complete substitute for the bill (which we refer to hereafter as "the Substitute"). We also offered a series of amendments. Some were accepted; many were not, and were defeated.

All told, the bill reported by the Committee reflects an extraordinary amount of work, and some significant compromises. But we should not judge the bill by the number of hours that have been spent working on it, or by the distance that has been traveled from the extreme bill that was considered early in the 104th Congress. We should judge the bill by one measure only: whether, on balance,

the bill gives the American people a better Superfund program—better for public health, better for the environment, better for communities, better for small businesses, and better for the economy.

By that measure, the bill falls short, by a wide margin. Below, we explain why.⁵

REMEDY

Introduction

Before addressing our principal objections to S. 8's remedy provisions, we would be remiss if we did not note that during negotiations prior to markup we reached agreement with the Majority concerning several provisions, and that those changes are reflected in S. 8.

These include: elimination of the requirement under current law that remedies meet "relevant and appropriate" requirements from other laws; consideration of future land use in selecting remedies; and codification of EPA's administrative reforms that accelerate remedy selection and cleanup by streamlining study phases, relying on standardized or "presumptive" remedies, and increasing PRP involvement in cleanups.

In addition, during markup, the Majority accepted three amendments offered by Democratic members to address some of our concerns with the cleanup provisions of S. 8: an amendment by Senator Boxer to make explicit that remedies must protect the health of children and other sensitive subpopulations; an amendment by Senator Wyden to strengthen the provision on cleanup of contaminated ground water; and an amendment by Senator Baucus to strike a provision that required institutional controls to be considered on equal footing with other alternatives.

These amendments improve the bill. But the bill still falls far short of meeting our goals of ensuring that:

- remedies protect human health and the environment over the long-run;
- contaminated ground water is restored to beneficial uses and clean ground water will not be contaminated; and
- cleanups are accomplished more quickly and efficiently and at less cost, without sacrificing protection of human health or the environment.

During markup it was asserted that although S. 8 was not perfect from the Majority's perspective or ours, it represented an improvement over current law. We disagree. We cannot support a bill that reduces the level of protection that the citizens of this country have come to expect, for themselves, their children, and the groundwater that they rely on for drinking water and other purposes, as would S. 8. It is with disappointment that we conclude that the remedy title of S. 8 does more harm than good.

The following discussion addresses some of the instances in which S. 8 would weaken cleanup of the most contaminated toxic waste sites in this country. The primary focus is the adverse im-

⁵These views describe our main concerns, but are not intended to provide an exhaustive list of every concern that we have with S. 8.

pact that the bill would have on protection of human health and on the quality of our Nation's water resources, over the long run.

First, we discuss two related provisions that would significantly influence the long-term reliability of remedies selected for cleanup of particular sites (*i.e.*, treatment of waste versus efforts at on-site containment). Those are the so-called "preference for treatment," and provisions regarding institutional controls. Second, we discuss instances in which the bill would reduce protection of human health, by lowering the standard for what is considered to be an acceptable level of cancer risk to human health and by allowing for the waiver of protective standards on grounds that include cost. Third, we discuss some provisions that would compromise protection of clean ground water and surface water, and lead to inadequate cleanup of contaminated ground water and surface water. Fourth, we discuss concerns with the role of cost in cleanup decisions under S. 8. Finally, we discuss provisions that would divert resources from and delay cleanups.

The Bill Contains an Inadequate Preference for Treatment and Safeguards for Waste Left in Place

A. Preference for treatment. S. 8 fails to encourage the use of remedies that involve treatment for even the most toxic and mobile hazardous waste. Unlike S. 8 as introduced, the bill now does nominally contain a preference for treatment. But there are so many hurdles before the so-called preference would be triggered that it would rarely, if ever, apply. Thus, containment of waste on site would be used much more often. The uncertainties associated with the long-term effectiveness of containment remedies, and with use of institutional controls to prevent uses of land and ground-water that are incompatible with a remedy and level of cleanup, would significantly increase the risks of contaminant migration and of human exposure over time.

Current law contains a preference for remedies that involve treatment of hazardous waste as a principal element and a mandate for use of permanent solutions and treatment to the maximum extent practicable:

Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment The President shall select a remedial action that . . . utilizes permanent solutions and alternative treatment technologies . . . to the maximum extent practicable" (section 121(b)(1)).

These provisions were added in the 1986 amendments to CERCLA, to address concerns regarding the extent of EPA's reliance on containment remedies under Superfund. At a 1984 hearing before this Committee, a representative of the Clean Water Action Project described the inadequacy of Superfund remedies as follows:

There is considerable evidence that the cleanups currently being conducted or planned do not provide adequately for the protection of public health [T]o date the cleanups have been designed to contain, rather than to elimi-

nate (remove/detoxify), the hazardous wastes and large volumes remain in the ground

In its attempts to hold down capital costs, EPA has based cleanups largely on (1) surface removal (2) containment of underground hazardous waste (3) isolation of the wastes from rainfall and groundwater infiltration (4) collection of leachates (5) pumping and treatment of contaminated ground water and (6) transfer to landfills. Unfortunately these methods have been shown to break down rapidly; slurry walls and liners leak, collection systems clog and clay caps are vulnerable to erosion. Most importantly highly concentrated sources of materials remain hazardous for indefinitely long periods and the public continues to be vulnerable and justifiably anxious. The danger remains whether material is being contained at the primary site or transported to a secondary site . . . Congress should enact proposals to promote permanent cleanups.

In response to concerns like these, Senator Mitchell noted during the floor debate on the 1986 amendments that “[i]t is a major purpose of this legislation to establish a statutory bias toward the implementation of permanent treatment technologies and permanent solutions in the selection of remedies, whenever they are feasible.”

Since 1986, the preference for treatment and mandate for permanence have been criticized as resulting in the selection of treatment remedies in instances where other remedies would be protective at a lesser cost so-called “treatment for treatments’s sake.”

To our knowledge complaints have subsided about instances where selection of a treatment remedy was overkill. EPA data bear this out, showing a trend away from treatment remedies. Between 1988 and 1993, EPA selected treatment remedies for source control approximately 70 percent of the time. In 1994 and 1995 it selected treatment remedies 59 percent and 53 percent of the time, respectively. EPA relies on containment remedies for wastes that pose relatively low long-term threats, or where treatment is impracticable, such as at extremely large sites. Therefore, remedies at landfills and mining sites routinely rely on containment as the predominant response. However, a treatment component may be appropriate at these sites too, such as treating groundwater that has been contaminated by the waste. At sites where treatment is found not to be practicable, it is not used or, in certain unusual circumstances, EPA may treat only part of a principal threat, and contain the rest. For example:

- At the Anaconda Company Smelter Site in Anaconda, Montana, a new Jack Nicklaus signature golf course was built over hazardous mining and smelter tailings.
- At the Raymark Industries site in Stratford, Connecticut, EPA did not treat principal threats due to unacceptable adverse short-term impacts and high costs associated with finding and treating hot spots amid the 480,000 cubic yards of fill that was up to 24 feet deep. EPA did, however, require measures, including extraction and treatment of solvents, to prevent contamination of ground water from highly concentrated pockets of liquid solvents at the site.

- At the Bunker Hill Mining site in Kellog, Idaho, EPA did not require treatment of soils at the 1,800 residential properties within the site, based on the nature of metal contamination, and because the costs of treating such high volumes of contaminated soil were prohibitive. Instead, contaminated yard soils were excavated and disposed of in a repository onsite, and yards replenished with clean soil. Treatment was used to treat leachate, runoff from a portion of the site, and contaminated wetlands at other parts of the site.

Under the current program, EPA targets treatment at “principal threats.” The revised National Contingency Plan (NCP), promulgated in March of 1990, provides that EPA expects to use “treatment to address the principal threats posed by a site, wherever practicable,” and “engineering controls, such as containment, for waste that poses a relatively low long-term threat.” In November of 1991, EPA issued “A Guide to Principal Threat and Low Level Threat Wastes,” which provides guidance on how to make site-specific determinations regarding treatment versus containment. This guidance provides that “principal threat wastes are those source materials considered to be highly toxic or highly mobile that generally cannot be reliably contained or would present a significant risk to human health or the environment should exposure occur.” For example, at Bayou Bonfuoca in Louisiana, EPA determined that incineration was necessary to treat creosote waste that had leaked into the bayou. The waste was so potent that divers received second degree chemical burns from contact with the contaminated sediments. The contamination also killed all life in the bayou.

The current more limited use of treatment remedies has prompted some to question whether the treatment provisions under existing law should be modified at all. In testimony before this Committee, witnesses for the Environmental Defense Fund (EDF) (Karen Florini) and Natural Resources Defense Counsel (NRDC) (Jacqueline Hamilton) stated: “Given current EPA practice of cleanup to unrestricted use at only one-third of sites even with the existing preference for treatment, we have increasing reservations about whether there is any rationale for changing this portion of the law.” The Association of Metropolitan Water Agencies testified that it “supports the continuation of the current law’s broad preference for treatment and could not support the narrow preference for ‘hot spots’ only.”

S. 8 eliminates the mandate for permanence and treatment, and provides that the preference for treatment does not apply unless each of five conditions are met: that contamination—

- cannot be reliably contained, and
- presents a substantial risk to human health and the environment, because it is highly toxic, and
- it is highly mobile, and
- there is a reasonable probability that actual exposure will occur, based on an evaluation of site-specific factors.

S. 8’s so-called preference is so narrow that it would rarely apply, even where common sense tells us it should apply. It would not apply even at a site where hazardous waste could not be reliably

contained and is highly toxic, and there is a reasonable probability of actual exposure, if the waste were not also highly mobile. Some examples of actual contaminants and sites illustrate the severity of the constraints on the purported preference in S. 8:

- The preference would not apply where contaminants are highly toxic but not highly mobile, such as dioxin (Love Canal in New York and Times Beach in Missouri), PCB's (New Bedford Harbor in Massachusetts and Wide Beach Development in New York) (in some conditions PCBs can be so persistent that levels remain virtually unchanged for decades), and polycyclic aromatic hydrocarbons (PAHs) (Bayou Bonfuoca in Louisiana).
- The preference would not apply where contaminants are highly mobile but not highly toxic, such as pentachlorophenol (PCP) (Libby Groundwater Contamination site in Montana), organic solvents (the Miami Drum site in Florida) (at the Miami Drum site contamination caused the shutdown of several well fields that supplied drinking water for much of southeast Florida), trichloroethylene (TCE) (Advanced Micro Devices in California), and solvents (Pasley Solvents and Chemicals in New York).
- The preference would not apply where chemicals can have acute toxicity at high concentrations and chronic toxicity at low concentrations, such as mercury (General Electrical Co. Wiring Devices site in Puerto Rico).

Of course, less treatment means that more contaminated material will remain on site and pose higher potential threats for future generations, should institutional or engineering controls fail. Less treatment also means more "dead zones" of unproductive, contaminated property, instead of encouraging beneficial reuse of Superfund sites.

The Majority has argued that the preference for treatment in S. 8 must be read in conjunction with the remedy selection balancing factors. They suggest that where treatment is the appropriate remedy, it will be chosen due to the balancing factor pertaining to long term reliability. This argument misses the point. It is based on an assumption that we can somehow look into the future and know whether and when waste that was left in place will migrate into a clean aquifer, or excavation for new construction will destroy an essential component of a remedy. And when a remedy is selected there may be different views as to its long term reliability: the fact is, often we cannot know which view is the correct one. Hence the need for a preference for treatment. Any suggestion that the long term reliability factor constitutes an implicit preference for treatment is inconsistent with the provision in S. 8 that "no single factor predominates over the others" (section 121(a)(3)(A)).

The preference for treatment is essential precisely because of the unavoidable limitations in our knowledge regarding the future speed and pathways of contaminant migration, future trends in population that will influence needs for land and ground water at particular locations, and human activities. In view of the high stakes—potential future contamination of drinking water sources, and threats to the health of our children and grandchildren—we

should take a somewhat conservative approach to making decisions to leave toxic waste in place, untreated.

A meaningful preference for treatment would tip the scales in favor of treatment of the principal threats. This can be accomplished in a way that does not lead to unjustifiably costly remedies. Moreover, the cost of treatment remedies really can only be appreciated in relation to the potential future cost of addressing unforeseen conditions that may result from not treating the waste in the first instance. In other words, it pays to prevent. If the containment fails at any time in the future, people may be exposed to contamination and contamination may migrate into a clean aquifer, resulting in new threats, new uncertainties, and new costs. In addition, the claim that treatment remedies are significantly more costly than are remedies where the waste is left in place often is founded on an incomplete consideration of the potential costs associated with containment remedies. Unlike remedies that more permanently eliminate hazardous waste, containment remedies may require maintenance long into the future, meaning that the costs will have to be borne by future generations. Focusing on up-front capital costs, to the exclusion of potential future costs (that are less certain and more difficult to quantify) associated with containment remedies, frequently results in an understatement of the true costs of containment remedies.

These considerations emphasize the importance of maintaining a meaningful preference for treatment.

At markup, Senators Baucus, Moynihan and Boxer offered an amendment that would have stricken the so-called preference in S. 8, and inserted a preference for treatment of principal threats. The amendment would have modified current law by eliminating the mandates for permanent remedies and treatment and narrowing the scope of the preference for treatment from site-wide to principal threats. The Substitute contained the same provision.

The amendment was intended to reflect current practice, which to our understanding is working well. To critics of the preference for treatment in current law, our amendment would have provided heightened assurance that EPA would not abandon its limiting interpretation of the current preference. We intended that such a change would reflect and codify, not reduce, the current approach to selection of treatment remedies. We were disappointed that the amendment was defeated.

In all likelihood, the weak preference for treatment in S. 8 would result in a sharp reduction in treatment remedies. That would mean that the effectiveness of our so-called "containment" remedies would depend on how reliably they actually contain toxic waste over the long-term. And that, and our ability to prevent exposure, depend in large part on the effectiveness of institutional controls.

B. Institutional Controls. Generally, institutional controls serve one of two functions: to protect the remedy, both during construction and over the long-run; and to prevent certain human activities that would be inconsistent with the remedy and which, if undertaken, would pose an unacceptable level of risk. For example, an institutional control may prohibit excavation at a park that is located on top of a landfill, to preserve the integrity of the landfill cap. Another may restrict a site to industrial use, due to levels of

residual contaminants that render the site unsafe for residential use.

In effect, a preference for treatment and against sole reliance upon institutional controls are flip sides of the same coin. As Administrator Browner testified before this Committee in September of 1997:

the Administration supports treatment for those wastes that are highly toxic or highly mobile, in light of the continuing challenges in ensuring the long-term reliability of engineering and institutional controls, as well as the limitations that containment and institutional controls place on productive reuse or redevelopment of property.” The limited effectiveness of institutional controls is reflected in the NCP provision that “the use of institutional controls shall not substitute for active response measures . . . as the sole remedy unless . . . active measures are determined not to be practicable (40 CFR 300.430(a)(iii)(D)).

Issues relating to the use of institutional controls in connection with hazardous waste cleanup have come to the forefront relatively recently. Although EPA’s use of institutional controls such as restrictive covenants, easements, and other deed restrictions as a component of remedial actions is not new, heightened scrutiny is now being given to the effectiveness of these mechanisms. The increased focus on institutional controls is not coincidental. As noted above, decreased use of remedies that treat waste to reduce its toxicity, mobility, and volume gives rise to a need for other means to prevent exposure over the long-run.

In addition, the movement toward consideration of anticipated future land use in remedy selection decisions opens the door for less stringent cleanup standards in some instances. In a recent report on the problems associated with reliance on institutional controls for protection from threats associated with hazardous waste, *Linking Land Use and Superfund Cleanups: Uncharted Territory*, Resources for the Future cautions that land use designations (such as industrial, commercial, residential) are not always accurate as proxies for exposure, and that accurately predicting future uses is “no easy task.”

As noted earlier, the Majority accepted a Democratic amendment to strike the provision that remedies that rely on institutional controls shall be considered on equal footing with other remedial alternatives. That is a step in the right direction. However, it does not compensate for the absence of affirmative provisions in S. 8 sufficient to ensure the long-term reliability of institutional controls.

Since virtually all institutional controls are creatures of local or State property law, there is a great degree of variability, and EPA is forced to rely on a complex patchwork of mechanisms. In many instances institutional controls that are available under these laws have limitations that render them unreliable for use in the hazardous waste context. For example, some States’ easements automatically terminate at a time certain, regardless of whether they continue to be needed for the remedy to be protective; some State laws require privity, so that institutional controls would not apply to subsequent property owners; some limit enforcement authority to

the holder of the property interest. Resources for the Future also notes the sometimes highly political nature of zoning decisions and variances, making them particularly unreliable and ill suited as a component of a Superfund remedy. Since in many instances institutional controls are an essential element to ensuring protection at a site, “the effectiveness of these controls becomes a crucial component of the remedy.”

In testimony, EDF and NRDC summarized the problems with S. 8’s treatment of institutional controls as follows:

The definition of “institutional controls” is itself overly broad. While zoning, land use plans, and notification systems may be extremely valuable as supplements to institutional controls, these devices are too ephemeral and/or too weak to serve as institutional controls in this context

Similarly, the bill’s current “requirements” for institutional controls—that they are “adequate to protect human health and the environment,” “ensure . . . long-term reliability,” and “will be appropriately implemented, monitored, and enforced”—are far too vague to be meaningful. Rather, the bill must explicitly require that specific criteria be met for any institutional control that is adopted as part of a remedy. These include, at a minimum:

- permanence (*i.e.*, the control will remain in effect until removed following an affirmative, site-specific determination that it is no longer needed because the contamination is gone);
- universality (*i.e.*, applies to all current and future interest-holders of the land or water);
- enforceability (*i.e.* by all interested parties, including citizens); and
- permanent notice (*i.e.*, in land records unless inappropriate given the specific nature of the control).

The consequences of failed institutional controls can be devastating. Most visible is the Love Canal site in the State of New York. For ten years between 1942 and 1952, 21,000 tons of chemical wastes, including dioxins, were disposed of in the former canal turned landfill. In 1953 the landfill area was covered and deeded to the Niagara Falls Board of Education. The deed of sale warned of the industrial wastes on the property. Subsequently, the area near the landfill was extensively developed, compromising the integrity of the landfill cover. In addition, the backyards of some of the newly built houses bordered the landfill and various storm drains and sanitary sewer lines punctured the sidewalls of the landfill. Toxic materials seeped into the basements of homes, and a rising water table caused chemicals to migrate from the landfill to nearby sewers and creeks. Deteriorating drums rose to the surface. Residents had to be relocated.

As this example demonstrates, we must ensure that in instances where remedies do rely on containment, institutional controls will effectively limit the uses of land and groundwater to those that are compatible with the remedy. Where land use does change, then the

protectiveness of the remedy must be reevaluated in light of the new use, and the remedy modified accordingly. And it must be clear who will bear responsibility for any necessary modifications. Since the PRPs incur fewer costs when remedies contain, rather than treat, hazardous waste, it is appropriate that they bear this responsibility. So, for example, if a lead-contaminated site is designated for industrial use and cleaned up only to levels appropriate for that use, then 20 years later becomes the site for a day-care center, children could be exposed to unacceptable levels of lead. Effective mechanisms are needed to ensure that either the remedy is upgraded to be protective for use as a day care center, or the property is not used for a day care center. The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) testified concerning this issue:

ASTSWMO does recommend that institutional controls and other designated restrictions necessary to implement a particular remedy be made legally enforceable, run with the land, and be binding among all parties to implement the restrictions. Financial responsibility mechanisms should also be identified to provide for the perpetual maintenance of these sites in case the responsible parties are unable to do so.

Our Substitute includes safeguards to prevent reliance on unreliable mechanisms to protect against the long-term threats posed by untreated toxic waste. For example, it contains baseline requirements for institutional controls before they may be relied on as part of a remedial action. These include requirements that any restrictions on land use or other activities are adequate to protect human health and the environment over the long term, are binding on current and future owners and lessees of the property, are enforceable, are publicly noticed, and will remain in effect until terminated upon a determination that they are no longer necessary to protect human health and the environment.

The Substitute also creates a new authority for a Federal easement to restrict uses of property or activities that would be inconsistent with a remedy that leaves waste on site. This mechanism is intended to avoid the shortfalls of certain institutional controls currently available, which make them inadequate to protect human health and the environment over the long run.⁶

The Bill Reduces Protection of Human Health By Lowering the Current Acceptable Level of Cancer Risk and Allowing a Waiver of Risk-Based Standards Based on Technical Impracticability

During all of the hours of hearings, negotiations and markup, we do not recall ever having heard anyone say that they support rolling back the protection of human health. Yet that is exactly what S. 8 would do. Some of the provisions that contribute to the reduction of human health protection are discussed below.

⁶Our Substitute would not create new authority to allow EPA and the States to dictate local land use. Rather, it would provide that if a remedy is selected assuming a particular land use (*i.e.*, industrial, not residential), and that remedy will be protective only if the land use is so restricted, then if the land use is to change, the remedy must be reassessed and modified, as necessary, so that it will continue to be protective.

Currently CERCLA contains a narrative standard, which requires EPA to select remedies that “attain a degree of cleanup of hazardous substances . . . at a minimum which assures protection of human health” Under the National Contingency Plan (NCP), EPA has interpreted the statute to require cleanups to attain a cleanup level for carcinogens based on a cancer risk in the range of 10^{-4} to 10^{-6} , with 10^{-6} as the point of departure. Hence, the current standard uses 1 additional cancer death in a population of 1,000,000 as the starting point, but allows that standard to be reduced to 1/10,000. Movement from the point of departure may be based on considerations including technical limitations, such as quantification and detection limits for a particular contaminant.

S. 8 departs from current law and practice in two significant respects. First, while using the same risk range as in the NCP, S. 8 eliminates the 10^{-6} point of departure. By eliminating the point of departure, the bill tilts remedy selection to the less protective end of the risk range. As witnesses from EDF and NRDC testified before this Committee: “As a result, cost considerations are likely to tilt remedies toward the less-protective outcome, since cleaning up to a less protective level is almost always cheaper.”

Second, S. 8 prescribes a numerical cleanup standard in the statute itself. Administrator Browner testified concerning the problems associated with prescribing numeric risk levels in the statute, rather than in regulation:

by prescribing numeric risk goals, the bill would lock the Agency into current methods of expressing and measuring risk, which are in transition as the science is changing. Under the Agency’s new cancer guidelines, there will be decreasing reliance on linear models which underlie the risk range . . . and new units of measures, including ‘margin of exposure’ will begin to be used.

In any event, if numerical limits are used, they should at least strive to achieve levels that are protective. Yet, under S. 8, the level of protection is much more likely to be 1 in 10,000, or 100 times less protective.⁷

We are also concerned that the technical impracticability waiver in S. 8 expands the technical impracticability waiver in current law, opening the possibility that risk-based cleanup standards may be waived based on cost considerations. Under present law, remedies are required to meet cleanup levels derived from two sources. First, they must meet standards in other Federal or State environmental laws that are “applicable or relevant and appropriate” (ARARs) to the cleanup. (There is general agreement that this requirement should be modified to require compliance only with those standards that are “applicable.”) Second, since in some instances ARARs do not exist, or cleanup to applicable standards will not be sufficiently protective to meet the mandate to protect human health and the environment, remedies also are required to meet site-specific risk based standards.

Current law authorizes the waiver of ARARs on specified grounds. But it does not authorize the waiver of risk based cleanup

⁷Despite numerous iterations of S.8 since its introduction, the bill persists in inappropriately linking the hazard index, which applies only to noncarcinogens, to “threshold” carcinogens.

standards under any circumstances. One ground for waiver of ARARs is "technical impracticability," which has been interpreted to mean (and in S. 8 is defined to mean) impracticable due to engineering infeasibility or inordinate cost.

Although S. 8 is somewhat ambiguous on this point, the bill could be interpreted to allow the waiver of risk-based cleanup standards based on technical impracticability. On the one hand, section 121(b)(5)(A) seems to open the door for a waiver of risk-based standards, by saying that risk based standards may be waived based on technical impracticability (which includes consideration of cost), in which case a remedy must be selected that is technically practicable and "will most closely achieve" the "goals" of protecting human health, through cost-effective means. On the other hand, in a seemingly contradictory provision (section 121(a)(1)(B)(i)), the bill contains a more absolute requirement for remedies to protect human health.

As Administrator Browner testified: "We cannot afford any confusion over the fact that protection of human health and the environment is a fundamental mandate that must be met in all cases without exception." In view of the fact that protection of human health and the environment is the foundation of Superfund, we oppose any provision that leaves room for doubt as to whether there may be exceptions to the requirement to meet this standard, based on technical impracticability or any other grounds.

The Bill Will Lead to Inadequate Cleanup of Contaminated Water and Let Clean Water Become Contaminated

More than 85 percent of all fresh water in the United States is ground water. Over 50 percent of Americans get their drinking water from ground water, and this demand is steadily increasing. Between 1970 and 1990, Alaska, Arizona, California, Florida, Kentucky and Missouri all doubled their use of ground water for public water supply. Between 1985 and 1990, the population of the United States grew 4 percent, but ground water use grew 8 percent. Nine States rely on ground water to supply drinking water to over 75 percent of their population. Florida, New Mexico and Mississippi rely on ground water for at least 90 percent of their drinking water supply. In rural areas reliance on ground water for drinking water can be as high as 95 percent of the population. Approximately 20 million Americans rely on private wells fed by ground water without any treatment, and 20 percent of drinking water systems supplied by ground water do not provide any treatment. Ground water also is the source for uses other than drinking water. It is the source of 37 percent of agricultural irrigation water and 14 percent of industrial process water.

Toxic waste sites have and will continue to contaminate ground water, sometimes irreversibly. In those instances where ground water can in fact be remediated, the cost of remediation usually will far exceed the costs of prevention.

According to EPA, 85 percent of Superfund sites have groundwater contamination. At more than 90 percent of NPL sites, one or more operable ground water well is located within 1 mile of the site, and at 82 percent of NPL sites ground water is withdrawn for drinking purposes within 3 miles of the site. Existing drinking

water wells were either contaminated or threatened by continued plume migration at 499 sites. At at least 359 of these sites, drinking water wells have been shut down due to contamination. In testimony submitted to this Committee, the American Water Works Association noted that “Increasingly, public water suppliers throughout the country are closing down wells due to pollution. The most recent highly publicized case is in San Bernardino, California, where some of the city wells had to be closed because of ammonium perchlorate contamination”

The potential impacts of ground water contamination go beyond contamination of the aquifer that is initially impacted. Ground water is frequently connected to surface water or to other aquifers, or to ecologically sensitive environments such as wetlands that could be impaired by ground water contamination. In addition, contamination can impair other uses such as agricultural irrigation. And in the arid west where water is scarce, failure to adequately clean up contaminated ground water and to protect uncontaminated ground water could result in an irretrievable loss of the resource.

As demonstrated by cleanups at Superfund sites to date, restoration is possible. According to EPA, as of 1997, Superfund actions have accomplished significant restoration of ground water at 119 out of 173 sites (69 percent) where a ground-water remedy has been in place for more than 2 years, and at an additional 91 sites, Superfund actions have prevented water supplies from becoming contaminated.

We fear that a variety of provisions of S. 8, individually and cumulatively, will result in inadequate cleanup of contaminated ground water and contamination of clean ground water, including ground water that may be used for drinking water. In addition to the provisions discussed earlier, those discussed below contribute to these concerns.

A. Inadequate Cleanup of Contaminated Ground Water. Our principal concerns are two. First, that contaminated ground water could be written off as a potential drinking water source, and therefore be cleaned up to less protective levels, even where it potentially could have been used for drinking water. Second, where ground water is not reasonably anticipated to be used in the future for drinking water, S. 8 fails to ensure that it will be restored to other potential beneficial uses. These concerns are addressed in turn below.

Two provisions give rise to our conclusion that S. 8 would result in inadequate cleanup of potential drinking water sources. First, S. 8 provides that unless technically impracticable, contaminated ground water for which the “current or reasonably anticipated future use” is drinking water shall be restored to a condition suitable for such use (section 121(b)(2)(C)(i)). We object to use of the standard “current or reasonably anticipated future use” in connection with ground water. (Although this discussion focuses on use of this phrase in one provision, for the reasons discussed here we also object to the use of the phrase throughout the title.) The better standard would be whether drinking water is a “potential beneficial use.”

The difference is more than linguistic. Determining the reasonably anticipated future use involves projections as to future need

for the water as drinking water, which involves speculation as to future population trends and weather conditions, among other things. Our ability to anticipate these needs and conditions 20 or 50 or 100 years from now is imperfect, at best.

We believe that ground water is a valuable and limited resource that should be protected regardless of our expectation today of its future use. Therefore, whenever ground water could potentially be a drinking water source, it should be restored and preserved for that beneficial use. S. 8 would instead allow for cleanup to a lesser standard, which would preclude its use as drinking water, based on speculative projections of future needs and uses.

Second, S. 8 writes off potential drinking water sources through an overly broad definition of the phrase “water that is not suitable for drinking water.” Contaminated ground water that is not suitable for beneficial use as drinking water, unless technically impracticable, is required to “attain a standard that is protective for the current or reasonably anticipated future uses” (section 121(b)(2)(C)(vi)). In defining which water is not suitable for use as drinking water, S. 8 provides, for example, that “ground water that is not suitable for use as drinking water because of . . . naturally occurring conditions . . . shall not be considered as suitable for beneficial use as drinking water” (section 121(b)(2)(F)).

Due to the circularity, breadth, and lack of specificity of this definition, it could exclude from the universe of potential drinking water sources any water that has been contaminated by “naturally occurring conditions” that someone determines renders it unsuitable for use as drinking water. It is unclear who makes this determination, what criteria guide the determination, and the nature of the naturally occurring conditions that may justify ruling out ground water as a potential source of drinking water. As a representative of the Association of Metropolitan Water Agencies testified:

The proposal allows the existence of naturally occurring contaminants in groundwater to preclude its designation as a drinking water source, thus getting around the cleanup of contaminants that are not naturally occurring in the aquifer. AMWA believes naturally occurring contamination should not be used as a sole factor in determining the suitability of groundwater as a drinking water source.

Current EPA policy is to use a concentration of greater than 10,000 mg/l total dissolved solids (TDS) in defining ground water that would not be considered suitable for drinking water. Under S. 8, the presence of a much lower concentration of TDS, or some other naturally occurring condition, could preclude its cleanup to levels suitable for use as drinking water, even where ground water that might not currently be used as drinking water could be economically treated and an important source of drinking water. Under this provision, a potential drinking water source could be permanently written off as a future drinking water source, through a decision today to inadequately clean it up.

In addition, S. 8 fails to ensure that water that is not anticipated for use as drinking water will be cleaned up to other beneficial uses. If water is not suitable for use as drinking water, the bill re-

quires that it attain levels suitable to other beneficial uses. However, the bill is silent as to cleanup of water that is suitable for use as drinking water but for which drinking water is not an anticipated future use. While this gap may be inadvertent, it is nonetheless significant: it highlights the problem with use of the “anticipated future use” standard in connection with ground water. If, based on our imperfect ability to predict future needs, we determine that water that is suitable for use as drinking water is not reasonably anticipated to be used as such, then S. 8 would seem to exempt that source from cleanup to standards suitable for drinking water or for any other beneficial use. This would squander future generations’ resources because of our imperfect predictions of what they will want or need.

B. Contamination of Clean Ground and Surface Water. One of our strongest objections to S. 8 is its failure to prevent contamination of clean water sources. Although Superfund is generally considered a remedial statute, it also serves a preventive function. To fulfill the statutory mandate to protect human health and the environment necessitates control and prevention of contaminant migration. As stated in the NCP, “when restoration of ground water to beneficial use is not practicable, EPA expects to prevent further migration of the plume, prevent exposure to the contaminated ground water, and evaluate further risk reduction.” The American Water Works Association testified that “at sites in which it has been determined that it is not technically practical to clean up groundwater as a part of remediation for the site, permanent measures must be implemented to prevent the contaminant [sic] of adjacent uncontaminated groundwater.” Provisions discussed above (*i.e.*, preference for treatment, institutional controls) contribute to the failure of S. 8 adequately to ensure that migration of contaminated water does not cause contamination of currently clean water. The provisions discussed below compound the problem.

S. 8’s exceptions to the general “requirement” to protect uncontaminated water inappropriately compromise the likelihood of actually keeping clean water clean. S. 8 provides that “a remedial action shall seek to protect uncontaminated ground water that is suitable for use as drinking water for such beneficial use unless it is technically impracticable to do so” (section 121(b)(2)(B)).

At markup, Senators Boxer, Moynihan and Wyden offered an amendment to strike this provision and replace it with the following (below is the amendment as modified by Senator Boxer during markup):

A remedial action shall protect uncontaminated ground water and surface water unless technically infeasible or limited migration of contamination is necessary to facilitate restoration of ground water to beneficial use.

We strenuously oppose the provision in S. 8, and support the Boxer/Moynihan/Wyden amendment. The amendment differs from S. 8 in several significant respects.

First, the amendment strikes the phrase “seek to.” This phrase makes the difference between an aspiration and a requirement. We believe that protection of clean water should be an outright requirement, not just something that one should seek to accomplish.

Second, S. 8 would protect uncontaminated ground water only to the extent that it is suitable for use as drinking water. The amendment would require protection regardless of the potential beneficial use of uncontaminated ground water. For example, it may not be suitable for drinking water but could be used as industrial process water or for agricultural purposes or for feeding wetlands.

Third, while S. 8 refers only to uncontaminated ground water, the protections under the amendment also apply to uncontaminated surface water.

Fourth, the amendment strikes the exception for “technical impracticability,” and replaces it with two more narrowly defined instances in which migration may be allowed: (1) where protection of uncontaminated ground water and surface water is technically infeasible, or (2) where limited migration of contamination is necessary to facilitate restoration of ground water to beneficial use.

The phrase “technical impracticability” refers to both engineering feasibility and reliability and inordinate costs. We oppose this use of a cost test for determining whether to allow uncontaminated ground water to become contaminated. Cost does, however, play a role in selecting remedies under current law and should continue to under any reauthorized program. Under current law, remedies have to meet the requirement of section 121(a) to be cost-effective. This standard is used in choosing among alternative remedies that meet the other statutory requirements. Hence, cost-effectiveness should be considered in choosing between alternative remediation methods that also protect uncontaminated ground water. However, cost should not be a factor in deciding whether clean water should stay clean. The technical infeasibility standard reflects the high value of water and the much greater cost to clean water that has become contaminated, compared to the cost of protecting it before it becomes contaminated.

For example, some contaminants are highly mobile and toxic. According to EPA, a 10 gallon bucket of trichlorethylene (TCE) can migrate substantial distances in a matter of days, and has the potential to contaminate 800 million gallons of water at levels two times higher than drinking water standards. This corresponds to a plume approximately 1 mile long, 1000 feet wide and 50 feet deep. Subsurface pathways for contaminant migration can be complex and difficult or impossible to remediate; and, monitoring systems can fail to detect releases.

Moreover, failure to prevent migration can create conditions that are orders of magnitude more costly to address than would be preventing migration in the first place. For example, at the Newmark Groundwater Contamination site in Southern California an 8-square-mile plume is threatening hundreds of municipal drinking water wells serving over half-million people. EPA is spending \$20 million dollars to stop the spread of contamination. By stopping the spread of this contamination, nearly 100 wells will be protected, saving over \$200 million in total potential wellhead treatment costs.

We are not suggesting that clean ground water must be kept clean even where to do so is impossible, or where limited migration is necessary to facilitate the restoration of ground water. That is why Senator Boxer modified her amendment at markup to add the

exception for technical infeasibility. And the amendment recognizes that limited migration may be necessary to facilitate restoration of ground water to beneficial use, and allows for it in that circumstance. Creation of an additional exception based on inordinate cost fails to provide the necessary assurance that our clean water will remain clean, and that we may avoid potentially incurring even greater costs to address contamination of previously clean water.

Additional provisions of S. 8 that would compromise the protection of clean ground and surface water allow remedies to rely too heavily on natural attenuation. S. 8 states that decisions regarding remediation of contaminated ground water must take into account “any attenuation or biodegradation that would occur if no remedial action were taken” (section 121(b)(2)(A)(iii)(II)). This provision elevates natural attenuation, by requiring that it serve as a standard against which all potential remedies be evaluated. The bill further provides that “monitored natural attenuation may be used as an element of a remedial action for contaminated ground water” (section 121(b)(2)(D)). Both of these provisions fail to include limitations on the use of natural attenuation that are necessary to ensure that it would not be selected in circumstances where it would not be suitable.

Current EPA policy recognizes that limited natural attenuation may be appropriate in certain narrow circumstances: where limited migration will help the aquifer to recover on its own through a natural degradation process, and there would not be significant contaminant migration or unacceptable impacts to receptors. EPA’s monitored natural attenuation policy provides that “monitored natural attenuation is an appropriate remediation method only where its use will be protective of human health and the environment and it will be capable of achieving site-specific remediation objectives within a time frame that is reasonable compared to other alternatives.” Under S. 8, natural attenuation could potentially be used even where natural degradation processes are not occurring, the plume is not stable, or cleanup standards would not be met in a time frame that is reasonable compared to other alternatives. Unless appropriately narrowed, the bill could allow clean water to become contaminated under the guise of “natural attenuation.”

A third instance in which S. 8 would not adequately protect uncontaminated ground water, and would be inconsistent with current EPA guidance, arises in the technical impracticability waiver. In particular, the waiver fails to include two critical conditions: “a requirement to contain and reduce sources of pollution that cannot be eliminated entirely and may continue to release pollutants to ground or surface water, and a requirement to contain the disolved plume” (testimony of Administrator Browner at hearing September 4, 1997). These two conditions are in EPA’s current ground water policy. Without these conditions, the waiver threatens to allow the further spread of contamination over time.

The importance of these two conditions has been recognized by a panel of experts in the report of the National Research Council, *Alternatives for Ground Water Cleanup*:

Ground water contamination problems may become increasingly complex with the passage of time because of the

potential for contaminants to migrate and accumulate in less accessible zones. Measures to remove contaminants from zones where the release occurred and to contain contaminants that cannot be removed should be taken as soon as possible after the contamination occurs.

At [sites where cleanup will most likely be infeasible with current technology], the plume of dissolved contaminants should be cleaned up, contaminant mass should be removed from source areas to the extent practicable, and remaining contaminant sources should be contained.

The Bill Provides for Inappropriate Consideration of Cost in Cleanup Decisions

Cost can be an appropriate consideration with respect to Superfund cleanups. For example, under current law, remedies are required to be cost-effective. That standard is also in S. 8 and in the Substitute. However, under current law, remedial alternatives must first be determined to meet cleanup standards and protect human health and the environment, and only then is cost-effectiveness considered, in connection with evaluating different technologies. Under the NCP, a remedial alternative is considered cost-effective if the cost is proportional to its overall effectiveness in achieving protection of human health and the environment.

We support appropriate measures to reduce costs. Several of the reforms that we support would reduce unnecessary costs of cleanup. Examples include streamlining remedy selection through use of presumptive remedies, and providing for consideration of future land use in selection of remedial actions. However, we simply cannot condone use of a cost test that could sacrifice protection of human health and the environment or unnecessarily inject burdensome and time consuming new requirements into the remedy selection process.

We have previously discussed provisions in S. 8 which could promote remedies that are less protective and less expensive, including: the extremely narrow preference for treatment (containment remedies are cheaper than treatment), the elimination of a point of departure in the risk range, and the expansion of the technical impracticability waiver to allow waivers based on consideration of cost of risk based standards and of the requirement to prevent contamination of clean ground water.

Several additional provisions, some of which are discussed below, would allow cost to play an inappropriate role.

First, the so-called fund-balancing waiver. Under current law this waiver is available only when the cleanup is funded "solely" by the Superfund. The intent of the fund-balancing waiver was to excuse compliance with applicable standards only when the Fund was financing the entire remedial action, and compliance with these standards would deplete the Fund for use at other sites where there were no viable PRPs. S. 8 would change this waiver in one significant respect: that the waiver would apply more broadly, in instances where the remedy is "predominantly" funded by the Superfund. This creates a potentially huge loophole in the requirement that remedies meet applicable standards: in view of the lib-

eral use of orphan funding under S. 8, a large number of sites would receive at least some funding from the Superfund. And, in many instances funding could be “predominantly” from the Superfund.

We cannot justify allowing otherwise applicable standards to be abandoned based on the fact that the Superfund may be paying 51 percent or more of the cleanup. Moreover, under S. 8 it is not unlikely that at the very same sites where cleanup requirements have been compromised based on cost, PRPs would receive reimbursement checks from the Superfund.

Second, the new requirement that remedies meet an undefined requirement to be “cost reasonable.” Under current law remedies are required to be cost-effective. This requirement is maintained in S. 8. But S. 8 compounds any cost analysis with a second requirement that remedies be “cost reasonable.” The bill neither defines this new term nor explains the interrelation between these two cost standards.⁸

In addition, we are concerned that “cost-reasonable” could be interpreted to require a cost-benefit analysis. A cost-benefit analysis would lead to an additional and unnecessary test that would needlessly complicate the remedy selection process. It would require an additional balancing of costs and benefits, before balancing of the remedy selection factors. In addition, cost-benefit analysis tends to undervalue those benefits that are difficult to quantify, such as benefits to future generations.

Finally, S. 8 liberally allows waivers based on technical impracticability. Some of the instances where this waiver is available have already been addressed (*i.e.*, waiver of risk based standards, waiver of requirement to protect uncontaminated ground water). The bill further elevates technical impracticability by authorizing waivers of any and all of the remedy selection rules based on this standard. Section 121(b)(5), the fifth of five remedy selection rules, allows waivers of any of the other four rules. These include rules relating to anticipated future use of land and water, ground water rules (such as requirements for long-term monitoring, requirements for alternate water supply, point-of-entry, or point-of-use treatment to ensure there is no ingestion of contaminated water), and the meager preference for treatment and provisions regarding institutional controls. This overarching technical impracticability waiver raises, among others, concern that there is yet another cost test, so that remedies will have to pass three cost-based hurdles: that they be cost-effective, cost-reasonable, and not inordinately costly. As noted earlier, we believe that the technical impracticability waiver should be limited to applicable cleanup standards, similar to the scope of the waivers in current law.

⁸ Contrary to the suggestion by the Majority, the reference, in a document attached to a memo concerning the remedy review board, to the reasonableness of cost estimates does not support S.8's new cost reasonableness balancing factor. That document listed a number of questions that the remedy review board may consider. Among them is the question: “Are the cost estimates reasonable?” Significantly, it does not ask “are the costs reasonable?” According to EPA, the question refers to the accuracy of the estimated costs of the remedy, not to the reasonableness of the remedy cost.

The Bill's Remedy Provisions Will Divert Resources Away From and Delay Cleanup

The remedy title imposes unnecessary and burdensome new requirements that will divert resources away from and delay cleanup. We fear that the provisions in the following three areas, among others, would impair the ability of EPA and States to select remedies and clean up sites in an efficient and timely manner: reopening RODs; the remedy review board; and risk assessment and communication.⁹

The requirements in S. 8 for revisiting past cleanup decisions would require significantly more agency resources than under EPA's current policy and practice,¹⁰ and create new potential for cleanup delay. Many RODs are issued only after years of study and controversy. Throwing potentially hundreds of seemingly resolved decisions back into dispute would tie up resources that could be better used addressing other sites, and could delay cleanup at the site at issue, and upset the expectations of community members regarding cleanup of sites that impact their lives. Several aspects of the provision give rise to these concerns.

First, although the bill leaves EPA discretion as to whether a particular remedy should be revised, it does mandate that EPA conduct a detailed analysis of each petition against eight factors, to set priorities as to which petitions it will accept (section 136(b)(3) and (4)).¹¹ Administrator Browner testified that the resources required for these analyses would be substantial. Second, it is not clear that PRPs are required to continue implementing a remedy pending a decision on a petition. PRPs implementing remedies will have a strong incentive to argue that they should not have to spend additional money implementing the current remedy, since that remedy will change if the petition is granted. Therefore, absence of an explicit requirement to continue remedies during consideration of a petition would risk delay. Third, it is not clear that PRPs would be barred from bringing a lawsuit to challenge an adverse decision on their petition.

Another provision that would drain significant resources is the remedy review board. As noted earlier, we support appropriate codification of EPA's remedy review board reform, and included such a provision in our Substitute. But S. 8 would require review of an arbitrary number of sites—one-third of remedies selected in a year, which would amount to review of more than 50 per year—regardless of whether review of so large a number of remedies is

⁹We note one improvement to the lead in soil amendment (Title VIII of S.8) offered during markup that would help avoid delay. We are pleased that the sponsors of the amendment agreed to drop language that could have limited EPA's ability to act until a regulation has been promulgated, and believe that this change will further our goal of minimizing or avoiding any delay. We remain concerned, however with the transfer of EPA decision-making to an outside entity which is not accountable to the President, and in accordance with the understanding reached at markup, we are reviewing whether it raises constitutional questions.

¹⁰Administrator Browner testified that EPA's reform relating to remedy updates "is yielding \$340 million in cost savings in fiscal year 1996 and another \$280 million estimated to date for fiscal year 1997."

¹¹A potentially large number of petitions will arrive in a short time frame, since a petition may be filed by one PRP implementing the remedy, regardless of how many PRPs are also involved, and in view of the 1 year deadline for submitting petitions. We have not been provided any estimate by the proponents of this provision as to the number of remedies that would be eligible for reconsideration.

feasible, warranted or even necessary. This requirement would add yet another significant resource demand.

We also are concerned that provisions on risk assessment and communication will require analyses that are unnecessary or ill suited for the purpose for which they would be used. For example, as Administrator Browner testified, “the requirement for ‘central, upper-bound and lower bound estimates’ of risk for reach facility are inappropriate for site-specific risk assessments, but rather apply to chemical-specific risk assessments like those found in IRIS or to be performed under the Safe Drinking Water Act.” According to EPA, central and lower-bound estimates only serve to illustrate how wide the range of toxicity may be, by estimating the two extremes; however, these values cannot be considered protective of public health.¹² Moreover, it is unclear whether this provision is intended to reject the current approach under Superfund of relying on the reasonable maximum estimate of exposure (between a central and upper-bound estimate) that neither minimizes nor exaggerates risks posed by contaminants at the site, and considers sensitive sub-populations. According to EPA, this is the value that is of greatest significance to the public. We would be concerned with a requirement that would abandon this approach and compromise the transparency of risk communication to the public.

LIABILITY

Introduction

According to EPA, as of late October, 1997, cleanup construction was underway or had been completed at 89 percent (1200 of 1353) of the sites on the NPL. As of late February, 1997, cleanup construction had been completed at 509 of these sites. The vast majority of cleanups at Superfund sites are conducted or funded by PRPs, under judicial consent decrees or administrative orders. Specifically, PRPs perform between 70 and 75 percent of long-term cleanups at non-Federally owned NPL sites.

The success of Superfund in holding those who had a role in creating hazardous waste sites responsible for their cleanup and avoiding cleanup delay from litigation is directly attributable to Superfund’s liability scheme, the prohibition on pre-enforcement judicial review, and EPA’s “enforcement first” policy. The bar on pre-enforcement review prevents the cleanup delay that would result if PRPs were allowed to challenge remedies in court in advance of any cleanup. Under the enforcement first policy, which EPA instituted in 1989, the Agency seeks to require PRPs to conduct cleanups, rather than EPA financing them through the Superfund and then suing to recover its costs. This policy reflects the reality that the Fund is limited and should be preserved for sites at which there are no viable PRPs. In view of the limited sums available in the Superfund, the only alternatives to a system that requires viable PRPs to conduct cleanups would be for the costs of cleanup to borne by the general taxpayer, or for sites not to be cleaned up, neither of which would be acceptable.

¹²In addition, these measures are not applicable to noncarcinogenic chemicals because the methodology for calculating those toxicity values is different.

Unfortunately, the liability title of S. 8 would set back, rather than build on, the strengths and successes of the current Superfund program in cleaning up hazardous waste sites. Our principal objections to the liability provisions of S. 8 are —

- It does not go far enough in reducing litigation and other transaction costs, particularly for small parties such as municipalities, small businesses and other small waste contributors.
- In several instances the bill actually would create new opportunities for litigation and increase transaction costs, often at the risk of delaying cleanup.
- Through overly broad exemptions and PRP entitlements to reimbursement from the Superfund, S. 8 would shift to the Superfund responsibility for cleanup, rather than holding PRPs responsible for cleaning up conditions that they created and thereby conserving Superfund dollars for cleanups at sites where there are no viable PRPs.

The Bill Keeps Municipalities, Small Businesses, and Contributors of Small Amounts of Waste Trapped in Superfund's Liability Net

Notwithstanding the seemingly widespread recognition that any Superfund reform bill needs to provide small parties (whose transaction costs generally dwarf any amounts they could or should contribute to cleanup) relief from Superfund liability, the nature and scope of that relief have proven surprisingly controversial. As discussed below, S. 8 fails to provide adequate relief to small businesses, municipalities and other contributors of low volume or low toxicity waste.

Although S. 8's various liability exemptions and limitations for these parties each raises unique concerns, there is one significant defect that they have in common: the failure to provide these parties any relief from claims for costs incurred prior to enactment of S. 8. Hence, S. 8 only partially lets these parties out. It says that small contributors of municipal solid waste (MSW), contributors of de micromis amounts of hazardous waste and small businesses cannot be sued for money spent after S. 8 is enacted into law; and it says that there are caps on the liability of larger contributors of MSW and municipal owners and operators of landfills—for some of the claims against them. That's a start. But it stops short of giving meaningful relief to many municipalities, contributors of MSW and small PRPs.

Where large non-exempt PRPs spent money studying or cleaning up a site before the enactment of S. 8, they still can sue these contributors, and continue pending lawsuits, to recover some of those costs, which in many instances are very large sums. For a small nonprofit organization that sent only municipal waste to a site and is facing a lawsuit for tens of thousands of dollars, it is little consolation that it is being sued only for pre-enactment costs. In addition to paying any judgment to resolve the claim, it still has to pay lawyers to defend or settle these claims. And even though the individual contributions of waste by these parties is small and judgments against them individually would likely be relatively small, PRPs that are large contributors can and do pursue them in con-

tribution actions. For example, in testimony before this Committee, Administrator Browner described the litigation at the Keystone site in Pennsylvania as follows:

First are the large owner-operators, major industrial generators. Those are the ones that EPA went to and asked for them to contribute to the cleanup costs. There were 11 at this site. Those 11, unfortunately, did turn around and seek contribution for cleanup costs from 168 other parties; those other 168 turned around and sought contribution from 589.

In fact, the well-publicized case of Barbara Williams, one of the 589 fourth-party defendants at the Keystone site, would not be resolved by S. 8. Even though Ms. Williams operates a small business and sent only municipal solid waste to the site, under S. 8 she would remain liable for claims by other PRPs for cleanup costs incurred prior to enactment of S. 8. Hers is not a unique situation, since Keystone is just one of many sites where PRPs have entered into cleanup agreements and have potential claims for unreimbursed pre-enactment costs. Nor is it hypothetical: at Keystone, as of October of 1997, the United States had incurred costs in excess of \$6.4 million. These costs have not yet been recovered. Municipalities, who face similar claims, also raised concerns. James P. Perron, Mayor of Elkhart, Indiana, testified on behalf of the Conference of Mayors regarding his concern with S. 8's limits on relief for municipalities: "We are concerned, however, that the bill does not provide generators and transporters of municipal solid waste protection from third-party contribution lawsuits, for cleanup costs incurred prior to the date of enactment at co-disposal sites."

Some suggest that extending these liability exemptions and limitations to pre-enactment costs would unfairly deprive non-exempt PRPs of their potential contribution claims against these small parties. We do not believe that this warrants denying relief to small parties. Our rationale differs with respect to different categories of PRPs.

With respect to de micromis contributors and small contributors of MSW, we disagree that the exemptions would unfairly deprive other PRPs of any contribution claims. The contributions by the PRPs covered by these exemptions are "truly tiny," in the words of Administrator Browner. For example, at the Keystone site, parties EPA determined qualified for de micromis settlement offers comprise almost 50 percent of the total number of parties named as defendants at the site. Yet, collectively, they sent less than 5 percent of the total waste volume to the site. It is difficult to conceive that larger PRPs have any legitimate expectation of obtaining a judgment for significant sums from PRPs that sent two drums of waste (the cutoff for the de micromis exemption's threshold of 110 gallons or 200 pounds), or from residential homeowners, small businesses or small nonprofit organizations that sent only municipal solid waste.

We recognize that the small business exemption presents a significant issue that is not raised by the exemptions for de micromis contributors of hazardous waste and small contributors of MSW. That is, it is more likely that in some instances larger PRPs may

have agreed to a cleanup settlement based on a well founded expectation that they could recover some of their costs in contribution suits against some of the small businesses covered by the exemption. But we believe that this issue can be addressed in a manner that allows recovery of costs in appropriate circumstances, and at the same time affords small businesses some protection with respect to claims for pre-enactment costs. Under the Substitute, small businesses that were sued would have an opportunity to avoid litigation and significant transaction costs by settling with EPA on the basis of what they could afford. EPA, in turn, could pass any sums recovered through settlements with the small businesses to PRPs who had legitimate expectations of recovery against these small businesses, to offset some of the cost of cleaning up the site.

We believe that S. 8 tips the balance too far in the direction of preserving the ability of large non-exempt PRPs to sue small businesses for pre-enactment response costs. The approach in the Substitute, in contrast, strikes a reasonable balance between protecting small businesses from claims that exceed their ability to pay and from the transaction costs associated with defending a claim, and protecting any other PRPs' legitimate expectations of recovery from those small businesses.

A. Additional concerns with exemption for small contributors of municipal solid waste. S. 8 creates an incentive for large non-exempt PRPs to pursue residential homeowners, small businesses and small nonprofit organizations for information regarding their contributions of municipal waste. It does so by shifting to the Superfund shares of cleanup costs attributable to these parties. Since the amount that the remaining PRPs have to pay is reduced by any sums that are shifted to the Superfund, those remaining PRPs have every incentive to track down PRPs whose shares may be shifted to the Fund. An exemption does not insulate a PRP from transaction costs incurred in response to discovery and information requests, including in some instances the cost of hiring an attorney.

For example, at the South 8th Street Superfund site in Arkansas, which was part of EPA's pilot allocations project, PRPs nominated approximately 2,000 parties as additional PRPs at the site. The vast majority of these nominations were not supported by deposition testimony, sworn statements, or any other evidence specifically identifying the nominee as a person that arranged for the disposal of hazardous substances at the site. Rather, these parties were nominated based on their having been listed in the Yellow Pages at the time the facility was in operation, and the nominating PRPs' theory that those parties therefore were likely to have generated waste oil that was sent to the site.

The better approach is that taken in our Substitute, which is the same as the approach that S. 8 takes with respect to de micromis parties: That is, to treat wastes contributed by small contributors of MSW as zero shares, since the amounts they contributed are so small and the toxicity so low. The situation of small contributors of municipal waste is comparable to that of contributors of de micromis amounts of waste, since in both cases whatever they could contribute to the cleanup would not be justified by the resources needed to calculate their shares.

B. Additional Concerns with Liability Limitations for Larger Generators and Transporters of Municipal Waste. The 10 percent liability cap under section 107(t)(1) (for generators and transporters of MSW) would impose further unnecessary transaction costs on municipalities and other contributors of municipal waste. We believe that these parties should have a choice, as in the Substitute, between the 10 percent cap and settling on the basis of a dollar per ton cost. The later option would give them the opportunity to resolve their liability earlier in the process and avoid transaction costs. We recognize that the bill we supported in the 103d Congress also capped liability of MSW contributors at 10 percent. But, since the 103d Congress, an alternative approach developed by EPA has gained considerable support from municipalities. On February 5, 1998, after public notice and comment, EPA issued a policy for settling claims against municipalities and contributors of municipal solid waste at NPL co-disposal landfill sites. The policy provides that EPA will offer to settle with generators and transporters of municipal waste for an amount calculated by multiplying the number of tons of MSW contributed by the PRP by \$5.30. The \$5.30 per ton figure was calculated based on estimates of the per unit costs of closure and post-closure activities at a representative landfill regulated under subtitle D of the Resource Conservation and Recovery Act. Senator Lautenberg introduced legislation earlier this Congress, S. 1497, which would codify a per ton settlement approach.

This approach has many advantages, including that it provides greater certainty, allows for early expedited settlements without the need for allocation, reduces transaction costs, and is based on an estimate of actual costs of addressing MSW. The EPA policy has attracted widespread support from municipalities, including from the National Association of Counties, National League of Cities, National School Boards Association, and International City/County Management Association. In a letter to EPA dated February 23, 1998, these organizations stated that: "We support the . . . unit cost of \$5.30 as the maximum settlement amount for generators/transporters of MSW/MSS. The amounts are equitable and are in line with the true costs of closure/post closure costs of municipal co-disposal landfills, as well as the historical settlements of local governments at sites similar to those included in the policy." These organizations further noted that the policy would allow municipalities to avoid the current financial burdens of defending against CERCLA lawsuits.

In sum, if Congress is going to make a policy decision to finally address the problem of small parties being dragged into Superfund cases, then reform legislation should reflect a full commitment to that policy. S. 8, through its preservation of claims for pre-enactment costs, creation of incentives to pursue small parties through information requests, and failure to provide an expedited procedure to resolve claims against contributors of MSW, falls short.

The Bill Promotes Unnecessary Litigation and Transaction Costs

We understand that the sponsors of S. 8 share our desire to reduce litigation under CERCLA. Some of the provisions in S. 8 reflect an effort to accomplish that goal. However, in many instances

the bill actually would promote litigation and increase transaction costs, diverting resources away from cleanup. Below are further examples of provisions that run counter to the goal of reducing litigation and transaction costs under CERCLA.

A. Requires Settled Cases to be Reopened. One of our most significant concerns with S. 8 is its mandate to reopen consent decrees that previously were approved and entered by courts. Section 137(b) of the bill provides that “[t]he Administrator shall conduct the allocation process under this section for each mandatory allocation facility.” A “mandatory allocation facility” is defined under section 137(a)(5) as an NPL facility at which there are 2 or more PRPs (including exempt PRPs), if at least 1 is viable and not exempt, “for which the potentially responsible parties demonstrate that the response costs to be incurred after the date of enactment of this Act will exceed \$1,000,000.” Section 137(b)(5) contains an extremely narrow exclusion which removes from the universe of mandatory allocation facilities any “facility for which there was in effect as of the date of enactment of this section a settlement or order that determines the liability and allocated shares of all potentially responsible parties” at the site. As discussed below, this exception would exclude few if any sites, and a significant number of sites also would not be screened out under another condition discussed below. As a result, allocations and orphan funding are mandatory at a large number of sites that already are being cleaned up under consent decrees or orders.

This means that the government and PRPs are required to collect and present detailed evidence to an allocator regarding the nature and extent of each settling party’s connection to the site. In other words, the very factual disputes that a prior settlement was designed to avoid would be litigated before the allocator, for the purpose of reimbursing responsible parties for response costs that they previously agreed to pay.

This provision has been widely criticized as, for example, giving “polluters who already agreed to carry out cleanups, an unwarranted windfall” (letter dated March 23, 1998, to members of the Environment and Public Works Committee from six national environmental organizations). Administrator Browner noted that of “particular concern are provisions that . . . reopen hundreds of final consent decrees and provide Federal payments to parties that created toxic waste sites” (letter dated March 24, 1998, from Carol Browner to Senator Baucus). Some of the problems associated with reopening consent decrees are captured in an excerpt from a letter from the Department of Justice:

These prior settlements were intended to ensure that sites were cleaned up, legal and factual disputes with the settling PRPs were resolved, and the cost and burden of discovery and trial were avoided. S. 8 would undo many of these benefits by reopening these disputes for litigation in an elaborate allocation process, for the purpose of reimbursing PRPs for cleanup costs that they previously committed to pay. Inevitably, legal and technical resources that should be devoted to obtaining new settlements for new cleanups would be diverted to this massive PRP reimbursement project, resulting in more lawyer time, fewer

new consent decrees, and a slower pace of cleanup. (Letter dated March 23, 1997, from Ann Harkins, Acting Assistant Attorney General, to Chairman Chafee).

While reopening a settlement in any type of case could have some disadvantages, these are exacerbated in large, complex, multi-party cases such as those common under CERCLA. The heightened impact is attributable in part to the large number of settlements (and parties) potentially implicated, and the difficulty and sheer complexity of conducting allocations. Indeed, the mandate to reopen past settlements would eliminate much of the intended and expected benefits of settlement. Sizable resources would be consumed in revisiting old settlements, and resources would be diverted from new cleanups to settled cases. As stated by State Attorneys General, "any settlement negotiation, whether it is the initial negotiation or a reopener, is extremely resource intensive. Given our limited budgets, a reallocation of time to old settlements at someone else's direction will clearly result in fewer new settlements, and thus fewer cleanups" (letter dated March 25, 1998, to Chairman Chafee from Peter Verniero, Attorney General of New Jersey and Chair of the Environment Committee, and Hardy Myers, Attorney General of Oregon, Chair and Vice Chair of the Environment Committee, of the National Association of Attorneys General, respectively). It is not unusual for Superfund settlements to involve hundreds of parties, take significant time and resources to negotiate, and involve cleanups worth tens or hundreds of millions of dollars.¹³

Regardless of one's views as to the merits of granting PRPs further access to the Fund in connection with cases that had been settled prior to enactment, the transaction costs alone should give one pause. It would open wide the Superfund, originally intended to pay for cleanup of abandoned sites, to incalculable claims for PRP reimbursement at each of these sites. The resource demands imposed by S. 8's settlement reopener must be evaluated in context: sites where settlements are being reopened are competing for resources with sites that are not yet being cleaned up under consent decrees. According to EPA there are nearly 350 sites currently on the NPL at which there may in the future be settlements with PRPs for the performance of remedial design or remedial action at a site. And as more sites are added to the NPL (currently at a rate of 20–30 per year), the likely number of additional settlements increases. The more personnel and other agency resources that are devoted to revisiting settled cases, the less that are available for moving new cases toward settlements under which PRPs would clean them up. Mandating the reopening of settlements would contribute to the cleanup delay that reform legislation is supposed to eliminate. This simply is not a wise use of our limited Fund resources.

S. 8 mandates allocations and orphan funding for post-enactment costs in connection with cases that were settled before February of

¹³In addition to having to present its views during the consideration of a settled case before an allocator, the United States would maintain its broader role in the allocation as representative and trustee of the Superfund Trust Fund.

1998, so long as there is a request by two or more settling PRPs and the settlement meets the following criteria:¹⁴

- a settlement decree or order that was in effect on the date of enactment of S. 8 did not determine the liability and allocated shares of all PRPs (sec. 137(b)(5));
- PRPs demonstrate that response costs to be incurred after enactment of S. 8 in connection with a settlement prior to February 1, 1998, will exceed \$1,000,000 (sec. 137(a)(5)(A)); and
- a neutral third party determines, based on information provided by PRPs, that the amount of the orphan share of the response costs remaining to be incurred for a settlement prior to February 1, 1998, can reasonably be expected to amount to \$500,000 or more (sec. 137(b)(6)).

Although the proponents of this provision have not provided us an estimate as to the number of consent decrees that would meet these criteria, clearly they are intended to and would reach a significant number of settled cases. The first criterion—that a pre-enactment settlement did not determine the liability and allocated shares of all PRPs—would screen out few if any sites. Under section 122(d)(1)(B) of CERCLA, settlements with the United States expressly preserve all arguments concerning liability: they do not constitute admissions of liability. In addition, if the settlement left unresolved a potential claim against even one defunct PRP, then under this criterion the case would be eligible for reopening, an allocation, and mandatory access to orphan share funding. Usually PRPs would be able to identify at least one PRP who was not included in a settlement, if they considered it to be in their interest to reopen the settlement and get orphan funding. The second and third criterion would screen out some sites, but a significant number would remain eligible for reopeners and orphan funding. Moreover, significant resources would be involved just in determining whether a site that is being cleaned up under a consent decree meets the criteria for mandatory allocations and orphan funding.

The resource demands of conducting allocations for settled cases are exacerbated by the fact that, unlike sites that are newly entering the consent decree negotiation process, all of these past settlements will be eligible for allocations immediately on the date of enactment of S. 8. In fact, there is an incentive for PRPs to demand allocations quickly, before more money is spent on cleanup, reducing sums that count toward meeting the monetary thresholds, and to obtain an allocation and rebate more quickly. Introducing this slug of cases into the allocation system immediately on enactment could significantly impair the ability of EPA to timely clean up sites ready to begin remediation.

As noted above, under S. 8 if there is a request by two or more settling PRPs for an allocation at a facility eligible for a mandatory allocation, then an allocation is required. This means that literally hundreds of settling PRPs can be dragged into a resource intensive and time consuming process at the behest of two outliers. In the

¹⁴These same criteria are used in S.8 to screen sites being cleaned up under administrative orders: if an administrative order has been issued prior to February 1, 1998, and PRPs demonstrate that they meet the cost thresholds, allocations and orphan funding are mandatory. This provision is discussed later.

course of presenting evidence, PRPs will hash out many of the same issues that supposedly had been resolved by the settlement. In some cases the issues were actually litigated the first time around. In others, the parties chose to avoid a contest by settling.

This time, there is no choice. Some parties may not want to reopen a settlement. They have put it behind them, and figure that any refund they would get through an allocation is outweighed by the time and money they would have to spend to participate in an allocation. That doesn't matter.

Certain provisions in S. 8 apparently are intended to mitigate some of the adverse impacts of reopening consent decrees. Unfortunately, these provisions would accomplish little, if anything, toward that end. For example, S. 8 provides that allocations involving settled cases will be performed for the sole purpose of determining the orphan share (sec. 137(b)(6)(F)). Any safeguards created by this provision are illusory. The exercise is fraught with complexity and litigation bait.

In order to determine the orphan share at a site, the total number of shares must be determined. And, to make that determination, the allocator must determine the shares of prior settling PRPs as well. Moreover, even if determining individual shares of settling PRPs could be dispensed with for purposes of ascertaining the orphan share, section 137(o) of S. 8 still would require the allocator to determine the shares of each settling PRP in order to determine its entitlement to reimbursement. Determination of shares will require enormous resources to wade through evidence on many issues, even though it was to avoid litigation and discovery over these issues that the parties entered into the settlement in the first place.

Garnering the evidence that the allocator will need to make decisions can be exceedingly difficult and in some cases impossible. It requires detailed factual information, which may or may not still exist in old cases. Simply because EPA settled a case, it cannot be assumed that the evidence is sitting in a Federal archives someplace just waiting to be retrieved. In many cases the evidence was never collected: the parties instead concentrated their efforts on negotiating a settlement agreement.

Finally, even after the allocator determines the respective shares attributable to the orphan and to other PRPs, an exceptionally difficult task still lies ahead: determining what compromises were made by EPA and for what reasons they were made. Any such determination generally would involve privileged information. Although it may be impossible to determine, information on past compromises is essential to avoid windfalls to PRPs.

In the majority of settlements, EPA compromises its claim in some respect, usually for a combination of reasons. These reasons may include resource and strategy considerations that relate to the strength of the case or the importance of the legal issues involved, the existence of a large number of defunct and insolvent PRPs, and an assessment of what it would take to reach an acceptable settlement. Decisions to settle CERCLA cases also may be influenced by a need for PRP resources to conduct a cleanup, due to a lack of EPA resources to do so or a need for those resources at a site where there are no viable PRPs. Therefore, it is not at all uncom-

mon for the United States to forgive all or a portion of its claim for past costs or future oversight costs, in exchange for an agreement by PRPs to conduct future cleanup work.

Another instance where bill language cannot cure the complex problems created by reopening consent decrees is the provision that allocations involving settled cases must take into account any monetary or nonmonetary compromises made by EPA in the initial settlement (sec. 137(b)(6)(F)). We appreciate this recognition that settling PRPs should not get the benefit of the same compromise twice. Unfortunately, in practice it would be very difficult and resource intensive to actually prevent these windfalls. That is because of the difficulty in unraveling old deals to ascertain what compromises that the government may have made, and the reason that they were made. It can be very difficult to determine how much of a prior compromise, embodied in a consent decree, represents costs that are eligible for orphan funding.

For example, EPA may say that its compromise of \$1 million reflected the share attributable to insolvent PRPs. Therefore, the settling PRP should not be given orphan funding when the settlement is reopened: to do so would give the PRP a windfall. The settling PRP may say that EPA forgave its \$1 million claim for past costs not because of any insolvent PRPs, but because there was a new issue of law in the case that EPA did not want to litigate. Therefore, the PRP would argue to the allocator that it is entitled to orphan share funding for the \$1 million share attributable to the insolvent PRP. The allocator would have to decide.

Proponents of reopening consent decrees focus principally on two arguments: fairness and reducing litigation. Neither one would justify the consent decree reopener provision in S. 8. We discuss them in turn below.

We are not persuaded that claims of unfairness of settlements justify a mandate to reopen them. It is fair to let settled cases lie. Just because we have created a new pot of orphan share funding, PRPs who previously settled their liability have no right or legitimate expectation of access to it. After all, if we cut capital gains taxes, people who sold their stock before the rates were cut don't have a legitimate expectation that they should be able to get a refund. What's done is done. Congress amends laws all the time and we do not go back and unravel settlements that were concluded before the change.

Proponents of the mandatory consent decree reopener provision focus almost exclusively on the perceived unfairness of holding settlers to their commitments, without any serious consideration of the unfairness of reopening consent decrees to others, including to many PRPs and to the public at large. We disagree that it is unfair to hold PRPs to commitments that they negotiated and voluntarily assumed through agreeing to a consent decree. Moreover, the suggestion of unfairness is based on a sweeping assumption that the terms of past consent decrees are unfair. That assumption is unfounded.

Settlements reflect compromises on all sides. One of the key factors in EPA offering to compromise is the existence of insolvent or defunct PRPs in connection with a site. In fact, in accordance with its 1996 orphan share policy, EPA has routinely offered orphan

share funding at eligible sites to parties who will agree to a clean-up settlement, in the form of forgiveness of claims for past costs or future oversight costs. According to EPA, the Agency has made offers of orphan funding under the policy estimated at more than \$100 million in the first 2 years of the policy. Even before the policy, EPA often compromised its cost recovery claims to reach a settlement. Hence, any assumption that orphan funding would be a new opportunity with the passage of S. 8 and was unavailable previously is unfounded: it is more like a second bite at the apple. And reopening settlements could give windfalls to PRPs if compromises that they benefitted from under the original consent decree are not accounted for in re-assessing their “shares.”

When PRPs elect to enter into settlements, they make a judgment that it is in their interest to do so: it is not unfair to hold them to that judgment. The decision whether to settle probably included consideration of whether some costs could be recovered from other parties. If the PRP entered the settlement knowing that all nonsettling PRPs are either insolvent or defunct, or too small to make meaningful contributions, then the PRP never had any expectation that it would recover its costs, and, for whatever reason, decided that it was more advantageous to settle than not to settle. If, on the other hand, a PRP enters a settlement with the intent of suing nonsettling PRPs to recoup some of its costs, then it has done so or can do so.

Moreover, before entering a consent decree as an order of the court, a judge has to find that the settlement is fair, reasonable and in the public interest. Any PRP who considers a settlement unfair has the option of not settling, submitting comments during the public comment period on the consent decree, and even intervening in court for the purpose of challenging entry of the decree. And PRPs would have previously had an opportunity to comment on the proposed cleanup plan before EPA issued its Record of Decision selecting the remedy.

In addition, the interests of any settling PRPs who do not want to reopen a settlement must be considered. They may be swept into an allocation at the request of two PRPs. Some assert that everyone would want to reopen their settlement, in order to benefit from reimbursements from the Fund for orphan shares. That view ignores the fact that the transaction costs may exceed any potential benefits to a PRP or its insurer.

Another significant category of persons that would be prejudiced by reopening settlements is the public, including communities located near superfund sites, the taxpaying public, and future generations. They have a keen interest in judicious use of the Superfund, so that it will be available at abandoned sites where there are no PRPs to pay for a cleanup. We have already illustrated the magnitude of the resources that would be required to conduct an allocation in connection with even one settled case. Even if payments of orphan funding were from a separate account from cleanup money, that would not protect resources—personnel and money—required to go through the allocation process. Inevitably, the settled cases would divert these resources away from yet unsettled cases. They would create a massive bottleneck on the date of

enactment that would significantly delay response actions at sites that are not yet undergoing cleanup.

That is not to say that in every single case it would necessarily be inappropriate to conduct an allocation or for EPA to offer orphan funding in connection with a site that is subject to a consent decree. But the provision in S. 8 for permissive allocations could be used in any appropriate case, based on case by case considerations and the availability of funding and other resources for revisiting past settlements. As State Attorneys General observe in their March 25, 1998 letter, "This problem [depletion of limited resources from reopening consent decrees] can be avoided if we simply leave the law the way it stands today, which allows EPA or a State agency to determine whether the reopening of settlements is necessary in order to achieve a better or less costly cleanup. We therefore urge you to remove [consent decree reopeners] from S. 8."

Proponents of this provision assert that reopening consent decrees may expedite resolution of litigation by PRPs against other PRPs, through the enticement of orphan funding. That misses the point. Allocations with respect to these and other claims addressed in past settlements would divert EPA resources from cleanups at sites that are not yet being cleaned up. And allocations in connection with past settlements would open up a whole host of issues for resolution that are not raised by third-party litigation. Other tools are available to facilitate the resolution of third-party claims without drawing down resources that could be better used to negotiate a settlement at a site that is not yet being cleaned up, so that it might be cleaned up.

The Majority asserts that reopening consent decrees and providing orphan share funding is necessary in order to reduce third-party litigation, particularly when it involves small parties. We are in favor of reducing third-party litigation, including when it involves small parties. We do not think that mandating the reopening of consent decrees gets us there, for three reasons.

First, defendants in third-party litigation are not jointly and severally liable. As provided in section 113(f)(1) of CERCLA, "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."

Second, arbitration and dispute resolution have always been available as tools to resolve cases short of trial. They can be used in third-party litigation too. So can allocation. Both S. 8 and the Substitute provide for "permissive" allocation, that is, discretionary use of allocation in appropriate cases. These third-party claims are eligible for permissive allocation.

Third, small party interests simply are not what is driving the consent decree reopener provision. As discussed above, the way to protect small parties is through liability exemptions and limitations that apply to claims for both past and future costs. It is not to reopen settled cases, devote substantial resources to allocations, and pay orphan funding to larger nonexempt PRPs.

If small parties were exempt, then they would not be liable in third-party cases for past or future costs. If they already settled, then they are covered by contribution protection and do not have to worry about being sued. Moreover, if they already settled they

are probably the least likely parties to benefit from the consent decree reopeners in S. 8. That is due to the fact that settlements between EPA and small parties virtually always are “cash outs.” In other words, they make payments, often in one lump sum within a specified number of days after a consent decree has been entered, and then their obligations are complete. They are not the ones spending money over the course of years implementing a remedy and therefore eligible for reimbursement under S. 8. Further, small contributors that cash out typically are given more complete covenants not to sue than are those performing the work.¹⁵ Therefore, they had an even greater expectation that the settlement would put the case behind them, forever. S. 8 would undermine that expectation. Hence, in all likelihood, small entities that settled prior to enactment would not benefit, and in fact could be harmed, by the reopeners.

As the State Attorneys General caution: it “is important to note that in our discussions with small business owners and local officials, they have clearly indicated that they do not want to reopen old settlements. They also have limited resources, and feel, as we do, that whatever the outcome, it is time to put settlements that have been concluded behind us” (letter dated March 25, 1998, to Chairman Chafee from Peter Verniero and Hardy Myers).

B. Other Provisions that Invite Litigation. The bill contains several additional provisions that would promote litigation in their own right and due to inconsistencies with other provisions. Following are some examples.

First, the bill creates a disincentive to settle and promotes litigation by allowing PRPs to obtain reimbursement from the Fund for cleanup costs they incur in excess of their allocated shares, even when the PRPs refuse to settle and preserve their ability to bring lawsuits for various potential claims related to cleanup of the site.

PRPs conduct cleanups either under a judicial consent decree or under an administrative order issued by EPA or another duly delegated Federal agency.¹⁶ One of the primary advantages of consent decrees is that they more completely resolve the range of potential claims related to a hazardous waste site. For example, settlements generally include agreements to waive potential claims to challenge the remedy or settlements between EPA and other PRPs, to litigate the liability of settling parties, for reimbursement from the Superfund, and against other settling PRPs. In addition, consent decrees often resolve EPA’s claims for past costs and future oversight costs. By contrast, when PRPs refuse to settle and instead conduct a cleanup under an administrative order, they preserve rights to sue that under a consent decree they generally would have to waive as a condition of settlement.¹⁷

¹⁵For example, the 1986 amendments to Superfund added a provision (section 122(g)) to promote expedited final settlements with contributors of low volume or low toxicity waste. Reopening settlements with these parties would undermine the benefits of that provision.

¹⁶S. 8 may create an entitlement to 100 percent of orphan funding where cleanup is under an order, rather than the 90 percent available under post-allocation settlements. We support offering 90 percent of orphan funding for post-allocation settlements, to create an incentive for the parties to resolve their internal disputes through a less resource intensive settlement process. However, PRPs who do not settle, and instead clean up under an administrative order, should not be entitled to more orphan funding than those who settle. This would be a further disincentive to settle.

¹⁷Although new section 137(o) provides that as a condition of receiving orphan funding a PRP must waive claims against other PRPs for cost recovery or contribution, it does not require a

Because of the advantages of settlements in reducing litigation, PRPs should be given incentives to settle. Orphan funding provides that incentive. But the strength of the incentive is reduced if orphan funding is made available even if a PRP refuses to settle, and instead cleans up under an administrative order, preserving certain rights to sue.

Under S. 8, PRPs conducting cleanups under administrative orders issued before February 1, 1998, clearly are entitled to allocations and orphan funding, and still reserve their rights to bring a variety of claims in connection with the site. S. 8 also may create a right to reimbursement for PRPs who conduct cleanups under administrative orders issued after February 1, 1998: section 137(o)(1) creates an entitlement to reimbursement for post-allocation payments in excess of a PRPs share, as determined by an allocator. This provision does not condition payment on cleanup being conducted under a consent decree. However, elsewhere S. 8 provides that a “potentially responsible party that does not agree to a settlement under paragraph (4) is subject to post-settlement litigation,” which suggests that orphan funding may be available only to PRPs that enter into judicial consent decrees.

S. 8 thereby promotes two layers of litigation: first, it creates an ambiguity as to whether a PRP conducting a cleanup under a post-enactment administrative order is entitled to an allocation and reimbursement. Second, it promotes challenges to the remedy, claims against the fund and other litigation, by creating an entitlement to orphan funding without requiring that PRPs waive these claims.

The Department of Justice summarized as follows its concerns with S. 8’s provision for reimbursement of PRPs who do not enter into settlements:

Unfortunately, the allocation provisions of S. 8 would reward recalcitrance and undermine incentives for PRPs to agree to cleanup settlements. Under S. 8, a recalcitrant PRP that refuses to enter into a cleanup settlement after an allocation may be treated *better* than a cooperative PRP that enters into a settlement and assumes responsibility for cleaning up the site. EPA’s option for dealing with such a recalcitrant is to issue an Administrative Order under Section 106 requiring such a party to perform the cleanup. Under S. 8, the taxpayers must then reimburse the recalcitrant party for 100 percent of the costs such a party incurs in excess of his “share” as determined by the allocator. On top of this financial reward, the recalcitrant PRP is free to continue to litigate its liability, to challenge the remedy, to seek reimbursement from the Superfund for all of its costs at some point in the future, and to challenge settlements between the United States and other PRPs. Far from reducing litigation, S. 8 promotes it by undermining the incentives for settlement.

A second provision ripe for litigation is section 137(f)(3)(D) of the bill, which creates a new right to bring a lawsuit to challenge an allocator’s decision. It is incongruous to create a cause of action to

waiver of other claims. By contrast, section 137(n)(2) requires a broader waiver of claims as a condition of settlement.

challenge a decision made in connection with a process established for the purpose of avoiding litigation. Under this provision, parties could challenge the allocator on virtually any exercise of discretion in the allocation process. And each challenge could delay the process, pending judicial resolution, which may take a very long time. This provision has the potential of taking a process that is intended to expedite settlements and cleanups, and grinding it to a halt.

Juxtaposed with this provision is section 137(h)(5), which provides that a “draft allocation report or final allocation report of an allocator and any other determination made by the Administrator or the allocator for the purposes of [subsection (h)] shall not be subject to judicial review.” Arguably every decision of an allocator is “for purposes of” subsection (h), which concerns the allocation report, since the report is the culmination of the allocation process. But that would render section 137(f)(3)(D) meaningless. Reconciling these two provisions could give rise to an additional layer of litigation.

Third, S. 8 will create unnecessary litigation over new undefined and untested standards and terms. It is not unusual for new laws to generate litigation, until the meaning of new standards and requirements is settled through judicial interpretation. However, S. 8 would needlessly generate litigation by unnecessarily introducing a variety of new and ambiguous standards. For example, title IV (Remedy) of S. 8 contains a new definition of protection of the environment. It provides that a determination of whether a remedial action is protective of the environment “shall not be based on the impact to an individual plant or animal in the absence of an impact at the population, community, or ecosystem level . . .” (section 121(a)(1)(B)(ii)(II)). Since the words “population,” “community,” and “ecosystem” are subject to different interpretations and are not defined in the bill, use of these terms has the potential to create new litigation. Additional new phrases that are likely to generate litigation are addressed in the discussions of other titles.

According to State Attorneys General, “It is changes such as these, imposing new language and new standards, which will, we fear, lead to new litigation or diversion of resources from what everyone professes to be the goal of this statute, which is faster, more efficient cleanups without the involvement of litigation.” The Department of Justice expressed similar concerns: “These undefined terms may interfere with the ability of the government to protect human health and the environment, and will spawn new litigation by displacing the now well-established case law under the existing statutory criteria for Federal action.”

The Bill Contains Overly Broad Liability Exemptions and Limitations, and Fails to Protect and Preserve the Superfund Trust Fund for Cleanup of Abandoned Sites

We support appropriate contribution from the Fund, in connection with a cleanup settlement, of shares attributable to certain exempt, insolvent and defunct parties. Orphan funding is an effective tool for achieving settlements and at the same time removing from CERCLA liability those parties who would be unable to make significant payments or whose share is minimal.

But many of the exemptions and requirements for orphan funding in S. 8 simply go too far. Some examples have already been discussed: the mandate to provide orphan funding to PRPs who are already under a legal obligation to conduct a cleanup, and the mandate to provide orphan funding to PRPs who are conducting a cleanup under an administrative order.

While this discussion is not intended to be exhaustive, there are a few additional instances of inappropriate exemptions and S. 8's failure to protect and preserve the Fund that warrant mention: the overly broad small business exemption; mandatory allocations and orphan funding at sites where all PRPs are current or former owners or operators of the facility, and at Federally owned facilities; the overly broad recycling exemption; preemption of State laws with respect to liability of response action contractors; and the requirement that EPA accept a settlement offer based on an allocation without regard to whether it would impair the Agency's ability to address cleanup of other hazardous waste sites.

A. *Small Businesses Exemption.* S. 8 exempts too many parties under the guise of a small business exemption. Under section 107(s) of S. 8, a small business is exempt if:

(1) during the taxable year preceding notification that it is a PRP the business (a) employed not more than 75 full-time employees or full-time equivalents, or (b) reported \$3 million or less in annual gross revenue; and

(2) "The activities specifically attributable to the person resulted in the disposal or treatment of material containing a hazardous substance at the vessel or facility before January 1, 1997" (section 107(s)(1)).

We oppose this provision on two grounds: first, the definition of a small business at 75 employees or \$3 million captures too many companies that contributed more than de minimis amounts of hazardous waste and can afford to pay their share of a cleanup. Of course, the larger the exemption, the greater the costs that are shifted to the Superfund and are unavailable for cleanup at other sites. Second, it goes beyond exempting small business generators and transporters, to exempt owners and operators of hazardous waste sites. We address these issues in turn.

The incremental expansion of this exemption over the course of this Congress prompted Senator Baucus to observe at markup that we are approaching the point that the exemption is swallowing the rule. A brief chronology illustrates the point:

In the 103d Congress, S.1834 did not have a small business exemption per se. Instead, it provided liability relief to small business generators and transporters through a variety of other liability exemptions and limitations, such as: exemptions for de minimis contributors of hazardous waste and small business contributors of municipal solid waste; and expedited settlements for de minimis amounts of waste, for PRPs whose ability to pay is limited, and for small business.

During the negotiations in the 104th Congress, we and EPA proposed an exemption for small business generators with fewer than 25 employees and less than \$2 million in gross annual revenues. As Administrator Browner explained in testimony before this Committee, the small business exemption is intended to serve as a

proxy for ability to pay. Since evaluation of the ability of small businesses to pay is resource-intensive, and generally small businesses are small contributors and have a limited ability to pay, the exemption enhances efficiency and reduces transaction costs by serving as a presumptive “inability to pay” exemption.

In S. 8, as introduced at the beginning of the 105th Congress, the small business exemption applied to small businesses that employed on average fewer than 30 employees during the taxable year, or reported \$3 million or less in annual gross revenues. The use of “or” rather than “and” significantly increased the number of businesses covered by the exemption. Then, a revised Mark released in February of 1998 increased the employee cutoff to 50, and at markup 50 employees was further increased to 75 employees.

No showing has been made, nor evidence offered, to demonstrate any need for further expanding the scope of the exemption by increasing the employee threshold. When a representative of the National Federation of Independent Businesses (NFIB) testified on S. 8 in September of 1997, she did not suggest that there was any problem with the employee threshold, which at that time was only 30. Nonetheless, S. 8 has since more than doubled that number. According to NFIB, the vast majority of small businesses have fewer than 50 employees: of the 6 million businesses in the United States, 94 percent employ fewer than 50 persons, and almost 90 percent employ fewer than 20. Moreover, even among PRPs with fewer than 50 employees, many have annual gross revenues well in excess of \$3 million. Increasing the employee cutoff to 75 would only increase the number of exempt businesses that are fully capable of contributing toward cleanup, and who as a policy matter should be required to contribute toward remediating conditions that they helped create.

We also oppose exempting PRPs who own or operate hazardous waste sites. These are parties that exercise control over the property, and in many cases either caused the problem or are current owners that paid a reduced purchase price to a seller who caused the problem. Yet, they would be allowed to benefit from an increase in their property value as a result of a government financed cleanup. Further, if they are unable to pay, they would receive the benefit of the expedited settlement provisions for “inability to pay” settlements. If, however, they can afford to pay, then exempting them from responsibility to clean up their own property constitutes another imprudent use of the Fund.

Some of the worst Superfund sites have been owned or operated by small businesses. For example, the Lipari landfill, which was number one on the NPL, was operated by a sole proprietor, Nick Lipari, who permitted industrial customers to back their trucks up to a hole on his property and dump millions of gallons of toxic liquids into the ground. Later he cooperated with the government and contributed over \$1 million toward the cleanup.

B. Mandatory Allocations and Orphan Funding at Owner/Operator and Federal Facilities. Under S. 8, owner/operator sites are within the universe of facilities at which allocations and orphan funding are mandatory, so long as certain minimal conditions are met: that response costs to be incurred after enactment will exceed

\$1 million; and there must be 2 or more PRPs (which may include one that is exempt).

So-called “owner/operator” sites are sites where all contamination was caused by the current and former owners and operators of the facility. No contamination was contributed by off-site generators or transporters. Many owner/operator sites constitute “chain of title” sites, where a series of different, though often related, parties have owned the facility, and some or all of them have contributed to the contamination over time. Title to the site has passed from one owner to another over the years. Advocates of mandatory allocations and orphan funding for this type of owner/operator sites argue that the taxpayers should compensate current owners for the “shares” of prior owners that are now defunct or unable to pay.

We believe there are strong policy reasons against mandating allocations, and provision of orphan share funding, at owner/operator sites. First, owner/operator sites are not the type at which allocations are necessarily needed or suited. Typically, they have smaller numbers of PRPs than do multi-party generator/transporter sites. Allocations are a valuable settlement tool at the sites with large numbers of PRPs, such as co-disposal landfills. Due to the large number of parties, transaction costs for litigation are particularly high. Owner/operator sites generally have fewer PRPs, so the potential savings on transaction costs from an allocation are more limited.

The types of issues raised are distinguishable as well. Generator/transporter sites usually pose issues which to a large extent are factual, often focusing principally on the volume and toxicity of waste each PRP contributed to the site. By contrast, owner/operator sites often pose issues that are more legal in nature, such as whether the current owner, a successor, is legally responsible for the acts of a related company that is its predecessor, the prior owner. Requiring mandatory allocations and orphan funding at these sites will force highly complex legal issues into a process not best suited to their resolution.

In addition, it is not unfair to hold property owners responsible for conditions on their property, subject to the innocent landowner defense. Current owners who acquired the site after the dumping ceased, and did not know of the contamination despite exercising due diligence, already have a defense to liability under the “innocent landowner” provision of Section 107(b)(3) of CERCLA. Such parties need no mandatory orphan funding because they have no liability to begin with.

That leaves owners who acquired the site with actual or constructive knowledge of contamination, or who failed to exercise due diligence to ascertain site conditions. It is fair to require such owners to take full responsibility for hazardous conditions on that property. Common law routinely imposes such responsibility on current owners. For example, the current owner of a decrepit apartment building is responsible for dangerous conditions such as broken stairs, even if the hazard existed before the current owner bought the building. The taxpayers are not forced to provide “orphan funding” for repairs if the prior owner is defunct. In addition, the purchase price may well have been reduced to reflect the contamina-

tion. Use of Fund money to address those conditions would improve the value of the property and give a windfall to the current owner.

At many chain of title sites, title has passed by means of a transactions among affiliated or related entities. In these cases, the current owner is often legally responsible for the liabilities of the defunct prior owner under one or more of several complex legal principles of successor liability such as de facto merger, assumption of liability, or "substantial continuity." In such cases, a defunct prior owner's liability has legally passed to a subsequent owner, or "successor." It is inappropriate to invite current owners to attempt to transfer their legal successor liability for their predecessors to the taxpayers through the allocation process.

The National Association of Attorneys General expressed their opposition to mandating allocations at owner/operator sites. They stated: "In our experience, these sites do not present the problems of factual issues that warrant findings by an allocator. They present only legal issues that are best left to the courts, generally through motion practice. To require allocation will delay resolution of these matters, and significantly increase, not decrease, their cost."

Mandatory orphan funding at owner/operator sites, which constitute approximately 50 percent of the sites on the NPL, including some that cost in the hundreds of millions of dollars to clean up, could have a major financial impact on the Fund. That is not to say that orphan funding will never be warranted at an owner/operator site. It may. But orphan funding should not be broadly mandated for this category of sites. They could remain eligible for permissive allocations. That way, in truly compelling cases that would not create a windfall for the current owner, orphan funding may be offered, at the discretion of and in amounts determined by the Administrator.¹⁸

The Substitute excludes owner/operator sites from the definition of mandatory allocation facilities, but leaves them eligible for allocations and orphan funding at the discretion of the Administrator ("permissive allocation"). Mandatory allocation and orphan funding at these sites would not be an appropriate use of the Fund.

We also oppose mandatory allocation and orphan funding at Federal facilities. Among other reasons, section 111(e)(3) of CERCLA bars the use of Superfund money for remedial activities at Federal facilities. In addition, Federal facilities are similar to owner/operator sites in that generally they involve a relatively small number of PRPs. Hence, like owner/operator sites, potential resources required to conduct an allocation may outweigh any reduction in transaction costs that could be realized from mandatory allocations. And, often when the United States brings claims regarding Federal facilities, those claims are in the nature of contribution claims. As noted earlier, under section 113(f)(1) of CERCLA, parties in contribution actions are not jointly and severally liable.

B. Recycling exemption. We supported the recycling provisions in the consensus bill in the 103d Congress. And we supported the bill

¹⁸ Under current law, EPA sometimes makes compromises at owner/operator sites to reflect fairness and account for the contribution of parties that are now defunct. In addition, owners and operators at these sites also have some protection through provisions for ability to pay settlements, where conditions warrant.

introduced by Senator Warner in the 104th Congress, S. 607, which was in most respects identical to the recycling provisions in the Superfund bill from the 103d. We continue to support an approach such as in those two proposals, as evidenced by the recycling provision in the Substitute.

We are concerned with S. 8's departure from these proposals. First, the momentum that has held together the agreement of the 103d Congress is lost with the new proposal. A broad range of interested parties reached agreement in connection with the recycling provisions in S.1834 in the 103d Congress, and that group has vigorously attempted to preserve that agreement, notwithstanding the fact that much of the rest of S. 1834 has since been revisited and revised. These efforts seem to reflect not that the agreement is necessarily perfect from the standpoint of any one interest, but that reopening the agreement in any way risks losing the broad based support. We are concerned that without the momentum behind the agreement and the Warner bill, amendments will take this provision even further from the original purpose of a recycling provision than has S. 8. More specifically, our primary concerns with S. 8's recycling provisions are these:

First, the exemption has been enlarged to encompass waste other than post-consumer use waste. The original goal of the recycling proposals was to avoid penalizing post-consumer use recycling efforts. S. 8 would expand the liability exemption to cover entities that generate and transport byproducts and wastes in the course of certain traditional manufacturing activities.

For example, S. 8 exempts generators and transporters of copper and copper alloy byproducts as "scrap metal recyclers." S. 8 defines "scrap metal" to include byproducts of copper and copper-based alloy production processes, and removes a previously proposed requirement that scrap metal cannot be "melted." "Scrap metals" under this bill appear to be aimed at covering smelter wastes, as long as they are "sold" to someone. For example, the exemption could subsume copper smelting sites where copper smelting slags were sold as fill. At some NPL sites, smelting slags have been sold to companies that have broken the slags into pieces and distributed them as "fill." Heavy metals contamination has resulted. If this language is enacted, smelters could argue that their wastes qualify as "recyclable scrap metal," and they would be exempt from liability as generators and transporters.

S. 8 also contains an exemption for "toll processing" of batteries. Under this provision, PRPs that normally might recycle batteries themselves (and thus be liable for any contamination as owners and operators) are permitted to evade liability as "generators" of waste by subcontracting the recycling off-site, while they nonetheless keep the valuable components of the batteries that are recovered through the recycling process. This will create poor waste handling incentives and undermine environmental protection.

We also are concerned that S. 8 departs from the agreement reached in the 103d Congress insofar as it fails to provide a heightened standard of care for persons seeking the exemption for post-enactment recycling transactions. Lastly, we are very concerned that this exemption adds yet another inappropriate burden on the Superfund Trust Fund. For example, at NPL sites the Superfund

would be responsible for paying the share of pre-enactment cleanup costs attributable to a smelter that is exempted as a scrap metal recycler.

C. Pre-Emption of State Laws on Liability of Response Action Contractors. Our principal concern with S. 8's provision concerning response action contractors is its preemption of State negligence law. Specifically, S. 8 provides that the negligence standard under section 119 of CERCLA applies in any lawsuit against a response action contractor not only under CERCLA, but also under State law, unless a State enacts a statute that establishes a standard for liability of response action contractors.

We believe that, for purposes of CERCLA, response action contractors should be subject to liability only in limited circumstances. But we also believe that States should be able to make their own decisions about the liability of response action contractors under their own State hazardous waste cleanup and tort laws. Moreover, we see no reason why a State legislature should have to pass a statute specifically addressing the liability of response action contractors in order to avoid Federal preemption. A State may be perfectly happy with its common law, or believe that the matter is best addressed generally rather than by a law specifically addressing the liability of response action contractors. As Stated by State Attorneys General in their letter of March 25, 1998, "[liability of] response action contractors . . . is another area best left to the States."

D. EPA May Not Reject a Settlement Offer on Grounds that it Would Impair the Ability of EPA to Conduct Cleanups at Other Sites. S. 8 limits the grounds on which the United States may reject an allocator's report to two: (1) that it does not provide a basis for settlement that is fair, reasonable and consistent with CERCLA; or (2) that the allocation process was directly and substantially affected by bias, procedural error, fraud, or unlawful conduct (section 137(1)). Absent one of these conditions, EPA is required to accept a settlement offer based on the share allocated to a PRP in the allocator's report, so long as the PRP agrees to other terms and conditions specified in the bill (section 137(n)).

As one of those conditions EPA may require that a PRP conduct a response action. But, in addition to any orphan share, EPA would be required to reimburse the PRP for estimated shares attributed to nonsettling parties. So, for example, if one PRP whose allocated share is 5 percent agrees to conduct the cleanup and to other conditions, then EPA would be required to settle with the PRP and, within strict time frames, reimburse the PRP for orphan share and costs of nonsettling PRPs. In this example, assuming there was no orphan share, EPA would have to reimburse the PRP for 95 percent of the cleanup costs. These payments from the Fund must be made periodically during the course of the response action, and not later than 120 days after completion of construction of a remedy that takes less than a year to construct.

This means that EPA must pay shares attributable to non-exempt, viable, liable nonsettlers even if doing so would adversely impact the Agency's ability to respond at other sites. S. 8 thereby creates the possibility that EPA would be required to reimburse settling PRPs for shares attributable to parties who refuse to set-

tle, to the detriment of another site at which those resources are needed for cleanup. In view of all of the other costs that S. 8 shifts to the Fund, it is quite possible that payment of a significant recalcitrant share could impair EPA's ability to fulfill its primary mission, to clean up hazardous waste sites.

The Substitute protects against this situation by providing that the United States may reject an allocation report if settlement based on the report would adversely impact the Agency's ability to take action at other sites. PRPs would still have the option of settling if they paid the "orphan share" and assumed the responsibility for recovering nonsettlers' shares in a contribution action. Failure to include such a safety valve unnecessarily risks depleting the Fund and places reimbursement of settling PRPs ahead of protecting human health and the environment.

BROWNFIELDS

Introduction

We have two principal sets of concerns with S. 8's Brownfields title. First, changes from previous legislative proposals for funding brownfields assessment and cleanup would significantly reduce the role of municipalities, unnecessarily increase the complexity of funding mechanisms, and fail to ensure adequate resources for assessment of brownfields. On the first day of this Congress in January of 1997, we introduced brownfields legislation, S. 18, to promote brownfields assessment and cleanup. Minority Leader Daschle designated S.18 one of the Senate Democrats' top legislative priorities. We fear that S. 8 would adversely impact our long-standing efforts to return brownfields to productive use.

Second, we believe that S. 8's voluntary cleanup provisions, by imposing significant constraints on EPA's enforcement authority without corresponding assurances of the adequacy of cleanups under State programs, would place our communities at risk.

The Bill Would Adversely Affect the Current Program for Providing Brownfields Assistance

At the outset, we note our dismay with the fundamental changes that S. 8 would make to EPA's ongoing program for the assessment and cleanup of contamination at brownfields sites. We are not aware of any need or justification for these changes. None was offered at the multiple Superfund hearings held before this Committee, including one devoted entirely to brownfields and voluntary cleanup programs. In fact, by virtually all accounts, the program has been quite successful. EPA's site assessment grants have already yielded more than 2000 jobs (either cleanup jobs, or jobs resulting from brownfields redevelopment), and nearly \$1 billion for cleanup and redevelopment.¹⁹ It is too soon to judge EPA's Revolving Loan Fund (RLF) grant program, which began in 1997. However, already there have been successes. For example, the City of

¹⁹For example, as a result of a \$250,000 site assessment grant, the city of Dallas leveraged nearly \$53 million in public and private funding for cleanup and redevelopment of a former landfill, industrial facility, and vacant lots. In St. Louis, the 12-block Dr. Martin Luther King Business Park, which consisted of idle industrial facilities and a vacant brewery and hotel, has been cleaned up and redeveloped to create businesses expected to yield 2000-3000 new jobs.

Dallas just voted to match EPA's \$350,000 RLF capitalization grant.

It is unnecessary and inefficient to start over with a host of new and untested procedures for a program that has a very good track record and concerning which there has been broad-based bipartisan support. Instead, we should build on the program's success.²⁰

More specifically, we have three principal concerns with the funding provisions of S. 8. First, it significantly limits the role of municipalities in any loan program. Under EPA's pilot program and under prior versions of S. 8, both local governments and States were eligible to receive capitalization grants for RLF programs, from which they would award loans for cleanup of brownfield sites. This would change under the bill: States would have first rights to brownfields capitalization grants. Cities could receive these grants only if the State declined, and even then only cities with populations over 1 million are eligible.

We are concerned with the requirement that Federal loans and grants flow through States (in S. 8's State Loan Fund Provision), making them intermediaries between EPA and municipalities. We have heard no testimony indicating that States seek to displace local governments as the chief agents of brownfields redevelopment. States may apply to EPA for capitalization grants today under the pilot program, but the majority of applications have been submitted by, and awards made to, cities, towns, or local redevelopment associations. Indeed, a recent report by the United States Conference of Mayors indicates that cities have eagerly seized brownfields assistance opportunities, while States have shown little interest. A recent letter from the Mayors to this Committee emphasizes their bipartisan support for brownfields grant provisions that "ensure much needed resources are available *directly* to the communities which are ready to tackle their brownfields inventories aggressively." (emphasis theirs).

Second, we are concerned that there is no mechanism to ensure that site assessments will be adequately funded. There is no set-aside for assessment funding, nor any assurance that any assessment funding will be available through grants rather than loans. By collapsing the two grant programs into one, without any set-aside for assessment grants, funding for cleanup could consume too many of the limited Federal dollars, and leave too little for site assessments, the critical first step in initiating brownfields cleanup and redevelopment activities. For a relatively small investment, an assessment grant potentially opens the door to redevelopment: often assessments reveal relatively light or no contamination, and cleanup and redevelopment can proceed. On the other hand, if an assessment reveals conditions that are not suitable for cleanup under a brownfields program or for redevelopment, assessment costs may not be recouped. Providing grants for assessments creates a heightened incentive to conduct an assessment; and, since

²⁰Until the Chairman's Mark to S. 8, legislative proposals on brownfields (including S. 8 and S. 18) had very similar brownfields funding provisions, which would have built upon EPA's existing procedures. They contained provisions that authorized EPA's establishment of two programs with which to award grants to States, cities, towns, or Tribes: one to perform site assessments; and one to capitalize RLFs to make cleanup loans. They also would have codified criteria, similar to those EPA uses today, as the basis for EPA decisions on grant awards.

assessments are less expensive than cleanup, Federal money will go further if a minimum amount is reserved for assessments.

Finally, we have serious concerns with the new requirement for development of a distribution formula pursuant to a negotiated rule-making. In contrast to the State revolving funds under the Clean Water and Safe Drinking Water Acts, both of which rely on formulas, the brownfields loan fund will involve relatively small sums of money. A requirement to develop a formula after a negotiated rule-making introduces unnecessary complexity and potential delay. Further, S. 8 would require that the formula be updated at least every 2 years. The amount of money involved does not justify so resource intensive a funding mechanism, particularly considering the risk of delay. Moreover, there is no need for a formula. A combination of criteria and statutorily specified caps (contemplated in all previous legislative proposals) could ensure a fair distribution of scarce Federal dollars.

The Conference of Mayors has testified that "redevelopment of brownfields is our top national priority." Communities, cities and others are anxious to move forward with brownfields cleanup and redevelopment while the economy is strong, and before expiration at the end of the year 2000 of the law that makes brownfields cleanup costs tax deductible. Administrator Browner highlighted S. 8's new State Loan Fund requirement as one of her significant concerns with S. 8. We are concerned that S. 8 would slow the momentum.

The Bill's Voluntary Cleanup Provisions Would Bar EPA Action Without Adequate Safeguards

We support measures to promote the development and enhancement of State voluntary cleanup programs, in order to promote cleanup of the nation's hundreds of thousands of lower risk sites unlikely to warrant EPA attention under CERCLA.

Our concerns with S. 8 relate to a narrower but critical issue: if a site is addressed under a State program, to what extent and under what circumstances is it appropriate to limit EPA's authority under Superfund? Any resolution of this question must take into consideration three factors: (1) the assurances of the adequacy of a State program that should be required as a precondition to restricting EPA authority; (2) the nature of any restrictions and the circumstances under which those restrictions should be lifted; and (3) the sites that should be possible candidates for restrictions. The manner in which S. 8 answers these questions would severely constrain Federal authority without sufficient assurances that sites would be addressed in a manner that protects human health and the environment.

Proponents of this provision in S. 8 rely largely on concerns that the fear of CERCLA liability may deter property transfers and redevelopment. We share those concerns, but believe that they must be considered in perspective and addressed in a more balanced and protective manner.

First, in many instances those concerns would be addressed by a prospective purchaser exemption, which we support and which is in our Substitute. And, in most respects, we agree with the prospective purchaser exemption in S. 8. Under that provision, a pur-

chaser of contaminated property is exempt, provided that specified conditions are met.

Second, the desire to provide developers certainty with respect to potential CERCLA liability must be balanced against the needs of municipalities and community members for certainty that someone will be there to protect them from threats associated with releases of toxic waste. Representatives of local governments have testified that they are concerned that they will bear the brunt of any inadequate site assessment or cleanup. On those relatively rare occasions when a site that is being or has been handled under a State program does require EPA intervention, citizens need to know that obstacles will not stand in the way of their protection. This point was underscored by the Environmental Justice Resource Center and other local community groups who wrote: "Our communities know from painful experience that some States have weak programs; even States with good programs need a Federal back-stop."

Third, potential CERCLA liability may be an important reason that some real estate transactions do not occur, but usually it is not the only reason. Other possible deterrents to redevelopment include lack of infrastructure or a high crime rate. In other words, the problems surrounding brownfields are complex, and cannot be resolved by a change to the CERCLA liability scheme, no matter how extreme. Therefore, changes to CERCLA should not be based on the assumption that the greater the restriction on EPA authority, the more we are promoting brownfields cleanup and redevelopment. The standard for evaluating any change should be whether it will ensure protection of human health and the environment. We hope and believe that changes to CERCLA could be made that would both promote cleanups under State programs and meet this standard. Unfortunately, S. 8 does not.

A. Limitations on EPA authority. New section 129(a) provides that, subject to limited exceptions, "neither the President nor any other person may use any authority under this Act to take an enforcement action against any person regarding any matter that is within the scope of a response action that is being conducted or has been completed under State law." The bill goes on to attempt to define the limited circumstances when this bar could be lifted. We have serious concerns with the scope of the bar and the inadequacy of the exceptions. We address them in turn below.

The bar on enforcement clearly would preclude any action by EPA to require PRPs to conduct a cleanup or for recovery of costs spent by the United States in conducting a cleanup. In addition, it potentially could impede EPA's ability, even using Fund money, to respond to conditions that present an imminent and substantial endangerment to public health or the environment. For example, if EPA requires access to property to assess conditions or conduct a cleanup, and a PRP refuses to comply with a request for access, S. 8 would preclude an action to compel site access. If EPA cannot get onto a site (because it cannot get access), it cannot perform a response. In addition, if the Federal program is underfunded, there may be no one to respond, if EPA cannot order performance.²¹

²¹We also oppose S.8's bar against enforcement by persons other than EPA, which is even broader, since the bill does not provide for lifting the bar on their enforcement actions under any circumstances.

The scope of the bar also is unclear. An action could not be taken regarding any matter “within the scope of a response action” under State law. Particularly in States that do not require the preparation and approval of cleanup plans before cleanup may begin, it may be difficult to know what is within the scope of the response.

The exceptions to the bar are too narrow and burdensome, and do not allow EPA to ensure the protection of public health and the environment. The first would lift the bar at a State’s request. We hope and expect that in most circumstances a State would request EPA involvement where it was needed. But experience shows that that does not always occur, and citizens should not be put at risk due to the absence of a request, for whatever reason. The second would lift the bar if contamination crossed State lines, a condition that may occur infrequently. The third applies after a cleanup, and requires that EPA determine both that the State is unwilling or unable to take appropriate action after notice and an opportunity to cure, and that there is a substantial risk requiring further remediation to protect human health or the environment because of unknown conditions, fraud, remedy failure, or a change in land use giving rise to a clear threat of exposure. In addition to introducing uncertainty because of new and untested standards such as “substantial risk” and “clear threat of exposure,” these provisions may unnecessarily place people at risk by precluding intervention until conditions have escalated significantly.

The fourth condition would lift the enforcement bar if EPA determines that a State is unwilling or unable to take appropriate action and provides the State notice and an opportunity to cure and determines that there is a “public health or environmental emergency under section 104(a)(4)” of existing law. This standard, too, is untested. We are not aware of any judicial interpretation of the standard, and, according to EPA, it has never been invoked.

By imposing a bar on EPA’s ability to act, and extremely narrow conditions for overcoming that bar, S. 8 creates a heightened standard for EPA action. Other Federal environmental laws allow EPA to step in and “overfile” using the same standard it would have used, had it taken the enforcement action to begin with. We should not risk public health while we debate whether a hazardous substance release has risen to a new, undefined, level of “emergency” that warrants EPA action. As the National Association of Attorneys General wrote, changing the current standard from “imminent and substantial endangerment” to “emergency” will “lead to new litigation or diversion of resources from what everyone professes to be the goal of this statute, which is faster, more efficient cleanups without the involvement of litigation.” A letter from the Environmental Justice Resource Center echos these sentiments, and expresses concerns that the new standards will cause confusion and “delay action in the face of health threats.”

Proponents of the new limitations on EPA reject the current standard of imminent and substantial endangerment in this context on grounds that it can be too easily met. Some base this conclusion on court holdings under the current standard. But that conclusion ignores a key distinction between the situation in those cases and the situation here: the case law on “imminent and substantial endangerment” interprets the standard as the basis for

EPA's taking action *before* a cleanup has commenced. It is not surprising that the standard would be met before any cleanup has taken place. But in the case of voluntary cleanups, the issue of EPA intervention generally would arise after a cleanup has taken place. It should be significantly more difficult to meet this standard *after* a cleanup. If conditions do present an imminent and substantial endangerment after a cleanup, then the law should not impede EPA's ability to take or require a response.²²

Finally, experience shows that cleanup and redevelopment of brownfields is occurring all over the country notwithstanding EPA's authority to step in under the "imminent and substantial" standard in current law. And we are not hearing any complaints that EPA has stepped in at sites being addressed under State programs. In addition, we have heard from developers and municipalities alike that Memoranda of Agreement between EPA and certain States, under which EPA states its general intent not to take response actions at sites being addressed under approved programs, have encouraged cleanup of brownfields in those States.²³ Significantly, those MOA's generally include an exception to this general intent not to act fashioned on the imminent and substantial endangerment standard. Lorrie Louder, on behalf of the National Association of Local Government Environmental Professionals, testified that NALGEP would support a reopener based on an imminent and substantial endangerment standard. And Richard Gimello, the Deputy Commissioner of the New Jersey Department of Environmental Protection, testified that "in the event EPA discovers an imminent and substantial threat to human health and the environment at a site, it should be able to continue using its emergency removal authority."

B. Minimum Criteria. S. 8 contains no minimum standards to ensure that a State cleanup program will protect public health and the environment. This is extremely troubling, since the only criterion that has to be met to trigger the limitations on EPA authority is that a person is taking or has taken a response action under State law. Under S. 8, what that law does or does not require is of no consequence. Again, the question is not whether States can operate their own cleanup programs. They can, and do, without any EPA evaluation, approval or oversight. The question is whether actions under State programs should bar EPA's authority to respond, even if there is an imminent and substantial endangerment. This authority is central to CERCLA's purpose. Even assuming some limitation were acceptable, there must be some assurances that the State program taking its place meets minimum standards.²⁴

²²One such instance occurred where the State of New Jersey gave a clean bill of health at a warehouse cleaned up under a State voluntary program. Later, after the building had been converted into condominiums, the new owners discovered that the building was heavily contaminated with mercury. The city and State asked EPA to assume the lead in evacuating the residents (some of whom tested positive for mercury poisoning) and remediating the problem.

²³An interim guidance that EPA issued in November, 1996, applied to MOAs that EPA entered into after that date. EPA then issued a final draft guidance in September, 1997, but withdrew this due to a lack of consensus on a range of issues among a variety of persons who submitted comments on the draft guidance. These comments included criticism of EPA's proposed new method for distinguishing low risk from high risk sites. EPA's November, 1996 interim guidance remains intact.

²⁴The absence of minimum standards is unprecedented in the analogous situation, where Federal environmental laws allow for State implementation: every one does so only on the condition that EPA find that the State program meets minimum criteria.

Ms. Louder testified in support of requiring that State voluntary cleanup programs meet minimum standards as a prerequisite to placing any limits on EPA action: “States vary widely with their technical expertise, staffing, statutory authority and commitment necessary to ensure that brownfields cleanups are adequately protective of public health and the environment.”²⁵

We recognize the importance of ensuring that any Federal criteria strike an appropriate balance between setting a protective baseline and leaving States flexibility to shape their own laws. Amendments offered at markup by Senators Baucus, Lautenberg and Moynihan struck that balance. So does our Substitute. They require such things as adequate site assessments, protection of human health and the environment, a mechanism for State approval of a cleanup plan and certification of completion, meaningful opportunities for public participation, and adequate oversight, enforcement authorities, and resources.

C. Site Eligibility. The concerns discussed above are compounded by the fact that under S. 8, EPA action may be barred even at high risk sites. For example, the enforcement bar would apply at all of the approximately 14,000 sites remaining on CERCLIS, including approximately 3,000 that are known to pose health and environmental risks serious enough to warrant listing on the NPL (the other approximately 11,000 have not been evaluated or have been deemed low-risk); and at all sites added to CERCLIS in the future, unless EPA lists the site on its NPL within 2 years.²⁶

It is inappropriate to constrain EPA authority at high-risk sites, particularly when they have been addressed through programs that were designed to foster expedited cleanups of lightly contaminated sites and may be inadequate to address high risk sites. A representative of NALGEP testified that constraints on EPA authority should be confined only to low-risk sites. Mayor Chris Bollwage also testified that the U.S. Conference of Mayors seeks a legislative “bright line distinction” between Superfund-caliber and brownfield sites.

A combination of baseline criteria, fewer restrictions on EPA authority, and a more effective method to ensure that EPA authority will not be compromised at high risk sites could help provide certainty to developers, municipalities and communities alike. However, as it stands now, the bill could seriously weaken EPA’s ability to protect public health and the environment by constraining EPA’s authority at high risk sites, failing to require that programs meet minimum standards as a prerequisite to any bar on Federal enforcement authority, and imposing inappropriate restrictions on EPA action and an inadequate mechanism to lift the enforcement bar.

²⁵ A 1997 General Accounting Office report indicates that of the 17 voluntary cleanup programs studied, some allowed for less comprehensive cleanups or cleanups that did not permanently treat waste but relied upon restricting site use; all of the programs reduced the requirements they imposed on voluntary cleanups to cut time and costs; three did not require long-term monitoring of nonpermanent cleanups or oversight; and eight required no public participation in the cleanup process other than filing a notice in a local newspaper.

²⁶ We are also concerned about the large number of sites that either have not been evaluated, or have been evaluated but for which listing decisions have not been made. But there is no bar today on the cleanup of these sites under State programs. We hope that the combined efforts by EPA and States will speed the evaluation and cleanup of these sites.

Introduction

The hazardous waste sites addressed in this title, those on the NPL, are among the most hazardous in the Nation. We support a responsible transfer of CERCLA cleanup authority with respect to these sites to qualified States and Tribes. The challenge is to fashion legislation that accounts for the significant variability among States, and within a given State over time, with respect to their capability, authority and resources to assume primary responsibility at NPL sites. Any statutory division of labor must maintain the checks and balances common to other environmental laws, which help to ensure that statutory requirements will be fulfilled by the States, that Federal authorities will be preserved as a backstop, and that the purposes of CERCLA will be achieved.

But the approach in S. 8 to transferring authority to States omits fundamental safeguards to ensure that protection of human health and the environment is not compromised. This is due to a combination of factors, including the inadequacy of criteria against which State capabilities would be evaluated and transfers approved; the possibility of State program approval without any review, under the expedited approval process; and extreme limitations on the authority of EPA to take action at sites that are under a State program.²⁷ In addition, we fear that this title's failure to ensure conservation of the Superfund Trust Fund could result in there being insufficient resources to address toxic waste sites at which there are no viable PRPs. And, the bill fails to include amendments to current law necessary to address matters that involve Tribes in various aspects of the Superfund program.

The Bill Fails to Include Adequate Criteria for Approval of State Programs

Federal legislation must contain standards against which a State program may be measured, to ensure that any increase in a State's authority to implement the Federal program will be commensurate with the State's abilities, experience, authorities and resources. S. 8 fundamentally departs from the methods we have traditionally relied on to sanction transfer of other environmental programs, such as the Clean Water Act and Safe Drinking Water Act. Many of the considerations that are relevant to transfers of responsibility under those laws are equally applicable here: we should build on the experience under these programs.²⁸ S. 8's criteria are inadequate to distinguish between States that have the capability to assume a greater role under the Superfund program and those that do not.

First, S. 8 provides that a State program must be implemented in a manner that is protective of public health and the environment. Although this standard is a familiar one, it is not sufficiently

²⁷ Several of our concerns with the State title also apply to the Federal Facilities title. Others that were discussed earlier in our discussion of the voluntary cleanup provisions of Title I are equally applicable here.

²⁸ That is not to say that criteria for approval of State Superfund programs should be identical to criteria for State approval under other environmental laws. A major difference arises from the remedial nature of Superfund, and the existence of the Superfund Trust Fund. As discussed later, this gives rise to additional considerations that are unique to Superfund.

specific to be useful in this context. Other environmental laws contain Federal floors—minimum Federal standards to ensure that citizens in all States receive at least a baseline level of protection. Under other laws, a State program must meet these minimum standards to be eligible for assumption of authority under Federal law.²⁹ The standard in S. 8 is too general to ensure a baseline level of protection, and it lacks the specificity necessary to serve as an objective standard against which EPA, a court, or the public may evaluate the adequacy of a State program. Moreover, it does not provide States adequate notice as to the prerequisites for transfer of Federal authority.

In addition, this criterion stops short of requiring that a State program have requirements that are protective: it requires only that they be implemented in a protective manner, which could be considerably more difficult for EPA to evaluate. This is a projection about the future, but does not guide an initial determination about whether to approve a program.

Second, S. 8 provides that for a State program to be authorized, it must have procedures to ensure public notice and, “as appropriate,” opportunity for public comment on cleanup plans, consistent with section 117 of CERCLA. This is inadequate to ensure that States whose applications are approved will provide for public involvement as required under section 117 of CERCLA, or that the public will have opportunities to participate in decisions about State cleanups of NPL sites in their communities to the same extent as they would if the cleanup were being handled by EPA. As Karen Florini testified on behalf of the Environmental Defense Fund, the “as appropriate” language is “a gigantic loophole” through which one could drive “the proverbial mack truck.”

Third, S. 8 requires that a State have adequate financial and personnel resources, organization, and expertise to implement a hazardous substance response program. Notably absent is a requirement that the State have comparable experience. S. 1834, for example, required that the State demonstrate experience in adequately performing or ensuring adequate performance of similar response actions.

In addition, the standard is not adequate to ensure that a State will have adequate resources over the long term. State capabilities vary over time for reasons that may be beyond their control. We have been told of several States in which resources for hazardous waste cleanup programs have been significantly cut over the past several years. Similarly, many States have made significant changes to their laws governing hazardous waste cleanup, which could impact the States’ continued capacity to carry out the Superfund program. But, the bill does not require that the State demonstrate periodically that it continues to have adequate resources or that new laws continue to meet the criteria for approval. Periodic demonstration that a State continues to have necessary resources and to meet other criteria is particularly important in view of the limitations on EPA authority under S. 8: a State’s capacity

²⁹For example, the Safe Drinking Water Act requires that State regulations be “no less stringent” than EPA’s regulations.

to run a cleanup program can deteriorate and the bars on EPA authority may eliminate any Federal backstop.³⁰

These deficiencies in the approval process are compounded by additional provisions in the bill. First, S. 8 bars EPA from imposing any terms or conditions on its approval of a State application for transfer of authority. This prohibition could prevent EPA from approving some but not all of the responsibility that a State seeks in its application for authorization, where the State has the capacity to manage some but not all of the activities and site conditions it seeks to assume. Unlike delegation, where S. 8 would allow EPA to approve all or part of an application,³¹ it appears that for authorization EPA must make an all or nothing determination on an application. It could also result in EPA disapproving an application despite its determination that the application would be approvable if a condition were met, such as requiring that a State adopt a regulation that has only been proposed by the State. In either event, the State or the public could sue to challenge EPA's determination. It would seem to be in the interest of EPA, the States, and the public that EPA have flexibility to partially approve an application, so that a State may assume at least a portion of the program, or to add needed conditions.

In addition, the bill establishes an unnecessary and cumbersome process for EPA to obtain additional information to make a determination on a State application. EPA is required to approve or disapprove an application within 120 or 180 days. Frequently EPA requires additional information before it can make a determination on a State application. If a State does not agree to an extension of time (in view of any deficiencies in the application), then EPA has to either disapprove the application, which the State can challenge in Court, or EPA can delay making a determination. In the later case, the State can sue EPA to compel EPA's determination. It is only once in court that EPA can ask the court to grant a 90-day extension to allow EPA to consider additional information. This situation could be handled in a far more efficient manner, without the litigation that this provision in S. 8 could promote.

The inadequacy of the process for granting State authority under S. 8 is most pronounced in the bill's provisions for "expedited" approval of at least six States that meet yet to be promulgated criteria. Under this program, a State program may be approved without ever having been reviewed by EPA or the public: if EPA fails to make a determination on a State application within the 180 day deadline, then the program is "deemed" approved. The bill also would bar judicial review of an "expedited" authorization. Ms. Subra, a technical advisor to several community groups concerning hazardous waste sites in their communities, points out that this approach could result in unqualified States being transferred responsibility. She testified: "if EPA gets overburdened and States apply, whether or not they are adequate, whether they have the

³⁰ Although S.8 allows EPA withdrawal of a State program, this can be a dramatic measure and more than is called for under the circumstances. Moreover, withdrawal can take significant time, during which sites may go unaddressed.

³¹ S. 8 provides that EPA may approve or disapprove a State's application for delegation "regarding any or all of the facilities with respect to which a delegation of authority is requested or with respect to any or all of the authorities that are requested." By contrast, S. 8 provides only that EPA may "approve or disapprove" a State's application for authorization.

rules, whether they have the finances, under default they are going to get the program.”

The Bill Virtually Eliminates Any Federal Safety Net For Sites Addressed Under State Programs

Once a State application for authorization or delegation has been approved, S. 8 severely constrains EPA’s ability to take action at a site in the State program. In particular, it provides that a State to which responsibility is transferred shall have “sole authority” to perform the transferred authority, subject to limited exceptions.³² It specifically bars administrative and judicial enforcement actions by EPA or any other person regarding a matter that is within the scope of responsibility transferred to a State.

In taking away EPA’s ability to use its imminent and substantial endangerment authority, and injecting in its place heightened standards for EPA action, S. 8 is inconsistent with other environmental laws, which preserve EPA’s ability to take action using the same standard that would have applied absent a transfer of authority to a State.³³

There are two exceptions to S. 8’s enforcement bar.³⁴ Section 130(f)(4)(B)(i) would lift the bar on EPA enforcement at the State’s request. But we cannot condition the protection of citizens on an expectation that States will always seek intervention by EPA when needed: experience shows that, for whatever reasons, States do not always seek EPA assistance. For example, Ms. Subra testified that her State refused to propose sites for NPL listing, because it “did not want the stigma of hazardous waste sites being on a Federal list,” and that “[t]he majority of the National Priorities List sites in Louisiana were submitted to EPA by citizens groups.” We are aware of an instance in another State, where EPA has taken action at the request of county personnel dissatisfied with response actions taken by their State.

Section 130(f)(4)(B)(ii) would lift the enforcement bar if EPA determines that the State is unwilling or unable to take appropriate action and that the release constitutes a public health or environmental emergency, and EPA goes to court and obtains a declaratory judgment that the State has failed to make reasonable progress in performing a remedial action at a facility. We believe these compound conditions will seldom be met. Even if they could be met, it may be too late to protect public health and the environment. According to estimates by the Administrative Office of the U.S. Courts, it can take at least 18 months for a court to issue a declaratory judgment if a trial is required, or 13 months, if the action is resolved prior to trial, but after commencement of discovery.

Also troublesome, the bill limits EPA’s ability to use its removal authorities, which most agree EPA uses successfully. S. 8 requires

³² We note also that while S. 8 bars citizens from taking enforcement actions against persons acting under approved State programs, it provides no circumstances that would reinstate citizens’ rights to sue. Ms. Florini has testified that “[t]hese limitations are radical and unwarranted departures from prior law not only under Superfund, but indeed virtually all Federal environmental programs.”

³³ A 1995 survey by the Environmental Commissioners of States showed that between 1994 and 1995, EPA overfiled under such other environmental laws on only 15 occasions, or on approximately 0.1 percent of State actions.

³⁴ As noted in the discussion of the voluntary cleanup provisions in Title I, constraints on “enforcement” could preclude EPA from taking a response action.

that EPA provide 48 hours notice, await notice from the State whether it intends to act, then allow another reasonable period of time to give the State an opportunity to act. Only if the Administrator finds a “public health or environmental emergency under section 104(a)(4)” —again, a new standard that will likely be litigated, and an abolition of EPA’s ability to use “imminent and substantial endangerment” under section 106—may EPA act without providing notice. Again, these are untenable options. Forty-eight hours can be critical in the “removal” scenario. Further, as we noted earlier, when the public is at risk, we ought not to be litigating for the first time whether a release of hazardous substance meets the new, heightened threshold of an “emergency.”

We agree that an appropriate division of responsibility between EPA and States, which provided a greater role for States, could enhance efficiency in the cleanup of NPL sites. But we are concerned that S. 8’s method for drawing lines between State and Federal authorities strike too deeply at the Federal authorities, potentially at the expense of public health and the environment.

The Bill Lacks Adequate Safeguards to Conserve the Superfund Trust Fund

The existence of a Trust Fund raises complex issues that are not posed by transfers of Federal authority under other Federal environmental laws. S. 8 does not adequately address these issues. For example, the bill fails to provide safeguards sufficient to ensure that the Fund is conserved for use at high risk sites where there are no viable PRPs, and that the standards for access to the Fund for orphan funding are consistent across the various States.

For example, to access Trust Fund dollars to finance a response action, S. 8 requires only that a State certify that it has been unable to locate any viable PRPs, or that enforcement measures have been attempted and the remedial action would be delayed without Federal funding. These standards are not adequate to ensure that States will maximize funding from PRPs before seeking Fund dollars to finance a cleanup. We have been told of instances in which a State has concluded that there are no viable PRPs at a site, and EPA has then located viable PRPs who performed multi-million dollar cleanups. Unless there are safeguards to prevent this type of occurrence, a State that devotes little effort to obtaining a cleanup by PRPs could get more Fund money than a State that devotes the resources necessary for a thorough PRP search and cleanup negotiations. The other criterion—that enforcement measures have been attempted and the remedial action would be delayed without Federal funding—imposes only a minimal obligation on a State to pursue PRPs before looking to the Fund. EPA has greatly leveraged the resources of the Fund: approximately 70 percent of cleanups are financed or performed by PRPs. Only approximately 30 percent of cleanups are Fund-financed. This has been critical to EPA’s success in getting cleanup construction complete at more than 500 sites. Any reform to Superfund should increase, and at a minimum maintain, this significant level of PRP participation. S. 8 fails to do so.

S. 8 also fails to ensure that the Fund will not be inappropriately drawn down through orphan spending in State-run allocations. For

example, one of the criterion for transfer of authority to a State is that the “State agrees to exercise its enforcement authorities to require persons that are potentially liable under section 107(a), to the extent practicable, to perform and pay for the response actions.” This provision is inadequate to conserve the Fund. Since it requires only that a State agree to exercise its enforcement authorities to require PRPs to perform and pay for cleanups, it falls short of requiring that an authorized State either rely on section 107 of CERCLA,³⁵ or actually have and exercise enforcement authorities that require parties who are liable under CERCLA to pay for and perform cleanups. This standard would make it exceedingly difficult for EPA to evaluate whether a State meets this criterion for authorization, since the requirement only goes to how the State exercises its authority, not to the substance of any State law authority. Moreover, if an authorized State’s liability provisions are different from those under CERCLA, it seems that S. 8 may require that the State exercise its authority in a way that may be inconsistent with State law. And, the “to the extent practicable” qualifier could further weaken any requirement that an authorized State pursue parties that are PRPs under CERCLA.

Opening the Fund to a potentially large number of additional sovereigns raises many challenging issues as to how EPA, the Trustee of the Fund, may safeguard the Fund to maximize the cleanup of hazardous waste sites. Problems are compounded by the fact that, under S. 8, each State could be operating under a different liability scheme. For a transfer of Superfund authority and Fund money to States to succeed, these issues must be satisfactorily addressed.

We also are concerned that cost recovery provisions in S. 8 are inadequate to maximize recovery of Fund money from PRPs. The bill would allow the United States to bring a cost recovery action if a State notifies EPA that it does not intend to do so itself, or if it fails to do so within a reasonable time. The bill also provides that a State may retain 25 percent of any Federal funds it recovers, to provide an incentive for States to attempt to recover costs from PRPs. These provisions are deficient in several respects. First, there is not a sufficient affirmative obligation for States to bring cost recovery actions: some States may not have the resources to file these cases, or have other priorities for use of limited resources. For these States, the 25 percent bonus may not be sufficient incentive to bring an action. But the United States would not be able to recover the State costs unless the State had maintained adequate cost documentation to prove its case, and there is no obligation that a State maintain this evidence. Also problematic, there is no requirement that States use the 25 percent bonus for hazardous waste site cleanup. While creating an incentive for States to recover costs from PRPs may be appropriate, providing Fund money without limiting its use to cleanup of Superfund sites is an inappropriate use of the Fund.

³⁵The broad requirement that delegated States use State enforcement authorities potentially creates unnecessary problems, in view of the fact that today States can and sometimes do rely on Section 107 of CERCLA.

The Bill Does Not Adequately Address the Role of Tribes Under Superfund

At markup Senators Chafee and Baucus offered an amendment providing that Tribes may seek the same role and authorities as States under the State Role title. We are pleased that the amendment passed, but believe that the bill still does not adequately address the role of Tribes: further amendments to current law are necessary to expand the role of and address matters that relate to Tribes in various aspects of the Superfund program.

COMMUNITY PARTICIPATION

Introduction

At the outset, we want to emphasize the importance of maximizing community participation in the process of deciding how to clean up Superfund sites. More than 40 million Americans live within 4 miles of a Superfund site; it is their health and livelihoods that are most at stake. Deohn Ferris, of the Lawyers' Committee on Civil Rights, put it this way at one of our first Superfund reform hearings, in 1993: "Public participation is essential because it ensures that EPA is accountable to those whose health it is obligated to protect, and it is desirable because it enhances the efficiency and effectiveness of the Superfund program."

It is not only community members who believe that public participation improves the Superfund process. Industry representatives also support early and complete public participation. Robert N. Burt, Chairman of FMC Corp., testified on behalf of the Business Roundtable that:

It is the experience of many of our members that [citizen] involvement can assist in developing remedies which are truly protective of human health and the environment, while taking into account the specific concerns of communities about comparative risks of alternative remedies. More often than not, citizens are looking to return Superfund sites to some productive use where this is consistent with meeting appropriate health and environmental standards.

The bill that the Committee reported during the 103d Congress, S. 1834, contained many provisions designed to increase community participation, and was supported by a wide range of stakeholders. When S. 8 was introduced, Title III, which pertains to community participation in the Superfund decision-making process, contained only three provisions that would have increased community participation. During subsequent negotiations, several of our proposals to expand opportunities for community participation were incorporated into the bill. These significantly improved the bill. However, the reported bill still omits several important provisions that would help to ensure that citizens have meaningful opportunities to participate in decisions regarding the cleanup of hazardous waste sites in their communities.

The Bill Fails to Include Important Provisions that Would Increase Community Participation

First, S. 8 fails to ensure that there will be opportunities for public participation in the development of sampling and monitoring plans. Sampling plans are vital to any efforts to characterize the nature and extent of contamination at a site; sampling is in some respects the foundation of remedy selection, since sampling results are relied on in determining which areas need to be cleaned up. The effectiveness of a remedy is only as good as the information on which it is based: so, for example, if a highly contaminated area is never sampled, or testing is for contaminants other than those present, then it is far less likely that the remedy will address those contaminants. Citizen participation at this early and fundamental stage of Superfund planning is critical.

In addition, citizens should be ensured an opportunity to review and comment on plans for monitoring during and after implementation of the remedy. Again, the consequences of inadequate monitoring—in the wrong locations or for the wrong contaminants—are significant. And it is the community that will suffer those consequences.

One of the reasons that community involvement is critical is that residents may know things about the site that nobody else knows; after all, they live there. A representative of the American Public Health Association testified that community members “know how a site has been used in the past, who lived near the site, and who has moved away. This information is essential to the conduct of studies that help us understand both the short-term and long-term health effects associated with a hazardous waste site.” This is not merely conjecture. We are aware of sites where community members’ knowledge of companies’ historic disposal practices was instrumental in EPA’s identification of the sources of contamination.

In addition, community participation in the development of sampling plans helps community members to better understand site conditions, which will in turn enhance their ability to participate effectively in other remedy decisions. We have been told about one site where community members were concerned that an EPA contractor failed to sample white dusty material he encountered when boring a hole into soil, and sampled only the soil itself. The community members took their own sample of the material, had it analyzed, and confirmed that it was DDT. Because of that experience, EPA and the PRPs had to spend significant resources in regaining the community’s trust that site sampling had accurately located the sources of contamination.

Our Substitute would require that EPA seek community input on sampling and monitoring plans. We believe this would improve decision-making, increase community confidence in the cleanup plan, and, in the long run, expedite and reduce the cost of cleanups.³⁶

Second, S. 8 fails to include a provision establishing a central clearinghouse where people may obtain information about Superfund sites in their States. We have heard repeatedly from commu-

³⁶It has been alleged that to allow citizens to conduct sampling and monitoring could risk worsening site conditions. That issue is irrelevant to the modest proposal in our Substitute, which would only ensure that citizens had an opportunity to comment on sampling and monitoring plans.

nity representatives that they want to participate in the Superfund process, but that they are often unaware of the existence of a program like EPA's Technical Assistance Grant program; or they found the documentation required for the TAG application overly burdensome. They also made clear that their failure to, for example, attend a meeting where EPA would be explaining how to apply for a TAG grant did not indicate a lack of interest, but rather that they may be holding down more than one job, and can't meet on an EPA employee's schedule.

We should take affirmative steps to help people benefit from information and knowledge gained at other sites, rather than having to start from scratch. The bill that was reported in the 103d Congress, S. 1834, did this by creating Community Information Access Offices, or "CIAOs." These were to be citizen-run offices that would serve as clearinghouses to provide citizens with information regarding the Superfund sites in each State. These CIAOs were controversial. Some Committee members argued that the \$25 million authorization was too high and could overlap or interfere with the activities of State and local officials.

In response to these arguments, we made a more modest proposal, which is contained in the Substitute. We reduced the authorization level to \$12 million, and the offices (called Waste Site Information Offices) would be operated by States rather than local citizens (unless a State chose not to operate the office, in which case EPA would). So, in each State, there would be an office that would serve as a clearinghouse. It would provide information about how Federal and State hazardous waste laws work. And it would provide information about the sites in the State, including information about the location of each site, the contaminants present, the response actions being undertaken, any institutional controls that have been established, and any health studies that have been done. It also would identify additional sources of information and explain how people could participate in the decision making process at the site.

This proposal would help people play a more active role in decisions that affect them, their families, and their communities. We are disappointed that it has not been included in S. 8. As a result, we agree with representatives of environmental groups, who wrote that "[t]he bill fails to establish community-oriented information offices that are needed to provide meaningful access to information and enhance communities' ability to participate effectively in clean-up decisions."

The Bill Fails to Sufficiently Enhance Public Health Officials' Involvement in Superfund Decision-Making

CERCLA has always treated cleanup responsibilities and public health responsibilities distinctly. Evaluation and prevention of the adverse health effects caused by toxic waste exposure is one of the primary goals of Superfund. Authority for these crucial functions is vested in the Agency for Toxic Substances and Disease Registry (ATSDR), not EPA. Thus, under CERCLA, EPA samples and analyzes site media, and removes contaminants from exposure pathways; ATSDR investigates the acute and chronic health effects of such exposure, and takes certain actions, or recommends response

actions to EPA, that will mitigate the adverse health effects associated with exposure.

When S. 8 was introduced, it did not contain any provisions addressing public health authorities. As with community involvement, subsequent negotiations resulted in adding provisions to S. 8 that address public health authorities in Superfund. However, we are concerned that S. 8 still would fail to provide an adequate role for ATSDR and other health officials in Superfund decision-making. This is contrary to the recommendations of experts, such as the American Public Health Association, who believe that increased involvement of public health officials in all aspects of the Superfund process is important. A representative of APHA testified that "the full potential of public health approaches to improve the efficiency and effectiveness of Superfund has never been fully realized. To achieve this potential, the Superfund program must require early, strong, and meaningful involvement of public health agencies and experts at local hazardous waste sites, beginning at discovery."

The bill falls short of this goal in several significant ways.

First, the bill authorizes only \$50 million to ATSDR, \$25 million less than the level Congress appropriated in this fiscal year. Funding for ATSDR should be maintained at current levels, if not increased. The demands on ATSDR may be increasing. New data are showing that past exposures to hazardous substances can cause latent health effects. For example, in Idaho, ATSDR found that 20 years after the Bunker Hill site had been closed down, health effects persisted. Adult women who had worked at the site's smelter were more likely to report having an increased number of neurologic symptoms and early menopause. These data show the need for continued surveillance of populations exposed to hazardous substances, even after the remedy at a site has been implemented, or exposure has long since ended. In addition, since the bill's remedy provisions will result in fewer permanent cleanups and more hazardous waste left in place, there likely will be more cases that ATSDR must monitor over the long-run.

Second, the bill fails to authorize ATSDR's study of additional hazardous substances. Current law requires that ATSDR prepare toxicological profiles on 275 of the most commonly found hazardous substances and make those profiles available to the public, including Federal, State, Tribal, and local environmental regulators, and local health officials. In a July, 1997 report, the Environmental Defense Fund estimated that of the 30,000 chemicals in use today, there are data on the health effects of less than 10 percent. And experience shows that some of the most significant health effects occur as a result of exposure to uncommon hazardous substances. In Dover Township, New Jersey, particularly in the Toms River section (where a former dye- and chemical-manufacturing plant and illegal toxic dump site are located), children have developed leukemia and cancers of the brain and central nervous system at higher-than-normal rates. It is suspected that the cancers are caused by exposure to acrylonitrile, a rare chemical not included on the list of the 275 hazardous substances for which ATSDR is required to prepare toxicological profiles.

It is important that ATSDR be able to fill in some of the gaps, and provide information on health effects of chemicals, whether or not those chemicals happen to be on the list of 275 most commonly detected hazardous substances. The Substitute would have required ATSDR to prepare profiles of additional substances that have been detected at sites “and are determined by the Administrator of ATSDR to be of health concern.”

Third, S. 8 maintains the requirement that ATSDR perform a full-blown health assessment in all cases, even though more tailored activities may make the most sense. For example, in the methyl parathion cases (in Mississippi and Louisiana, among other States), ATSDR advised EPA to perform urine testing in conjunction with its indoor sampling of walls with residuals from the methyl parathion spraying (although these cases did not arise at NPL sites, they illustrate the point). These results allowed EPA to more precisely define the residents who would need relocation. Accordingly, EPA was able to relocate far fewer residents (perhaps hundreds fewer) than it had originally projected, since those residents were not showing adverse health effects.

To get the most “bang” for the clean-up “buck,” ATSDR should have flexibility to determine whether to conduct a health assessment or more tailored health activity, such as the type of analysis used for the methyl parathion cases. We acknowledge that S. 8 would allow ATSDR to conduct health education activities to make a community aware of steps it may take to mitigate or prevent exposure. That’s a good step. But our Substitute would have relieved ATSDR of the statutory obligation to perform a full-blown health assessment at a particular site, and instead would have allowed it to perform “other health-related activity.”

Fourth, S. 8 does not provide for full consideration of the effects of hazardous substances on children and other highly exposed or highly susceptible subpopulations. ATSDR has testified that children are likely to experience more exposure than similarly situated adults because “they play vigorously outdoors (splashing, digging, and exploring) and they often bring food into contaminated areas. They are shorter than adults which means they breathe dust, soil, and heavy vapors close to the ground; they are also smaller, which means they get higher doses per body weight.” Indeed, the September 29, 1997 New York Times reported that the rate of cancer among American children has been rising for decades, and “[a]lthough the reasons remain unclear, many experts suspect the increase may be partly the result of growing exposure to new chemicals in the environment.”

Children are not the only subpopulation more vulnerable to the effects of exposure. For example, Native American women who live on a reservation bordering a Superfund site, and whose diets consisted largely of area fish and wildlife, were found to have PCBs in their breast milk at levels many times higher than that of the non-Native American women also living very close to the Superfund site.

The Substitute would have specifically required that ATSDR health assessments consider impacts on children and other highly susceptible or highly exposed subpopulations.

NATURAL RESOURCE DAMAGES

Introduction

As Assistant Commerce Secretary Terry Garcia testified, "CERCLA was enacted to address the legacy of hazardous substance contamination created by over 100 years of harmful disposal practices in this country." Its purpose is not only to protect public health and the environment, but also to "allow us to reclaim our environment and restore those natural resources that have been degraded or destroyed by years of harmful hazardous waste disposal." Accordingly, CERCLA authorizes Federal, State, and Tribal trustees to bring actions for "damages for injury to, destruction of, or loss of natural resources . . . resulting from a release [of hazardous substances]." Trustees must use any amounts collected as damages to restore, replace, or acquire the equivalent of the damaged natural resources.

At some CERCLA sites, the remedial action that is undertaken to eliminate threats to human health and the environment also is sufficient to restore any injured natural resources. However at other sites, natural resources remain injured after the remedial action is completed, and further action is required if the natural resources are to be restored.

Since 1980, the Federal government, at least 18 States, and several Indian Tribes have brought natural resource damage claims. Most have been settled quickly and for relatively small amounts. In 1995, the General Accounting Office found that Federal trustees had settled 98 natural resource damage cases under CERCLA, for a total of \$106 million. Of those, 48 settled for no payment, and 36 settled for less than \$500,000 each.

In some cases, however, the remaining natural resource damage is substantial, and large natural resource damage claims have been brought. An example is the Upper Clark Fork River Basin in western Montana, which, with its four NPL sites, is the nation's largest contiguous grouping of NPL sites. In 1995, Montana's Chief Deputy Attorney General, Chris Tweeten, testified about natural resource injuries there. Over many years, mining and smelting operations released millions of tons of wastes to the air, water, and land over a 150 mile-long area. "These wastes," he testified, "not entirely spent of their metals and metalloids like arsenic, continue to release hazardous substances into groundwater and surface water, resulting in contamination and harm to fish and wildlife." When the State of Montana assessed the damage to natural resources in the Basin, Tweeten continued, it found the following:

Silver Bow Creek, which is nearly 25 miles long, contains no fish as a result of extremely high concentrations of metals in the water, in the sediments of the Creek, and in the floodplain of the Creek. Although it is not as injured as Silver Bow Creek, 125 miles of the Clark Fork River are also impacted by high metal concentrations in the river, in sediments, and on the floodplain. In addition, aquatic insects, upon which fish feed, are also contaminated. The end result is that trout populations in the Clark Fork River are one-sixth what they would be if hazardous substances had not been released. Floodplain contamination

along Silver Bow Creek and the Clark Fork River is severe and extensive. More than a thousand acres of floodplain are denuded of vegetation, and accordingly fail to provide wildlife habitat, due to the presence of metals. Three-thousand-four-hundred acres of what were formerly wetlands have been filled in with contaminated material and cannot support any life. Seventeen square miles of mountainous terrain around the city of Anaconda have been effectively denuded of vegetation and are unable to support viable wildlife populations. Lastly, some 600,000 acre feet of groundwater in the Basin are contaminated. Moreover, this volume of groundwater contamination is expected to continue to expand in size.

In addition to the Upper Clark Fork River natural resource damages claim, several other large claims have been settled or are pending. For example, the Federal Government, the State of Washington, and several Tribes brought large claims for injury to Elliot Bay in Washington; the Federal government has brought a large claim for extensive injury to natural resources off the Los Angeles Coast due to contamination with PCBs and DDT; and Federal trustees and the Coeur d'Alene Tribe have brought large claims with respect to the Coeur d'Alene Basin in Idaho.

Critics have argued that the natural resource damage program should be reformed. They argue that more emphasis should be put on restoration rather than assessing monetary damages, and that coordination between the remedial and natural resource damage programs, and among trustees, should be improved. Some also have called for "reforms" that go much further, and that would dramatically weaken the ability of Federal, State, and Tribal trustees to restore damaged natural resources.

We agree that some reforms are appropriate. For example, we support changes to the law to focus the NRD program more closely on restoration (so long as there is an appropriate transition provision for cases where significant resources have been invested under current law). And we support changes to improve coordination between the CERCLA remediation and NRD programs and improve coordination among trustees. But we oppose changes that would deprive the public of full restoration of damaged natural resources. Unfortunately, despite improvements from previous versions, the bill would do just that.

The Bill Prevents Trustees From Fully Considering the Intrinsic Value of Injured Natural Resources

When natural resources are injured, part of the harm suffered by the public can be measured by lost "use values" experienced by those who would have directly used the resource—for example, if a forest has been denuded and its streams no longer support fish populations, people have lost opportunities to hike, hunt, and fish.

But, when a forest, river, or other natural resource is damaged, we don't just lose the opportunity to use the resource. We also lose something more. We lose the beauty of a forest or a clear-running stream. We lose the natural value of an ecosystem teeming with wildlife. We lose the value of passing natural treasures along to our grandchildren. We lose the value of knowing that a natural re-

source like a remote wilderness or an endangered bird species exists, even if we do not “use” it directly. Gordon Johnson, New York State Assistant Attorney General, put it this way:

The value of a natural resource is a combination of its value as a useful commodity, such as the value of an aquifer as drinking water or seal pelts as clothing, and its passive values. These passive values include the value placed on having a resource available for future use, and the fact that we repeatedly pay to have resources available merely because we value their existence. My State expends thousands of dollars a year to protect and propagate endangered species, even though we cannot think of any use for a piping plover, for instance. We protect whales and will incur costs to save stranded ones not because the whales are ‘useful’ as commodities, but because we value their existence. Unique resources, such as majestic canyons and rivers like the Grand Canyon and the Hudson River, are valuable to society not only for their actual uses as parks, waterways, or recreational facilities, but because they just are.

These values are referred to as “passive,” “non-use,” or “intrinsic” values. Their validity is well accepted. As a panel of distinguished economists explained in 1993, “for at least the last twenty-five years, economists have recognized the possibility that individuals who make no active use of a particular beach, river, bay, or other such natural resource might, nevertheless, derive satisfaction from its mere existence, even if they never intend to make active use of it.”

The consideration of the intrinsic value of natural resources also has an important practical effect. We agree that the focus of the program should be on restoring injured natural resources, including compensatory restoration to reflect losses that the public suffers until the resource is fully restored. If, however, in determining the scope of restoration, we exclude the consideration of intrinsic values, we may wind up restoring, replacing, or acquiring far less than has been lost. For example, if the value of a wilderness area is defined as nothing more than the hiking, hunting, and fishing days that it supports, we might decline to restore the wilderness area and instead provide equivalent hiking, hunting, and fishing days by improving access to some forests and streams near town. The cost may be lower, but the wilderness area will not be restored, and the public will be shortchanged. New Mexico Assistant Attorney General Charles de Saillan testified: “If you just consider natural resources based on the value of the board feet of the timber in the forest, or the market value of the fish in the stream, you wind up undervaluing the resources.”

Previous versions of the bill would have prohibited trustees from considering intrinsic values. For example, the introduced version of S. 8 provided that “there shall be no recovery under this Act for any impairment of nonuse values,” and the Chairman’s Mark contained a similar prohibition (although referring to “psychological damages” rather than “non-use values”). This prohibition would have dramatically undermined trustees’ ability to restore injured

natural resources. As Terry Garcia testified, “to exclude non-use values, as specified in S. 8, means that the public will not be fairly and fully compensated for loss of resources.”

The bill no longer contains a flat prohibition on the consideration of intrinsic values. Instead, section 701(b) of the bill would create new CERCLA section 107(f)(3)(B), which provides that, in developing restoration measures, a trustee “may take into consideration unique intrinsic values associated with the natural resource to justify the selection of measures that will provide for expedited or enhanced restoration of the natural resource to replace the intrinsic values lost, provided that the incremental costs associated with the measures selected are reasonable.” Although an improvement over previous versions, this provision and a related provision create three potentially serious impediments to the full consideration of the intrinsic values of damaged natural resources.

First, section 107(f)(3)(B) permits trustees to consider only “unique” intrinsic values. It is unclear what the word “unique” means in this context. For example, a pristine stretch of river undoubtedly has significant intrinsic values, but if trustees must prove that those values are somehow different from the values provided by any other pristine stretch of river, they may well be prevented from taking them into account. In any event, natural resource damage cases will be significantly complicated by litigation over whether the intrinsic values of a particular resource are unique.

Second, section 107(f)(3)(B) subjects a trustee’s consideration of intrinsic value to a difficult standard. Trustees may take unique intrinsic values into account only if they show that the “incremental costs” of doing so are “reasonable.” This appears to require trustees to perform a kind of cost-benefit analysis, requiring cumbersome, expensive, and perhaps impractical economic analyses. Moreover, trustees could be required to calculate costs while being precluded from calculating full benefits of a particular restoration option (because, as discussed above, they can only take “unique” intrinsic values into account, and, as discussed below, the costs of an important method of calculating such benefits, contingent valuation, are not recoverable). At the very least, this provision will further complicate natural resource damages restoration planning and litigation. More significantly, it will impede trustees’ ability to restore damaged resources.

Third, this impact is exacerbated by a provision that discourages the use of one of the principal methods by which intrinsic values are measured. Unlike the value of lost uses of a resource, such as lost hiking or fishing opportunities, intrinsic values do not have a market price. However, economists have developed a method to measure intrinsic values (generally referring to them as non-use or passive use values), through the use of sample surveys, commonly referred to as “contingent valuation.” In a 1996 appendix to a regulation, the National Oceanic and Atmospheric Administration (NOAA) described contingent valuation as follows:

The contingent valuation (CV) method determines the value of goods and services based on the results of carefully designed surveys. The CV method obtains an estimate of the total value, including both direct and passive

use values of a good or service by using a questionnaire designed to objectively collect information about the respondent's willingness to pay for the good or service. A CV survey contains three basic elements: (i) A description of the good/service to be valued and the context in which it will be provided, including the method of payment; (ii) questions regarding the respondent's willingness to pay for the good or service; and (iii) questions concerning demographics or other characteristics of the respondent to interpret and validate survey responses.

Although some industry groups and others have sharply criticized the use of contingent valuation, many economists have concluded that it is appropriate. Several years ago, NOAA convened a panel of economists to review the use of contingent valuation in natural resource damage cases. In January, 1993, the panel issued its report. The panel "start[ed] from the premise that passive-use loss . . . is a meaningful component of the total damage resulting from environmental accidents." Then the panel rejected the "extreme arguments" that contingent valuation does not provide useful information. Instead, the panel outlined several guidelines necessary to assure the adequacy of a contingent valuation study. If done in conformity with these guidelines, the panel said, "CV studies can produce estimates reliable enough to be the starting point of a judicial process of damage assessment, including passive use values."

New section 107(f)(1)(C)(iii) provides that trustees may recover their reasonable assessment costs, "but not including the costs of conducting any type of study relying on the use of contingent valuation methodology." This creates an inappropriate barrier against the use of a legitimate method of assessing natural resource damages. Contingent valuation studies can be expensive, especially under the guidelines proposed by the NOAA panel, which stress the use of pre-testing and extensive cross tabulations. If trustees cannot recover the cost of conducting a contingent valuation survey, they may, as a practical matter, be precluded from conducting the survey. That, in turn, may make it impossible for them to demonstrate the loss of intrinsic values, even when the losses to the public are severe, either because the trustees will not be able to determine and document the extent of the lost values, or because trustees will not be able to show that the incremental costs of considering those lost values is reasonable.

During the committee markup, Senators Baucus and Moynihan offered an amendment to delete the provisions that create these impediments, but the amendment was defeated.

The Bill Fails to Include Changes that Would Strengthen the NRD Program

In addition to making changes that would weaken the NRD program, the bill fails to make two changes, proposed by Federal, State, and Tribal trustees, that would strengthen the program.

The first relates to the judicial review of trustees' restoration plans. Under current law, when a Federal district court reviews a trustee's damage assessment, it is not clear whether the assessment is subject to deferential review based on the administrative

record or instead trial *de novo*.³⁷ The bill maintains the status quo. In doing so, the bill misses an opportunity to reduce litigation by resolving the question in favor of deferential review based on the administrative record.

Record review would complement the shift, in this bill, from an emphasis on assessing damages to an emphasis on developing an appropriate restoration plan. The development of a restoration plan involves highly technical biological, chemical, and toxicological decisions. Such decisions should largely be based on the trustee's scientific and technical expertise. This is particularly true in light of the other changes that the bill makes to the natural resource damage provisions. The bill adds several new detailed requirements for natural resource damage restoration planning. For example, new section 107(f)(3) requires trustees to select measures that achieve an "appropriate balance" among identified factors, based on the "best scientific evidence available." By failing to clearly establish record review, and by creating new detailed requirements for restoration planning, the bill creates new issues for litigation.

Record review also would improve the restoration planning process. It would encourage the full involvement of both responsible parties and the general public. It also would ensure that the final decisions regarding restoration will be made by a trustee that considers public views, rather than by a court which has no obligation to consider such views. New Mexico Attorney General Tom Udall testified: "If an administrative record is mandated, each side will have a strong incentive to submit its studies and reports into the record to be considered by the court. A much more open and efficient, less litigious process will result." One example of the process without record review is an NRD case pending in California, *United States and State of California v. Montrose Chemical Corp. of California, et al.* In that litigation, the discovery phase has been underway for 8 years.

In the 1986 amendments, Congress subjected CERCLA remedial actions to record review. The report of the House Committee on Energy and Commerce explained the reasons for the change as follows:

Reliance on an administrative record helps assure that the basis for the response decision is clearly articulated and open to scrutiny by the public and responsible parties. It also encourages full responsible party and public participation in development of the record before the remedy is selected. Moreover, limiting judicial review of response actions to the administrative record expedites the process of review, avoids the need for time-consuming and burdensome discovery, reduces litigation costs, and ensures that the reviewing court's attention of focused on the . . . criteria used in selecting the response.

³⁷ Both Federal and State trustees have argued that, under current law, damage assessments should be subject to deferential review based on the administrative record. At the time of the Committee markup, only one Federal district court had ruled on the question, holding that a damage assessment is subject to trial *de novo*. *State of Montana v. Atlantic Richfield Co.*, C.V. Case No. 83-317-HEN-P.H. (D. Mont., March 3, 1997). After markup, another district court reached a similar decision. *United States v. ASARCO, Inc.*, No. CV 96-0122-N-ECL (D. Idaho, March 31, 1998). However, no court of appeals has ruled on the issue, and it is unsettled.

For similar reasons, we agree with the Administration, the National Governors Association, the National Association of Attorneys General, and the Council of Western Attorneys General that the bill should include a provision that, as a resolution of the National Association of Attorneys General says, “[c]larifies that in any legal action, restoration decisions of a natural resource trustee shall be reviewed on the administrative record and shall be upheld unless found to be arbitrary and capricious or otherwise not in accordance with law.” Our Substitute would have provided for record review.

In addition, the bill fails to address the statute of limitations for non-NPL sites. Under current law, the statute of limitations at non-NPL sites has two alternative tests. An action can be brought within 3 years of either the “the date of the discovery of the loss and its connection with the release in question” or “the date on which regulations are promulgated” under the natural resource damages provision. Under the discovery test, it is not clear how courts will interpret the terms “discovery of the loss” and the “connection with the release.” This ambiguity generates unnecessary litigation over the provision’s meaning, and premature filing of natural resource damages claims, because, as Gordon Johnson testified, “the trustee may have to bring suit before he or she has sufficient information to determine the scope of the injury or to quantify damages.”

To address these problems, our Substitute included a provision that would have amended the statute of limitations to provide that actions could be brought within 3 years of the completion of a damage assessment or comparable restoration plan (or six years from the date the potentially responsible party provides funding for an assessment by all trustees). In addition, the Substitute would have imposed a moratorium on the filing of any actions until the completion of an assessment plan.

By failing to include a provision along these lines, the bill assures that litigation over the current statute of limitations will continue and that trustees will continue to be compelled to file claims prematurely.

Some Provisions Require Further Clarification

Several other provisions of the bill are ambiguous and may require further clarification (or deletion). Two are particularly significant.

The first provision relates to double recovery. In the 1986 amendments, Congress enacted CERCLA section 107(f), which provides that there “shall be no double recovery under this chapter for natural resource damages . . . for the same release and natural resource.” This provision stands for the straightforward proposition that a party should not have to pay the same damages twice. For example, if one trustee collects \$100,000 in damages for injuries to a fishery, another trustee should not be able to come in later and collect another \$100,000 for the same damages. However, as the 1986 conference report Statement of Managers says, the provision is not intended “to prohibit different claims or actions for different damages stemming from the same injury to the same natural resource.”

New section 107(f)(1)(D)(ii) revises the current double recovery provision. The revision may be intended to clarify the operation of the current provision, without significantly expanding its scope. The Committee report appears to support this interpretation. We are concerned, however, that the language may be interpreted more broadly, to preclude cleanup and natural resource restoration at many sites and undermine efforts to coordinate restoration planning with cleanup efforts. As New York State Assistant Attorney General Gordon Johnson testified about an earlier version of the double recovery language (in the August, 1997, Chairman's Mark), one reading of the new language "may suggest that anyone who has recovered response costs which are used to restore an injured resource—and remedial work often has that consequence, obviously—cannot recover natural resource damages."

If this interpretation were upheld, trustees would be compelled to file NRD claims simultaneously with EPA or a State's response costs claims, whether or not trustees have had resource concerns addressed during cleanup or whether trustees have had the opportunity to determine whether there will be residual resource injury once response actions are complete. Response action agencies and natural resource trustees might be forced into a race to the courthouse to litigate their claim first. At many sites, trustees would be compelled to file protective claims before they have had a meaningful opportunity to determine whether injury will remain on-site after the conclusion of a response action. This would undermine the goal of focusing NRD claims on costs of restoring the injured resources. Further, at the numerous sites where EPA has already collected response costs, it could be argued that this provision bars trustees altogether from seeking restoration of natural resources, to the extent that EPA has collected response costs arguably addressing injury to a particular resource.

The second provision relates to releases that occurred before the enactment of CERCLA. Current law provides that there is no recovery in any case in which both the release and the resulting "damages" occurred wholly before December 11, 1980. New section 107(f)(1)(D)(iii) revises this provision, to provide that there is no recovery in any case in which the release and the "injury, destruction, or loss" occurred before that date. We are concerned, however, that in light of the way one court has interpreted the terms "damages" and "injury," it could be argued that the change precludes recovery in any case in which injury, destruction, or loss began before December 11, 1980, but the damage persists thereafter. (*See, In Re Acushnet River & New Bedford Harbor Proceedings*, 716 F. Supp. 676 (D. Mass. 1989)). Such an interpretation would extinguish some existing claims. And it would do so inappropriately, because, as New York State Assistant Attorney General Gordon Johnson testified, "[a]t common law, the creator of a nuisance which continues to cause damage after its creation still is liable for its abatement."

The Bill Creates a Special Natural Resource Damages Program for the Coeur d'Alene Basin that Jeopardizes the Rights of Some Parties and May Result in Inadequate Restoration

Section 705 of the bill is a free-standing provision of law relating to the Coeur d'Alene Basin. It directs the Coeur d'Alene Basin Commission, an entity created under Idaho law, to recommend a basin restoration plan to the Governor of Idaho. The Governor may revise the Plan and finalize it. Once the Plan is in effect, the Governor may enter into enforceable agreements with potentially responsible parties, whereby those parties agree to contribute to the implementation of the Plan. Each agreement must be approved by the Federal district court under the standard applicable to the approval of consent decrees ("fair, reasonable, and in the public interest"). Once an agreement is approved, parties to the agreement may ask the courts to stay any proceeding that is pending against them under CERCLA, the Clean Water Act, or the Resource Conservation and Recovery Act, for certain actions that they took in the Basin.

We understand that the provision reflects an effort to expedite cleanup and restoration of the Coeur d'Alene Basin. But we oppose the provision, primarily for two reasons.

First, the provision allows the Governor of Idaho to determine the rights of other parties who have important interests, under Federal law, concerning the Basin. Federal trustees, EPA, the Coeur d'Alene Tribe, and the State of Washington all have interests in the cleanup and restoration of the Basin. Many of the resources at the site are of special Federal interest, such as migratory birds and Federal lands. Both Federal trustees and the Tribe have pending natural resource damage claims. The Tribe's claim, brought in 1991, is for more than \$1 billion. The Federal claim, brought in 1996, is for several hundred million dollars.

Although Federal, State, and Tribal representatives are members of the Basin Commission, the bill gives the Governor the exclusive authority to determine the final Basin plan. It also gives the Governor the exclusive authority to negotiate with PRPs the terms of enforceable agreements, which, after approval by the Federal district court, would have the effect of extinguishing pending claims. Presumably, the Federal Trustees, the Tribe, and the State of Washington could comment to the court about whether the court should approve an enforceable agreement that the Governor submits. But this is no substitute for the power to assert their own legal rights, preserving their discretion to settle on terms they see fit.

Second, the bill does not assure that injured natural resources will be restored to the same extent as they would under the general natural resource damages provisions of CERCLA. Section 705(b) provides that the goals of the Basin restoration plan are to "restore, manage, and enhance the natural recovery" of the Basin, "consistent with the objectives" of CERCLA, in a cost-effective manner. It is not clear whether and why this standard differs from the general standard for restoring injured natural resources. In any event, it is not clear how the standard could be enforced. For example, if one of the Federal trustees believed that the Governor's Plan would not restore, manage, and enhance natural recovery in a way

that was consistent with the objectives of CERCLA, it is not clear that the trustee would have any way to directly challenge the adequacy of the Plan.

CONCLUSION

Pulling all of this together, we believe that, despite S. 8's positive provisions, it contains many flaws. The bill:

- contains an inadequate preference for treatment and safeguards for waste left in place;
- reduces protection of human health by lowering the current acceptable level of cancer risk and allowing a waiver of risk-based standards based on technical impracticability;
- will lead to inadequate cleanup of contaminated water and let clean water become contaminated;
- provides for inappropriate consideration of cost in cleanup decisions;
- diverts resources away from and delays cleanup through requirements that EPA reconsider past cleanup decisions and conduct new and sometimes inappropriate risk assessments;
- keeps municipalities, small businesses, and contributors of small amounts of waste trapped in Superfund's liability net;
- promotes unnecessary litigation and transaction costs, by requiring settled cases to be reopened and through other provisions that invite litigation;
- contains overly broad liability exemptions and limitations, and fails to protect and preserve the Superfund Trust Fund for cleanup of abandoned sites;
- would adversely affect the current program for providing brownfields assistance;
- would bar EPA action at hazardous waste sites, without adequate safeguards;
- fails to include adequate criteria for approval of State programs;
- virtually eliminates any Federal safety net for sites addressed under State programs;
- lacks adequate safeguards to conserve the Superfund Trust Fund;
- does not adequately address the role of Tribes under Superfund;
- fails to include important provisions that would increase community participation;
- fails to sufficiently enhance public health officials' involvement in Superfund decision-making;
- prevents trustees from fully considering the intrinsic value of injured natural resources;
- fails to include changes that would strengthen the Natural Resource Damages restoration program; and
- creates a special natural resource damages program for the Coeur d'Alene Basin that jeopardizes the rights of some parties and may result in inadequate restoration.

Given these many flaws, we agree with Administrator Browner's assessment, prior to markup, that S. 8 "would still weaken public health and environmental protection, generate new litigation, delay

cleanups, and inappropriately shift cleanup costs from parties that created toxic waste sites to the Superfund Trust Fund.”

At the same time, we remain willing to resume negotiations to develop a Superfund reform bill that makes practical, common sense reforms and can attract broad bipartisan consensus support.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: existing law as proposed to be omitted is printed in **bold** and enclosed in brackets; new matter proposed to be added to existing law is printed in *italic*; and existing law in which no change is proposed is shown in roman.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) ³⁸

[As Amended Through P.L. 105-62, October 13, 1997]

AN ACT To provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “Comprehensive Environmental Response, Compensation, and Liability Act of 1980”.

TITLE I—HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

DEFINITIONS

SEC. 101. For purpose of this title—

(1) The term “act of God” means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(2) The term “Administrator” means the Administrator of the United States Environmental Protection Agency.

(3) The term “barrel” means forty-two United States gallons at sixty degrees Fahrenheit.

(4) The term “claim” means a demand in writing for a sum certain.

(5) The term “claimant” means any person who presents a claim for compensation under this Act.

(6) The term “damages” means damages for injury or loss of natural resources as set forth in section 107(a) or 111(b) of this Act.

(7) The term “drinking water supply” means any raw or finished water source that is or may be used by a public water system (as defined in the Safe Drinking Water Act) or as drinking water by one or more individuals.

(8) The term “environment” means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters

³⁸The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601-9675), commonly known as “Superfund,” consists of Public Law 96-510 (Dec. 11, 1980) and the amendments made by subsequent enactments.

of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

(9) The term “facility” means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

(10) The term “federally permitted release” means (A) discharges in compliance with a permit under section 402 of the Federal Water Pollution Control Act, (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 402 of the Federal Water Pollution Control Act and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of the Federal Water Pollution Control Act, which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 404 of the Federal Water Pollution Control Act, (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005 (a) through (d) of the Solid Waste Disposal Act from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 102 of³⁹ section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act, (H) any emission into the air subject to a permit or control regulation under section 111, section 112, title I part C, title I part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil,

³⁹So in law. Probably should be “or”.

natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 307 (b) or (c) of the Clean Water Act and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 402 of such Act, and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954, in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.

(11) The term "Fund" or "Trust Fund" means the Hazardous Substance Response Fund established by section 221 of this Act or, in the case of a hazardous waste disposal facility for which liability has been transferred under section 107(k) of this Act, the Post-closure Liability Fund established by section 232 of this Act.

(12) The term "ground water" means water in a saturated zone or stratum beneath the surface of land or water.

(13) The term "guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this Act.

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act, (B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of this Act, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act. 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.

(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 Fishery Conservation and Management Act of 1976), any State, local government, or any foreign government, any Indian Tribe, or, if such resources are subject to a trust restriction or 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.

(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 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) 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 107(a) (3) or (4) of this Act, (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) 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 107(a) (3) or (4) (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control *through seizure or otherwise in connection with law en-*

forcement activity or 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 Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107.

(E)⁴⁰ EXCLUSION OF LENDERS NOT PARTICIPANTS IN MANAGEMENT.—

(i) INDICIA OF OWNERSHIP TO PROTECT SECURITY.—

The term “owner or operator” does not include a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.

(ii) FORECLOSURE.—The term “owner or operator” does not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person—

(I) forecloses on the vessel or facility; and

(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a response action under section 107(d)(1) or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition,

if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(F) PARTICIPATION IN MANAGEMENT.—For purposes of subparagraph (E)—

(i) the term “participate in management”—

(I) means actually participating in the management or operational affairs of a vessel or facility; and

(II) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations;

(ii) a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility shall be considered to participate in

⁴⁰So in law. Indentation of subparagraphs (E) through (G) is incorrect.

management only if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person—

(I) exercises decisionmaking control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or

(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility—

(aa) for the overall management of the vessel or facility encompassing day-to-day decisionmaking with respect to environmental compliance; or

(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance;

(iii) the term “participate in management” does not include performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility; and

(iv) the term “participate in management” does not include—

(I) holding a security interest or abandoning or releasing a security interest;

(II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(IV) monitoring or undertaking 1 or more inspections of the vessel or facility;

(V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

(VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

(VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(IX) conducting a response action under section 107(d) or under the direction of an on-scene coordinator appointed under the National Contingency Plan,

if the actions do not rise to the level of participating in management (within the meaning of clauses (i) and (ii)).

(G) OTHER TERMS.—As used in this Act:

(i) EXTENSION OF CREDIT.—The term “extension of credit” includes a lease finance transaction—

(I) in which the lessor does not initially select the leased vessel or facility and does not during the lease term control the daily operations or maintenance of the vessel or facility; or

(II) that conforms with regulations issued by the appropriate Federal banking agency or the appropriate State bank supervisor (as those terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) or with regulations issued by the National Credit Union Administration Board, as appropriate.

(ii) FINANCIAL OR ADMINISTRATIVE FUNCTION.—The term “financial or administrative function” includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

(iii) FORECLOSURE; FORECLOSE.—The terms “foreclosure” and “foreclose” mean, respectively, acquiring, and to acquire, a vessel or facility through—

(I)(aa) purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;

(bb) a deed in lieu of foreclosure, or similar conveyance from a trustee; or

(cc) repossession,

if the vessel or facility was security for an extension of credit previously contracted;

(II) conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or

(III) any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a vessel or facility in order to protect the security interest of the person.

(iv) LENDER.—The term “lender” means—

(I) an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813));

(II) an insured credit union (as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752));

(III) a bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.);

(IV) a leasing or trust company that is an affiliate of an insured depository institution;

(V) any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;

(VI) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or any other entity that in a bona fide manner buys or sells loans or interests in loans;

(VII) a person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and

(VIII) a person that provides title insurance and that acquires a vessel or facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

(v) OPERATIONAL FUNCTION.—The term “operational function” includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.

(vi) SECURITY INTEREST.—The term “security interest” includes a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

(H) LIABILITY OF CONTRACTORS.—

(i) IN GENERAL.—The term “owner or operator” does not include a response action contractor (as defined in section 119(e)).

(ii) LIABILITY LIMITATIONS.—A person described in clause (i) shall not, in the absence of negligence by the person, be considered to—

(I) cause or contribute to any release or threatened release of a hazardous substance, pollutant, or contaminant;

(II) arrange for disposal or treatment of a hazardous substance, pollutant, or contaminant;

(III) arrange with a transporter for transport or disposal or treatment of a hazardous substance, pollutant, or contaminant; or

(IV) transport a hazardous substance, pollutant, or contaminant.

(iii) *EXCEPTIONS.—This subparagraph does not apply—*

(I) to a person that is potentially responsible under section 106 or 107 other than a person that is associated solely with the provision of a service relating to a response action; or

(II) with respect to liability for a facility at which a response action contractor did not perform a response action.

(I) RELIGIOUS, CHARITABLE, SCIENTIFIC, AND EDUCATIONAL ORGANIZATIONS.—The term “owner or operator” includes an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 that is organized and operated exclusively for religious, charitable, scientific, or educational purposes and that holds legal or equitable title to a vessel or facility.

(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.

(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 solely 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, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act, or, for the purposes of section 104 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 102(a)(1) or 302(a) of the Uranium Mill Tailings Radiation Control Act of 1978, and (D) the normal application of fertilizer.

(23) The terms⁴¹ “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

⁴¹So in law. Probably should be “term”.

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 104(b) of this Act, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act.⁴²

(24) The terms¹ “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 and associated 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 includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms⁴³ “respond” or “response” means remove, removal, remedy, and remedial action;⁴⁴ all such terms (including the terms “removal” and “remedial action”) include enforcement activities related thereto.

(26) The terms¹ “transport” or “transportation” means the movement of a hazardous substance by any mode, including a hazardous liquid pipeline facility (as defined in section 60101(a) of title 49, United States Code), 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 con-

⁴²Should refer to the “Robert T. Stafford Disaster Relief and Emergency Assistance Act”, pursuant to the amendment to the short title of such Act made by section 102 of Public Law 100-707.

⁴³So in law. Probably should be “term”.

⁴⁴So in law.

tinuity 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.

(30) The terms “territorial sea” and “contiguous zone” shall have the meaning provided in section 502 of the Federal Water Pollution Control Act.

(31) The term “national contingency plan” means the national contingency plan published under section 311(c) of the Federal Water Pollution Control Act or revised pursuant to section 105 of this Act.

(32) The terms¹ “liable” or “liability” under this title shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act.

(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 substance under subparagraphs (A) through (F) of paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

(34) The term “alternative water supplies” includes, but is not limited to, drinking water and household water supplies.

(35)(A) The term “contractual relationship”, for the purpose of section 107(b)(3) includes, but is not limited to, land contracts, **[deeds or]** *deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:*

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that

any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that **[(he)] the defendant** has satisfied the requirements of section 107(b)(3) (a) and (b)**[(.)]**, *has provided full cooperation, assistance, and facility access to the persons that are responsible for response actions at the facility, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility, and has taken no action that impeded the effectiveness or integrity of any institutional control employed under section 121 at the facility.*

[(B)] To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry 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 the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.**]**

(B) REASON TO KNOW.—

(i) ALL APPROPRIATE INQUIRIES.—To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must show that—

(I) at or prior to the date on which the defendant acquired the facility, the defendant undertook all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and

(II) the defendant exercised appropriate care with respect to each hazardous substance found at the facility by taking reasonable steps to stop any continuing release, prevent any threatened future release and prevent or limit human or natural resource exposure to any previously released hazardous substance.

(ii) STANDARDS AND PRACTICES.—The Administrator shall by regulation establish as standards and practices for the purpose of clause (i)—

(I) the American Society for Testing and Materials (ASTM) Standard E1527-94, entitled Standard Prac-

tice for Environmental Site Assessments: Phase I Environmental Site Assessment Process; or

(II) alternative standards and practices under clause (iii).

(iii) ALTERNATIVE STANDARDS AND PRACTICES.—

(I) IN GENERAL.—The Administrator may by regulation issue alternative standards and practices or designate standards developed by other organizations than the American Society for Testing and Materials after conducting a study of commercial and industrial practices concerning the transfer of real property in the United States.

(II) CONSIDERATIONS.—In issuing or designating alternative standards and practices under subclause (I), the Administrator shall consider including each of the following:

(aa) The results of an inquiry by an environmental professional.

(bb) Interviews with past and present owners, operators, and occupants of the facility and the facility's real property for the purpose of gathering information regarding the potential for contamination at the facility and the facility's real property.

(cc) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records to determine previous uses and occupancies of the real property since the property was first developed.

(dd) Searches for recorded environmental cleanup liens, filed under Federal, State, or local law, against the facility or the facility's real property.

(ee) Reviews of Federal, State, and local government records (such as waste disposal records), underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility or the facility's real property.

(ff) Visual inspections of the facility and facility's real property and of adjoining properties.

(gg) Specialized knowledge or experience on the part of the defendant.

(hh) The relationship of the purchase price to the value of the property if the property was uncontaminated.

(ii) Commonly known or reasonably ascertainable information about the property.

(jj) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate investigation.

(iv) SITE INSPECTION AND TITLE SEARCH.—In the case of property for residential use or other similar use pur-

chased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) Nothing in this paragraph or in section 107(b)(3) shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this Act. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 107(a)(1) and no defense under section 107(b)(3) shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this Act of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

(36) The term “Indian tribe” means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(37)(A) The term [“service station dealer”] “*service station or automobile dealer*” means any person—

(i) who owns or operates a motor vehicle service station, filling station, garage, *dealership*, or similar retail establishment engaged in the business of selling, repairing, or servicing motor vehicles, where a significant percentage of the gross revenue of the establishment is derived from the fueling, repairing, [or servicing] *servicing, or selling* of motor vehicles, and

(ii) who accepts for collection, accumulation, and delivery to an oil recycling facility, recycled oil that (I) has been removed from the engine of a light duty motor vehicle or household appliances by the owner of such vehicle or appliances, and (II) is presented, by such owner, to such person for collection, accumulation, and delivery to an oil recycling facility.

(B) For purposes of [section 114(c)] *section 114(b)*, the term [“service station dealer”] *service station or automobile dealer* shall, notwithstanding the provisions of subparagraph (A), include any government agency that establishes a facility solely for the purpose of accepting recycled oil that satisfies the criteria set forth in subclauses (I) and (II) of subparagraph (A)(ii), and, with respect to recycled oil that satisfies the criteria set forth in subclauses (I) and (II), owners or operators of refuse collection services who are compelled by State law to collect, accumulate, and deliver such oil to an oil recycling facility.

(C) The President shall promulgate regulations regarding the determination of what constitutes a significant percentage of the gross revenues of an establishment for purposes of this paragraph.

(38) The term “incineration vessel” means any vessel which carries hazardous substances for the purpose of incineration of such substances, so long as such substances or residues of such substances are on board.

(39) *QUALIFYING STATE VOLUNTARY RESPONSE PROGRAM.*—The term “qualifying State voluntary response program” means a State program that includes the elements described in section 128(b).

(40) *BONA FIDE PROSPECTIVE PURCHASER.*—The term “bona fide prospective purchaser” means a person that acquires ownership of a facility after the date of enactment of this paragraph, or a tenant of such a person, that establishes each of the following by a preponderance of the evidence:

(A) *DISPOSAL PRIOR TO ACQUISITION.*—All deposition of hazardous substances at the facility occurred before the person acquired the facility.

(B) *INQUIRIES.*—

(i) *IN GENERAL.*—The person made all appropriate inquiries into the previous ownership and uses of the facility and the facility’s real property in accordance with generally accepted good commercial and customary standards and practices.

(ii) *STANDARDS AND PRACTICES.*—The standards and practices referred to in paragraph (35)(B)(ii) or those issued or adopted by the Administrator under that paragraph shall be considered to satisfy the requirements of this subparagraph.

(iii) *RESIDENTIAL USE.*—In the case of property for residential or other similar use purchased by a non-governmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) *NOTICES.*—The person provided all legally required notices with respect to the discovery or release of any hazardous substances at the facility.

(D) *CARE.*—The person exercised appropriate care with respect to each hazardous substance found at the facility by taking reasonable steps to stop any continuing release, prevent any threatened future release and prevent or limit human or natural resource exposure to any previously released hazardous substance.

(E) *COOPERATION, ASSISTANCE, AND ACCESS.*—The person has not failed to substantially comply with the requirement stated in subsection (y) with respect to the facility.

(F) *NO AFFILIATION.*—The person is not affiliated through any familial or corporate relationship with any person that is or was a party potentially responsible for response costs at the facility.

(41) *ATSDR.*—The term “ATSDR” means the Agency for Toxic Substances and Disease Registry.

(42) *TECHNICALLY IMPRACTICABLE.*—The term “technically impracticable” means impracticable due to engineering infeasibility or unreliability or inordinate costs.

(43) *BENEFICIAL USE.*—The term “beneficial use” means the use of land on completion of a response action in a manner that confers economic, social, environmental, conservation, or aesthetic benefit.

(44) *CODISPOSAL LANDFILL.*—The term “codisposal landfill” means a landfill that—

(A) was listed on the National Priorities List as of January 1, 1997;

(B) received for disposal municipal solid waste or sewage sludge; and

(C) may also have received, before the effective date of requirements under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.), any hazardous waste, if the landfill contains predominantly municipal solid waste or sewage sludge that was transported to the landfill from outside the facility.

(45) *MUNICIPAL SOLID WASTE.*—

(A) *IN GENERAL.*—The term “municipal solid waste” means waste material generated by—

(i) a household (such as a single- or multi-family residence) or a public lodging (such as a hotel or motel); or

(ii) a commercial, institutional, or industrial source, to the extent that—

(I) the waste material is substantially similar to waste normally generated by a household or public lodging (without regard to differences in volume); or

(II) the waste material is collected and disposed of with other municipal solid waste or sewage sludge and, regardless of when generated, would be conditionally exempt small quantity generator waste under the regulation issued under section 3001(d) of the Solid Waste Disposal Act (42 U.S.C. 6921(d)).

(B) *INCLUSIONS.*—The term “municipal solid waste” includes food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.

(C) *EXCLUSIONS.*—The term “municipal solid waste” does not include combustion ash generated by resource recovery facilities or municipal incinerators or waste from manufacturing or processing (including pollution control) operations that is not described in subclause (I) or (II).

(46) *MUNICIPALITY.*—

(A) *IN GENERAL.*—The term “municipality” means a political subdivision of a State (including a city, county, vil-

lage, town, township, borough, parish, school district, sanitation district, water district, or other public entity performing local governmental functions).

(B) *INCLUSIONS.*—The term “municipality” includes a natural person acting in the capacity of an official, employee, or agent of an entity described in subparagraph (A) in the performance of a governmental function.

(47) *SEWAGE SLUDGE.*—The term “sewage sludge” means solid, semisolid, or liquid residue removed during the treatment of municipal waste water, domestic sewage, or other waste water at or by publicly owned treatment works.

(48) *CONSUMING FACILITY.*—The term “consuming facility” means a facility at which recyclable material is handled, processed, reclaimed, or otherwise managed.

(49) *RECYCLABLE MATERIAL.*—

(A) *IN GENERAL.*—The term “recyclable material” means—

- (i) scrap glass, paper, plastic, rubber, or textile;
- (ii) scrap metal; and
- (iii) spent batteries.

(B) *INCLUSIONS.*—The term “recyclable material” includes small amounts of any type of material that is incident to or adherent to material described in subparagraph (A) as a result of the normal and customary use of the material before the material becomes scrap.

(C) *EXCLUSIONS.*—The term “recyclable material” does not include—

- (i) a shipping container that—
 - (I) has (or, when intact, had) a capacity of not less than 30 and not more than 3,000 liters; and
 - (II) has any hazardous substance contained in or adherent to it (not including any small pieces of metal that may remain after a hazardous substance has been removed from the container or any alloy or other material that may be chemically or metallurgically bonded in the container itself);
- (ii) any material described in subparagraph (A) that the Administrator may by regulation exclude from the meaning of the term; or
- (iii) a whole tire.

(50) *SCRAP METAL.*—

(A) *IN GENERAL.*—The term “scrap metal” means—

- (i) a bit or piece of a metal part (such as a bar, turning, fine, rod, sheet, or wire);
- (ii) material comprised of metal pieces that may be combined with bolts or soldering (such as a radiator, automobile, or railroad boxcar); or
- (iii) a metal byproduct of copper and a copper-based alloy that—

(I) is not 1 of the primary products of a secondary production process;

(II) is not solely or separately produced by the production process;

(III) is not stored in a pile or surface impoundment; and

(IV) is sold to another recycler that is not speculatively accumulating such metal byproducts; which, when worn or superfluous, can be recycled.

(B) SPECULATIVE ACCUMULATION.—For the purposes of a sale under subparagraph (A)(iii)(IV), a recycler to which a metal byproduct described in subparagraph (A)(iii) is sold shall be considered to be accumulating the metal byproduct speculatively if 75 percent or more of the mass of the metal byproducts purchased by the recycler during the 12-month period beginning on the date of the sale is not reprocessed.

[42 U.S.C. 9601]

REPORTABLE QUANTITIES AND ADDITIONAL DESIGNATIONS

SEC. 102. (a) The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances, in addition to those referred to in section 101(14) of this title, such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment, and shall promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to section 103 of this title. The Administrator may determine that one single quantity shall be the reportable quantity for any hazardous substance, regardless of the medium into which the hazardous substance is released.

For all hazardous substances for which proposed regulations establishing reportable quantities were published in the Federal Register under this subsection on or before March 1, 1986, the Administrator shall promulgate under this subsection final regulations establishing reportable quantities not later than December 31, 1986. For all hazardous substances for which proposed regulations establishing reportable quantities were not published in the Federal Register under this subsection on or before March 1, 1986, the Administrator shall publish under this subsection proposed regulations establishing reportable quantities not later than December 31, 1986, and promulgate final regulations under this subsection establishing reportable quantities not later than April 30, 1988.

(b) Unless and until superseded by regulations establishing a reportable quantity under subsection (a) of this section for any hazardous substance as defined in section 101(14) of this title, (1) a quantity of one pound, or (2) for those hazardous substances for which reportable quantities have been established pursuant to section 311(b)(4) of the Federal Water Pollution Control Act, such reportable quantity, shall be deemed that quantity, the release of which requires notification pursuant to section 103 (a) or (b) of this title.

[42 U.S.C. 9602]

NOTICES, PENALTIES

SEC. 103. (a) Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 102 of this title, immediately notify the National Response Center established under the Clean Water Act of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

(b) Any person—

(1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), and who is otherwise subject to the jurisdiction of the United States at the time of the release, or

(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that determined pursuant to section 102 of this title who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(c) Within one hundred and eighty days after the enactment of this Act, any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances (as defined in section 101(14)(C) of this title) are or have been stored, treated, or disposed of shall, unless such facility has a permit issued under, or has been accorded interim status under, subtitle C of the Solid Waste Disposal Act, notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility. The Administrator may prescribe in greater detail the manner and form of the notice and the information included. The Administrator shall notify the affected

State agency, or any department designated by the Governor to receive such notice, of the existence of such facility. Any person who knowingly fails to notify the Administrator of the existence of any such facility shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year, or both. In addition, any such person who knowingly fails to provide the notice required by this subsection shall not be entitled to any limitation of liability or to any defenses to liability set out in section 107 of this Act: *Provided, however,* That notification under this subsection is not required for any facility which would be reportable hereunder solely as a result of any stoppage in transit which is temporary, incidental to the transportation movement, or at the ordinary operating convenience of a common or contract carrier, and such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(d)(1) The Administrator of the Environmental Protection Agency is authorized to promulgate rules and regulations specifying, with respect to—

(A) the location, title, or condition of a facility, and

(B) the identity, characteristics, quantity, origin, or condition (including containerization and previous treatment) of any hazardous substances contained or deposited in a facility;

the records which shall be retained by any person required to provide the notification of a facility set out in subsection (c) of this section. Such specification shall be in accordance with the provisions of this subsection.

(2) Beginning with the date of enactment of this Act, for fifty years thereafter or for fifty years after the date of establishment of a record (whichever is later), or at any such earlier time as a waiver if obtained under paragraph (3) of this subsection, it shall be unlawful for any such person knowingly to destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records identified in paragraph (1) of this subsection. Any person who violates this paragraph shall, upon conviction, be fined in accordance with the applicable provisions of title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both.

(3) At any time prior to the date which occurs fifty years after the date of enactment of this Act, any person identified under paragraph (1) of this subsection may apply to the Administrator of the Environmental Protection Agency for a waiver of the provisions of the first sentence of paragraph (2) of this subsection. The Administrator is authorized to grant such waiver if, in his discretion, such waiver would not unreasonably interfere with the attainment of the purposes and provisions of this Act. The Administrator shall promulgate rules and regulations regarding such a waiver so as to inform parties of the proper application procedure and conditions for approval of such a waiver.

(4) Notwithstanding the provisions of this subsection, the Administrator of the Environmental Protection Agency may in his discretion require any such person to retain any record identified pursuant to paragraph (1) of this subsection for such a time period in excess of the period specified in paragraph (2) of this subsection as the Administrator determines to be necessary to protect the public health or welfare.

(e) This section shall not apply to the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act or to the handling and storage of such a pesticide product by an agricultural producer.

(f) No notification shall be required under subsection (a) or (b) of this section for any release of a hazardous substance—

(1) which is required to be reported (or specifically exempted from a requirement for reporting) under subtitle C of the Solid Waste Disposal Act or regulations thereunder and which has been reported to the National Response Center, or

(2) which is a continuous release, stable in quantity and rate, and is—

(A) from a facility for which notification has been given under subsection (c) of this section, or

(B) a release of which notification has been given under subsections (a) and (b) of this section for a period sufficient to establish the continuity, quantity, and regularity of such release:

Provided, That notification in accordance with subsections (a) and (b) of this paragraph shall be given for releases subject to this paragraph annually, or at such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof released, above that previously reported or occurring.

[42 U.S.C. 9603]

RESPONSE AUTHORITIES

SEC. 104. (a)(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 122. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only

if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

(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 efficient performance of any long term remedial action with respect to the release or threatened release concerned.

(3) LIMITATIONS ON RESPONSE.—The President shall not provide for a removal or remedial action under this section in response to a release or threat of release—

(A) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;

(B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; or

(C) into public or private drinking water supplies due to deterioration of the system through ordinary use.

(4) EXCEPTION TO LIMITATIONS.—Notwithstanding paragraph (3) of this subsection, to the extent authorized by this section, the President may respond to any release or threat of release if in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.

(b)(1) INFORMATION; STUDIES AND INVESTIGATIONS.—Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this Act.

(2) COORDINATION OF INVESTIGATIONS.—The President shall promptly notify the appropriate Federal and State natural resource trustees of potential damages to natural resources resulting from releases under investigation pursuant to this section and shall seek to coordinate the assessments, investigations, and planning under this section with such Federal and State trustees.

(3) NOTICE TO HEALTH AUTHORITIES.—*The President shall notify State, local, and tribal public health authorities whenever a release of a hazardous substance, pollutant, or contaminant has occurred, is occurring, or is about to occur, or there is a threat of such a release, and the release or threatened release is under investigation pursuant to this section.*

[(c)(1) Unless] (c) MISCELLANEOUS LIMITATIONS AND REQUIREMENTS.—

(1) CONTINUANCE OF OBLIGATIONS FROM FUND.—*Unless* (A) the President finds that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis, or (B) the President has determined the appropriate remedial actions pursuant to paragraph (2) of this subsection and the State or States in which the source of the release is located have complied with the requirements of paragraph (3) of this subsection, or (C) continued response action is otherwise appropriate and [consistent with the remedial action to be taken] *not inconsistent with any remedial action that has been selected or is anticipated at the time of any removal action at a facility*, obligations from the Fund, other than those authorized by subsection (b) of this section, shall not continue after [\$2,000,000] \$5,000,000 has been obligated for response actions or [12 months] 3 years has elapsed from the date of initial response to a release or threatened release of hazardous substances.

[(2) The President] (2) CONSULTATION.—*The President shall consult with the affected State or States before determining any appropriate remedial action to be taken pursuant to the authority granted under subsection (a) of this section.*

[(3) The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President; (B) the State will assure the availability of a hazardous waste disposal facility acceptable to the President and in compliance with the requirements of subtitle C of the Solid Waste Disposal Act for any necessary offsite storage, destruction, treatment, or secure disposition of the hazardous substances; and (C) the State will pay or assure payment of (i) 10 percent of the costs of the remedial action, including all future maintenance, or (ii) 50 percent (or such greater amount as the President may determine appropriate, taking into account the degree of responsibility of the State or political subdivision for the release) of any sums expended in response to a release at a facility,

that was operated by the State or a political subdivision thereof, either directly or through a contractual relationship or otherwise, at the time of any disposal of hazardous substances therein. For the purpose of clause (ii) of this subparagraph, the term "facility" does not include navigable waters or the beds underlying those waters. The President shall grant the State a credit against the share of the costs for which it is responsible under this paragraph for any documented direct out-of-pocket non-Federal funds expended or obligated by the State or a political subdivision thereof after January 1, 1978, and before the date of enactment of this Act for cost-eligible response actions and claims for damages compensable under section 111 of this title relating to the specific release in question: *Provided, however,* That in no event shall the amount of the credit granted exceed the total response costs relating to the release. In the case of remedial action to be taken on land or water held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe (if such land or water is subject to a trust restriction on alienation), or otherwise within the borders of an Indian reservation, the requirements of this paragraph for assurances regarding future maintenance and cost-sharing shall not apply, and the President shall provide the assurance required by this paragraph regarding the availability of a hazardous waste disposal facility.】

(3) STATE COST SHARE.—

(A) *IN GENERAL.*—*The Administrator shall not provide any funding for remedial action under this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the Administrator providing assurances deemed adequate by the Administrator that the State will pay, in cash or through in-kind contributions, 10 percent of the costs of the remedial action and operation and maintenance costs.*

(B) *ACTIVITIES WITH RESPECT TO WHICH STATE COST SHARE IS REQUIRED.*—*No State cost share shall be required except for remedial actions under section 104.*

(C) *INDIAN TRIBES.*—*In the case of remedial action to be taken on land or water held by an Indian Tribe, held by the United States in trust for an Indian Tribe, held by a member of an Indian Tribe (if the land or water is subject to a trust restriction on alienation), or otherwise within the borders of an Indian reservation, the requirements of this paragraph shall not apply.*

(4) *SELECTION OF REMEDIAL ACTION.*—The President shall select remedial actions to carry out this section in accordance with section 121 of this Act (relating to cleanup standards).

(5) STATE CREDITS.—

(A) *GRANTING OF CREDIT.*—The President shall grant a State a credit against the share of the costs, for which it is responsible under paragraph (3) with respect to a facility listed on the National Priorities List under the National Contingency Plan, for amounts expended by a State for remedial action at such facility pursuant to a contract or cooperative agreement with the President. The credit under this paragraph shall be limited to those State expenses which the President deter-

mines to be reasonable, documented, direct out-of-pocket expenditures of non-Federal funds.

(B) EXPENSES BEFORE LISTING OR AGREEMENT.—The credit under this paragraph shall include expenses for remedial action at a facility incurred before the listing of the facility on the National Priorities List or before a contract or cooperative agreement is entered into under subsection (d) for the facility if—

(i) after such expenses are incurred the facility is listed on such list and a contract or cooperative agreement is entered into for the facility, and

(ii) the President determines that such expenses would have been credited to the State under subparagraph (A) had the expenditures been made after listing of the facility on such list and after the date on which such contract or cooperative agreement is entered into.

(C) RESPONSE ACTIONS BETWEEN 1978 AND 1980.—The credit under this paragraph shall include funds expended or obligated by the State or a political subdivision thereof after January 1, 1978, and before December 11, 1980, for cost-eligible response actions and claims for damages compensable under section 111.

(D) STATE EXPENSES AFTER DECEMBER 11, 1980, IN EXCESS OF 10 PERCENT OF COSTS.—The credit under this paragraph shall include 90 percent of State expenses incurred at a facility owned, but not operated, by such State or by a political subdivision thereof. Such credit applies only to expenses incurred pursuant to a contract or cooperative agreement under subsection (d) and only to expenses incurred after December 11, 1980, but before the date of the enactment of this paragraph.

(E) ITEM-BY-ITEM APPROVAL.—In the case of expenditures made after the date of the enactment of this paragraph, the President may require prior approval of each item of expenditure as a condition of granting a credit under this paragraph.

(F) USE OF CREDITS.—Credits granted under this paragraph for funds expended with respect to a facility may be used by the State to reduce all or part of the share of costs otherwise required to be paid by the State under paragraph (3) in connection with remedial actions at such facility. If the amount of funds for which credit is allowed under this paragraph exceeds such share of costs for such facility, the State may use the amount of such excess to reduce all or part of the share of such costs at other facilities in that State. A credit shall not entitle the State to any direct payment.

(6) OPERATION AND MAINTENANCE.—For the purposes of paragraph (3) of this subsection, in the case of ground or surface water contamination, completed remedial action includes the completion of treatment or other measures, whether taken onsite or offsite, necessary to restore ground and surface water quality to a level that assures protection of human health and the environment. With respect to such measures, the operation of such measures for a period of up to 10 years after the construction or installation and commencement of operation shall be considered remedial action. Activities required to maintain the effectiveness of such measures

following such period or the completion of remedial action, whichever is earlier, shall be considered operation or maintenance.

(7) LIMITATION ON SOURCE OF FUNDS FOR O&M.—During any period after the availability of funds received by the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 from tax revenues or appropriations from general revenues, the Federal share of the payment of the cost of operation or maintenance pursuant to paragraph (3)(C)(i) or paragraph (6) of this subsection (relating to operation and maintenance) shall be from funds received by the Hazardous Substance Superfund from amounts recovered on behalf of such fund under this Act.

(8) RECONTRACTING.—The President is authorized to undertake or continue whatever interim remedial actions the President determines to be appropriate to reduce risks to public health or the environment where the performance of a complete remedial action requires recontracting because of the discovery of sources, types, or quantities of hazardous substances not known at the time of entry into the original contract. The total cost of interim actions undertaken at a facility pursuant to this paragraph shall not exceed \$2,000,000.

(9) SITING.—Effective 3 years after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,

(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act.

(d)(1) COOPERATIVE AGREEMENTS.—

(A) STATE APPLICATIONS.—A State or political subdivision thereof or Indian tribe may apply to the President to carry out actions authorized in this section. If the President determines that the State or political subdivision or Indian tribe has the capability to carry out any or all of such actions in accordance with the criteria and priorities established pursuant to section 105(a)(8) and to carry out related enforcement actions, the President may enter into a contract or cooperative agreement with the State or political subdivision or Indian tribe to carry out such actions. The President shall make a determination regarding such an application within 90 days after the President receives the application.

(B) TERMS AND CONDITIONS.—A contract or cooperative agreement under this paragraph shall be subject to such terms and conditions as the President may prescribe. The contract or cooperative agreement may cover a specific facility or specific facilities.

(C) REIMBURSEMENTS.—Any State which expended funds during the period beginning September 30, 1985, and ending on the date of the enactment of this subparagraph for response actions at any site included on the National Priorities List and subject to a cooperative agreement under this Act shall be reimbursed for the share of costs of such actions for which the Federal Government is responsible under this Act.

(2) If the President enters into a cost-sharing agreement pursuant to subsection (c) of this section or a contract or cooperative agreement pursuant to this subsection, and the State or political subdivision thereof fails to comply with any requirements of the contract, the President may, after providing sixty days notice, seek in the appropriate Federal district court to enforce the contract or to recover any funds advanced or any costs incurred because of the breach of the contract by the State or political subdivision.

(3) Where a State or a political subdivision thereof is acting in behalf of the President, the President is authorized to provide technical and legal assistance in the administration and enforcement of any contract or subcontract in connection with response actions assisted under this title, and to intervene in any civil action involving the enforcement of such contract or subcontract.

(4) Where two or more noncontiguous facilities are reasonably related on the basis of geography, or on the basis of the threat, or potential threat to the public health or welfare or the environment, the President may, in his discretion, treat these related facilities as one for purposes of this section.

(e) INFORMATION GATHERING AND ACCESS.—

(1) ACTION AUTHORIZED.—Any officer, employee, or representative of the President, duly designated by the President, is authorized to take action under paragraph (2), (3), or (4) (or any combination thereof) at a vessel, facility, establishment, place, property, or location or, in the case of paragraph (3) or (4), at any vessel, facility, establishment, place, property, or location which is adjacent to the vessel, facility, establishment, place, property, or location referred to in such paragraph (3) or (4). Any duly designated officer, employee, or representative of a State or political subdivision under a contract or cooperative agreement under subsection (d)(1) is also authorized to take such action. The authority of paragraphs (3) and (4) may be exercised only if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant. The authority of this subsection may be exercised only for the purposes of determining the need for response, or choosing or taking any response action under this title, or otherwise enforcing the provisions of this title.

(2) ACCESS TO INFORMATION.—Any officer, employee, or representative described in paragraph (1) may require any person who has or may have information relevant to any of the

following to furnish, upon reasonable notice, information or documents relating to such matter:

(A) The identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a vessel or facility or transported to a vessel or facility.

(B) The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a vessel or facility.

(C) Information relating to the ability of a person to pay for or to perform a cleanup.

In addition, upon reasonable notice, such person either (i) shall grant any such officer, employee, or representative access at all reasonable times to any vessel, facility, establishment, place, property, or location to inspect and copy all documents or records relating to such matters or (ii) shall copy and furnish to the officer, employee, or representative all such documents or records, at the option and expense of such person.

(3) ENTRY.—Any officer, employee, or representative described in paragraph (1) is authorized to enter at reasonable times any of the following:

(A) Any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from.

(B) Any vessel, facility, establishment, or other place or property from which or to which a hazardous substance or pollutant or contaminant has been or may have been released.

(C) Any vessel, facility, establishment, or other place or property where such release is or may be threatened.

(D) Any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this title.

(4) INSPECTION AND SAMPLES.—

(A) AUTHORITY.—Any officer, employee or representative described in paragraph (1) is authorized to inspect and obtain samples from any vessel, facility, establishment, or other place or property referred to in paragraph (3) or from any location of any suspected hazardous substance or pollutant or contaminant. Any such officer, employee, or representative is authorized to inspect and obtain samples of any containers or labeling for suspected hazardous substances or pollutants or contaminants. Each such inspection shall be completed with reasonable promptness.

(B) SAMPLES.—If the officer, employee, or representative obtains any samples, before leaving the premises he shall give to the owner, operator, tenant, or other person in charge of the place from which the samples were obtained a receipt describing the sample obtained and, if requested, a portion of each such sample. A copy of the results of any analysis made of such samples shall be fur-

nished promptly to the owner, operator, tenant, or other person in charge, if such person can be located.

(5) COMPLIANCE ORDERS.—

(A) ISSUANCE.—If consent is not granted regarding any request made by an officer, employee, or representative under paragraph (2), (3), or (4), the President may issue an order directing compliance with the request. The order may be issued after such notice and opportunity for consultation as is reasonably appropriate under the circumstances.

(B) COMPLIANCE.—The President may ask the Attorney General to commence a civil action to compel compliance with a request or order referred to in subparagraph (A). Where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant, the court shall take the following actions:

(i) In the case of interference with entry or inspection, the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

(ii) In the case of information or document requests or orders, the court shall enjoin interference with such information or document requests or orders or direct compliance with the requests or orders to provide such information or documents unless under the circumstances of the case the demand for information or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

The court may assess a civil penalty not to exceed \$25,000 for each day of noncompliance against any person who unreasonably fails to comply with the provisions of paragraph (2), (3), or (4) or an order issued pursuant to subparagraph (A) of this paragraph.

(6) OTHER AUTHORITY.—Nothing in this subsection shall preclude the President from securing access or obtaining information in any other lawful manner.

(7) CONFIDENTIALITY OF INFORMATION.—(A) Any records, reports, or information obtained from any person under this section (including records, reports, or information obtained by representatives of the President) shall be available to the public *not later than 14 days after the records, reports, or information is obtained*, except that upon a showing satisfactory to the President (or the State, as the case may be) by any person that records, reports, or information, or particular part thereof (other than health or safety effects data), to which the President (or the State, as the case may be) or any officer, employee, or representative has access under this section if made public would divulge information entitled to protection under section 1905 of title 18 of the United States Code, such information or

particular portion thereof shall be considered confidential in accordance with the purposes of that section, except that such record, report, document or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act, or when relevant in any proceeding under this Act.

(B) Any person not subject to the provisions of section 1905 of title 18 of the United States Code who knowingly and willfully divulges or discloses any information entitled to protection under this subsection shall, upon conviction, be subject to a fine of not more than \$5,000 or to imprisonment not to exceed one year, or both.

(C) In submitting data under this Act, a person required to provide such data may (i) designate the data which such person believes is entitled to protection under this subsection and (ii) submit such designated data separately from other data submitted under this Act. A designation under this paragraph shall be made in writing and in such manner as the President may prescribe by regulation.

(D) Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the President (or any representative of the President) under this Act shall be made available, upon written request of any duly authorized committee of the Congress, to such committee.

(E) No person required to provide information under this Act may claim that the information is entitled to protection under this paragraph unless such person shows each of the following:

(i) Such person has not disclosed the information to any other person, other than a member of a local emergency planning committee established under title III of the Amendments and Reauthorization Act of 1986, an officer or employee of the United States or a State or local government, an employee of such person, or a person who is bound by a confidentiality agreement, and such person has taken reasonable measures to protect the confidentiality of such information and intends to continue to take such measures.

(ii) The information is not required to be disclosed, or otherwise made available, to the public under any other Federal or State law.

(iii) Disclosure of the information is likely to cause substantial harm to the competitive position of such person.

(iv) The specific chemical identity, if sought to be protected, is not readily discoverable through reverse engineering.

(F) The following information with respect to any hazardous substance at the facility or vessel shall not be entitled to protection under this paragraph:

(i) The trade name, common name, or generic class or category of the hazardous substance.

- (ii) The physical properties of the substance, including its boiling point, melting point, flash point, specific gravity, vapor density, solubility in water, and vapor pressure at 20 degrees celsius.
 - (iii) The hazards to health and the environment posed by the substance, including physical hazards (such as explosion) and potential acute and chronic health hazards.
 - (iv) The potential routes of human exposure to the substance at the facility, establishment, place, or property being investigated, entered, or inspected under this subsection.
 - (v) The location of disposal of any waste stream.
 - (vi) Any monitoring data or analysis of monitoring data pertaining to disposal activities.
 - (vii) Any hydrogeologic or geologic data.
 - (viii) Any groundwater monitoring data.
- (f) In awarding contracts to any person engaged in response actions, the President or the State, in any case where it is awarding contracts pursuant to a contract entered into under subsection (d) of this section, shall require compliance with Federal health and safety standards established under section 301(f) of this Act by contractors and subcontractors as a condition of such contracts.
- (g)(1) All laborers and mechanics employed by contractors or subcontractors in the performance of construction, repair, or alteration work funded in whole or in part under this section shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. The President shall not approve any such funding without first obtaining adequate assurance that required labor standards will be maintained upon the construction work.
- (2) The Secretary of Labor shall have, with respect to the labor standards specified in paragraph (1), the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of title 40 of the United States Code.
- (h) Notwithstanding any other provision of law, subject to the provisions of section 111 of this Act, the President may authorize the use of such emergency procurement powers as he deems necessary to effect the purpose of this Act. Upon determination that such procedures are necessary, the President shall promulgate regulations prescribing the circumstances under which such authority shall be used and the procedures governing the use of such authority.
- (i)(1) There is hereby established within the Public Health Service an agency, to be known as the Agency for Toxic Substances and Disease Registry, which shall report directly to the Surgeon General of the United States. The Administrator of said Agency shall, with the cooperation of the Administrator of the Environmental Protection Agency, the Commissioner of the Food and Drug Administration, the Directors of the National Institute of Medicine, National Institute of Environmental Health Sciences, National Institute of Occupational Safety and Health, Centers for Disease Control and Prevention, the Administrator of the Occupational Safety

and Health Administration, the Administrator of the Social Security Administration, the Secretary of Transportation, [and appropriate State and local health officials] *the Indian Health Service, and appropriate State, tribal, and local health officials*, effectuate and implement the health related authorities of this Act. In addition, said Administrator shall—

(A) in cooperation with the States *and Indian Tribes*, establish and maintain a national registry of serious diseases and illnesses and a national registry of persons exposed to toxic substances;

(B) establish and maintain inventory of literature, research, and studies on the health effects of toxic substances;

(C) in cooperation with the States *and Indian Tribes*, and other agencies of the Federal Government, establish and maintain a complete listing of areas closed to the public or otherwise restricted in use because of toxic substance contamination;

(D) in cases of public health emergencies caused or believed to be caused by exposure to toxic substances, provide medical care and testing to exposed individuals, including but not limited to tissue sampling, chromosomal testing where appropriate, epidemiological studies, or any other assistance appropriate under the circumstances; and

(E) either independently or as part of other health status survey, conduct periodic survey and screening programs to determine relationships between exposure to toxic substances and illness. In cases of public health emergencies, exposed persons shall be eligible for [admission to hospitals and other facilities and services operated or provided by the Public Health Service] *referral to licensed or accredited health care providers*.

(2)(A) Within 6 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the Administrator of the Agency for Toxic Substances and Disease Registry (ATSDR) and the Administrator of the Environmental Protection Agency (“EPA”) shall prepare a list, in order of priority, of at least 100 hazardous substances which are most commonly found at facilities on the National Priorities List and which, in their sole discretion, they determine are posing the most significant potential threat to human health due to their known or suspected toxicity to humans and the potential for human exposure to such substances at facilities on the National Priorities List or at facilities to which a response to a release or a threatened release under this section is under consideration.

(B) Within 24 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the Administrator of ATSDR and the Administrator of EPA shall revise the list prepared under subparagraph (A). Such revision shall include, in order of priority, the addition of 100 or more such hazardous substances. In each of the 3 consecutive 12-month periods that follow, the Administrator of ATSDR and the Administrator of EPA shall revise, in the same manner as provided in the 2 preceding sentences, such list to include not fewer than 25 additional hazardous substances per revision. The Administrator of ATSDR and the Administrator of EPA shall not less often than once every year thereafter revise

such list to include additional hazardous substances in accordance with the criteria in subparagraph (A).

(3) Based on all available information, including information maintained under paragraph (1)(B) and data developed and collected on the health effects of hazardous substances under this paragraph, the Administrator of ATSDR shall prepare toxicological profiles of each of the substances listed pursuant to paragraph (2). The toxicological profiles shall be prepared in accordance with guidelines developed by the Administrator of ATSDR and the Administrator of EPA. Such profiles shall include, but not be limited to each of the following:

(A) An examination, summary, and interpretation of available toxicological information and epidemiologic evaluations on a hazardous substance in order to ascertain the levels of significant human exposure for the substance and the associated acute, subacute, and chronic health effects.

(B) A determination of whether adequate information on the health effects of each substance is available or in the process of development to determine levels of exposure which present a significant risk to human health of acute, subacute, and chronic health effects.

(C) Where appropriate, an identification of toxicological testing needed to identify the types or levels of exposure that may present significant risk of adverse health effects in humans.

Any toxicological profile or revision thereof shall reflect the Administrator of ATSDR's assessment of all relevant toxicological testing which has been peer reviewed. The profiles required to be prepared under this paragraph for those hazardous substances listed under subparagraph (A) of paragraph (2) shall be completed, at a rate of no fewer than 25 per year, within 4 years after the enactment of the Superfund Amendments and Reauthorization Act of 1986. A profile required on a substance listed pursuant to subparagraph (B) of paragraph (2) shall be completed within 3 years after addition to the list. The profiles prepared under this paragraph shall be of those substances highest on the list of priorities under paragraph (2) for which profiles have not previously been prepared. Profiles required under this paragraph shall be revised and republished as necessary, [but no less often than once every 3 years] *if the Administrator of ATSDR determines that there is significant new information. Such profiles shall be provided to the States and Indian Tribes and made available to other interested parties.*

(4) The Administrator of the ATSDR shall provide consultations upon request on health issues relating to exposure to hazardous or toxic substances, on the basis of available information, to the Administrator of EPA, [State officials] *State, tribal, and local officials.* Such consultations to individuals may be provided by States or *Indian Tribes* under cooperative agreements established under this Act.

(5)(A) For each hazardous substance listed pursuant to paragraph (2), the Administrator of ATSDR (in consultation with the Administrator of EPA and other agencies and programs of the Public Health Service *and the Indian Health Service*) shall assess whether adequate information on the health effects of such sub-

stance is available. For any such substance for which adequate information is not available (or under development), the Administrator of ATSDR, in cooperation with the Director of the National Toxicology Program, shall assure the initiation of a program of research *conducted directly or by such means as cooperative agreements and grants with appropriate public and nonprofit institutions*. The program shall be designed to determine the health effects (and techniques for development of methods to determine such health effects) of such substance. Where feasible, such program shall seek to develop methods to determine the health effects of such substance in combination with other substances with which it is commonly found. Before assuring the initiation of such program, the Administrator of ATSDR shall consider recommendations of the Interagency Testing Committee established under section 4(e) of the Toxic Substances Control Act on the types of research that should be done. Such program shall include, to the extent necessary to supplement existing information, but shall not be limited to—

(i) laboratory and other studies to determine short, intermediate, and long-term health effects;

(ii) laboratory and other studies to determine organ-specific, site-specific, and system-specific acute and chronic toxicity;

(iii) laboratory and other studies to determine the manner in which such substances are metabolized or to otherwise develop an understanding of the biokinetics of such substances; and

(iv) where there is a possibility of obtaining human data, the collection of such information.

(B) In assessing the need to perform laboratory and other studies, as required by subparagraph (A), the Administrator of ATSDR shall consider—

(i) the availability and quality of existing test data concerning the substance on the suspected health effect in question;

(ii) the extent to which testing already in progress will, in a timely fashion, provide data that will be adequate to support the preparation of toxicological profiles as required by paragraph (3); and

(iii) such other scientific and technical factors as the Administrator of ATSDR may determine are necessary for the effective implementation of this subsection.

(C) In the development and implementation of any research program under this paragraph, the Administrator of ATSDR and the Administrator of EPA shall coordinate such research program implemented under this paragraph with the National Toxicology Program and with programs of toxicological testing established under the Toxic Substances Control Act and the Federal Insecticide, Fungicide and Rodenticide Act. The purpose of such coordination shall be to avoid duplication of effort and to assure that the hazardous substances listed pursuant to this subsection are tested thoroughly at the earliest practicable date. Where appropriate, consistent with such purpose, a research program under this para-

graph may be carried out using such programs of toxicological testing.

(D) It is the sense of the Congress that the costs of research programs under this paragraph be borne by the manufacturers and processors of the hazardous substance in question, as required in programs of toxicological testing under the Toxic Substances Control Act. Within 1 year after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the Administrator of EPA shall promulgate regulations which provide, where appropriate, for payment of such costs by manufacturers and processors under the Toxic Substances Control Act, and registrants under the Federal Insecticide, Fungicide, and Rodenticide Act, and recovery of such costs from responsible parties under this Act.

[(6)(A) The Administrator of ATSDR shall perform a health assessment for each facility on the National Priorities List established under section 105. Such health assessment shall be completed not later than December 10, 1988, for each facility proposed for inclusion on such list prior to the date of the enactment of the Superfund Amendments and Reauthorization Act of 1986 or not later than one year after the date of proposal for inclusion on such list for each facility proposed for inclusion on such list after such date of enactment.]

(6) *HEALTH ASSESSMENTS AND RELATED HEALTH ACTIVITIES.*—

(A) *REQUIREMENTS.*—*The Administrator of ATSDR shall perform a health assessment for each covered facility unless the Administrator publishes a finding that the facility presents no significant health risk.*

(B) The Administrator of ATSDR may perform health assessments for releases or facilities where individual persons or licensed physicians provide information that individuals have been exposed to a hazardous substance, for which the probable source of such exposure is a release. In addition to other methods (formal or informal) of providing such information, such individual persons or licensed physicians may submit a petition to the Administrator of ATSDR providing such information and requesting a health assessment. If such a petition is submitted and the Administrator of ATSDR does not initiate a health assessment, the Administrator of ATSDR shall provide a written explanation of why a health assessment is not appropriate.

(C) In determining the priority in which to conduct health assessments under this subsection, the Administrator of ATSDR, in consultation with the Administrator of EPA, shall give priority to those facilities at which there is documented evidence of the release of hazardous substances, at which the potential risk to human health appears highest, and for which in the judgment of the Administrator of ATSDR existing health assessment data are inadequate to assess the potential risk to human health as provided in subparagraph (F). In determining the priorities for conducting health assessments under this subsection, the Administrator of ATSDR shall consider the National Priorities List schedules and the needs of the Environmental Protection Agency and other Federal agencies pursuant to schedules for remedial investigation and feasibility studies.

(D) Where a health assessment is done at a site on the National Priorities List, the Administrator of ATSDR shall complete such assessment promptly and, to the maximum extent practicable, before the completion of the remedial investigation and feasibility study at the facility concerned. *The President and the Administrator of ATSDR shall, for each facility that is placed on the National Priorities List on or after the date of enactment of the Superfund Cleanup Acceleration Act of 1998, complete a health assessment prior to the completion of the remedial investigation and feasibility study, but in no circumstance shall the President delay the progress of a remedial action pending completion of a health assessment. When appropriate, the Administrator of ATSDR shall, in cooperation with State and local health officials, provide to the President recommendations for sampling environmental media. To the extent practicable, the President shall incorporate the recommendations into facility characterization activities.*

(E) Any State, [or political subdivision carrying out a health assessment] *Indian Tribe, or political subdivision of a State carrying out a health assessment* for a facility shall report the results of the assessment to the Administrator of ATSDR and the Administrator of EPA and shall include recommendations with respect to further activities which need to be carried out under this section. The Administrator of ATSDR shall state such recommendation in any report on the results of any assessment carried out directly by the Administrator of ATSDR for such facility and shall issue periodic reports which include the results of all the assessments carried out under this subsection.

[(F) For the purposes]

(F) *DEFINITION OF HEALTH ASSESSMENTS.—*

(i) *IN GENERAL.—For the purposes of health assessments of this subsection and section 111(c)(4), the term “health assessments” shall include preliminary assessments of the potential risk to human health posed by individual sites and facilities, based on such factors as the nature and extent of contamination, the [existence of potential] past, present, and future potential pathways of human exposure (including ground or surface water contamination, air emissions, and food chain contamination), the size and potential susceptibility of the community within the likely pathways of exposure, [the comparison] of expected human exposure levels to the short-term and long-term health effects associated with identified hazardous substances and any available recommended exposure or tolerance limits for such hazardous substances, and the comparison of existing morbidity and mortality data on diseases that may be associated with the observed levels of exposure. [The Administrator of ATSDR shall use appropriate data, risk assessments, risk evaluations and studies available from the Administrator of EPA.]*

(ii) *PROVISION OF DATA.—The Administrator shall consider information provided by State, Indian Tribe, and local health officials and the affected community*

(including a community advisory group, if one has been established under subsection (g)) as is necessary to perform a health assessment.

(G) The purpose of health assessments under this subsection shall be to assist in determining whether actions under paragraph (11) of this subsection should be taken to reduce human exposure to hazardous substances from a facility and whether additional information on human exposure and associated health risks is needed and should be acquired by conducting epidemiological studies under paragraph (7), establishing a registry under paragraph (8), establishing a health surveillance program under paragraph (9), or through other means. **[In using the results of health assessments for determining additional actions to be taken]** *In performing health assessments* under this section, the Administrator of ATSDR may consider additional information on the risks to the potentially affected population from all sources of such hazardous substances including known point or nonpoint sources other than those from the facility in question *and shall give special consideration, where appropriate, to any practices of the affected community that may result in increased exposure to hazardous substances, pollutants, or contaminants, such as subsistence hunting, fishing, and gathering.*

(H) At the completion of each health assessment, the Administrator of ATSDR shall provide the Administrator of EPA and **[each affected State]** *appropriate State, Indian Tribe, and local health officials and community advisory groups* with the results of such assessment, together with any recommendations for further actions under this subsection or otherwise under this Act. In addition, if the health assessment indicates that the release or threatened release concerned may pose a serious threat to human health or the environment, the Administrator of ATSDR shall so notify the Administrator of EPA who shall promptly evaluate such release or threatened release in accordance with the hazard ranking system referred to in section 105(a)(8)(A) to determine whether the site shall be placed on the National Priorities List or, if the site is already on the list, the Administrator of ATSDR may recommend to the Administrator of EPA that the site be accorded a higher priority.

(7)(A) Whenever in the judgment of the Administrator of ATSDR it is appropriate on the basis of the results of a health assessment, the Administrator of ATSDR shall conduct a pilot study of health effects for selected groups of exposed individuals in order to determine the desirability of conducting full scale epidemiological or other health studies of the entire exposed population.

(B) Whenever in the judgment of the Administrator of ATSDR it is appropriate on the basis of the results of such pilot study or other study or health assessment, the Administrator of ATSDR shall conduct such full scale epidemiological or other health studies as may be necessary to determine the health effects on the population exposed to hazardous substances from a release or threatened release. If a significant excess of disease in a population is identified, the letter of transmittal of such study shall include an assessment of other risk factors, other than a release, that may, in the judgment of the peer review group, be associated with such dis-

ease, if such risk factors were not taken into account in the design or conduct of the study.

(8) In any case in which the results of a health assessment indicate a potential significant risk to human health, the Administrator of ATSDR shall consider whether the establishment of a registry of exposed persons would contribute to accomplishing the purposes of this subsection, taking into account circumstances bearing on the usefulness of such a registry, including the seriousness or unique character of identified diseases or the likelihood of population migration from the affected area.

(9) Where the Administrator of ATSDR has determined that there is a significant increased risk of adverse health effects in humans from exposure to hazardous substances based on the results of a health assessment conducted under paragraph (6), an epidemiologic study conducted under paragraph (7), or an exposure registry that has been established under paragraph (8), and the Administrator of ATSDR has determined that such exposure is the result of a release from a facility, the Administrator of ATSDR shall initiate a health surveillance program for such population. This program shall include but not be limited to—

(A) periodic medical testing where appropriate of population subgroups to screen for diseases for which the population or subgroup is at significant increased risk; and

(B) a mechanism to refer for treatment those individuals within such population who are screened positive for such diseases.

(10) [Two years after the date of the enactment of the Superfund Amendments and Reauthorization Act of 1986, and every 2 years thereafter] *Every 2 years*, the Administrator of ATSDR shall prepare and submit to the Administrator of EPA and to the Congress a report on the results of the activities of ATSDR regarding—

(A) health assessments and pilot health effects studies conducted;

(B) epidemiologic studies conducted;

(C) hazardous substances which have been listed under paragraph (2), toxicological profiles which have been developed, and toxicologic testing which has been conducted or which is being conducted under this subsection;

(D) registries established under paragraph (8); [and]

(E) an overall assessment, based on the results of activities conducted by the Administrator of ATSDR of the linkage between human exposure to individual or combinations of hazardous substances due to releases from facilities covered by this Act or the Solid Waste Disposal Act and any increased incidence or prevalence of adverse health effects in humans[.]; and

(F) *the health impacts on Indian Tribes of hazardous substances, pollutants, and contaminants from covered facilities.*

(11) If a health assessment or other study carried out under this subsection contains a finding that the exposure concerned presents a significant risk to human health, the President shall take such steps as may be necessary to reduce such exposure and elimi-

nate or substantially mitigate the significant risk to human health. Such steps may include the use of any authority under this Act, including, but not limited to—

(A) provision of alternative water supplies, and

(B) permanent or temporary relocation of individuals.

In any case in which information is insufficient, in the judgment of the Administrator of ATSDR or the President to determine a significant human exposure level with respect to a hazardous substance, the President may take such steps as may be necessary to reduce the exposure of any person to such hazardous substance to such level as the President deems necessary to protect human health.

(12) In any case which is the subject of a petition, a health assessment or study, or a research program under this subsection, nothing in this subsection shall be construed to delay or otherwise affect or impair the authority of the President, the Administrator of ATSDR or the Administrator of EPA to exercise any authority vested in the President, the Administrator of ATSDR or the Administrator of EPA under any other provision of law (including, but not limited to, the imminent hazard authority of section 7003 of the Solid Waste Disposal Act) or the response and abatement authorities of this Act.

(13) All studies and results of research conducted under this subsection (other than health assessments) shall be reported or adopted only after appropriate peer review. Such peer review shall be completed, to the maximum extent practicable, within a period of 60 days. In the case of research conducted under the National Toxicology Program, such peer review may be conducted by the Board of Scientific Counselors. In the case of other research, such peer review shall be conducted by panels consisting of no less than three nor more than seven members, who shall be disinterested scientific experts selected for such purpose by the Administrator of ATSDR or the Administrator of EPA, as appropriate, on the basis of their reputation for scientific objectivity and the lack of institutional ties with any person involved in the conduct of the study or research under review. Support services for such panels shall be provided by the Agency for Toxic Substances and Disease Registry, or by the Environmental Protection Agency, as appropriate.

(14) In the implementation of this subsection and other health-related authorities of this Act, the Administrator of ATSDR shall assemble, develop as necessary, and ~~[(distribute to the States, and upon request to medical colleges, physicians, and]~~*distribute—*

(A) to the States and local health officials, and upon request to medical colleges, medical centers, local health practitioners, and other health professionals, appropriate educational materials (including short courses) on the medical surveillance, screening, and [methods of diagnosis and treatment] methods of prevention, diagnosis, and treatment of injury or disease related to exposure to hazardous substances (giving priority to those listed in paragraph (2)), through such means as the Administrator of ATSDR deems appropriate[.]; and

(B) to the community potentially affected by a facility appropriate educational materials, facility-specific information, and other information on human health effects of hazardous

substances using available community information networks, including, if appropriate, or a community advisory group.

(15) The activities of the Administrator of ATSDR described in this subsection and section 111(c)(4) shall be carried out by the Administrator of ATSDR, either directly or **through cooperative agreements with States (or political subdivisions thereof) which the Administrator** *through grants to, or cooperative agreements or contracts with, States (or political subdivisions of States) or other appropriate public authorities or private nonprofit entities, public or private institutions, colleges or universities, or professional associations that the Administrator of ATSDR determines are capable of carrying out such activities.* Such activities shall include provision of consultations on health information, the conduct of health assessments, including those required under section 3019(b) of the Solid Waste Disposal Act, health studies, registries, and health surveillance.

(16) The President shall provide adequate personnel for ATSDR, which shall not be fewer than 100 employees. For purposes of determining the number of employees under this subsection, an employee employed by ATSDR on a part-time career employment basis shall be counted as a fraction which is determined by dividing 40 hours into the average number of hours of such employee's regularly scheduled workweek.

(17) In accordance with section 120 (relating to Federal facilities), the Administrator of ATSDR shall have the same authorities under this section with respect to facilities owned or operated by a department, agency, or instrumentality of the United States as the Administrator of ATSDR has with respect to any nongovernmental entity.

(18) If the Administrator of ATSDR determines that it is appropriate for purposes of this section to treat a pollutant or contaminant as a hazardous substance, such pollutant or contaminant shall be treated as a hazardous substance for such purpose.

(19) **PUBLIC HEALTH EDUCATION.**—

(A) **IN GENERAL.**—*If the Administrator of ATSDR considers it appropriate, the Administrator of ATSDR, in cooperation with State, Indian Tribe, and other interested Federal and local officials, shall conduct health education activities to make a community near a covered facility aware of the steps the community may take to mitigate or prevent exposure to hazardous substances and the health effects of hazardous substances.*

(B) **DISSEMINATION.**—*In disseminating public health information under this paragraph relating to a covered facility, the Administrator of ATSDR shall use community health centers, area health education centers, or other community information networks, including a community advisory group, or a technical assistance grant recipient.*

(j) **ACQUISITION OF PROPERTY.**—

(1) **AUTHORITY.**—The President is authorized to acquire, by purchase, lease, condemnation, donation, or otherwise, any real property or any interest in real property that the President in his discretion determines is needed to conduct a remedial action under this Act. There shall be no cause of action to compel

the President to acquire any interest in real property under this Act.

(2) STATE ASSURANCE.—The President may use the authority of paragraph (1) for a remedial action only if, before an interest in real estate is acquired under this subsection, the State in which the interest to be acquired is located assures the President, through a contract or cooperative agreement or otherwise, that the State will accept transfer of the interest following completion of the remedial action.

(3) EXEMPTION.—No Federal, State, or local government agency shall be liable under this Act solely as a result of acquiring an interest in real estate under this subsection.

[42 U.S.C. 9604]

NATIONAL CONTINGENCY PLAN

SEC. 105. (a) REVISION AND REPUBLICATION.—Within one hundred and eighty days after the enactment of this Act, the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances, originally prepared and published pursuant to section 311 of the Federal Water Pollution Control Act, to reflect and effectuate the responsibilities and powers created by this Act, in addition to those matters specified in section 311(c)(2).⁴⁵ Such revision shall include a section of the plan to be known as the national hazardous substance response plan which shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants, which shall include at a minimum:

(1) methods for discovering and investigating facilities at which hazardous substances have been disposed of or otherwise come to be located;

(2) methods for evaluating, including analyses of relative cost, and remedying any releases or threats of releases from facilities which pose substantial danger to the public health or the environment;

(3) methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this Act;

(4) appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and nongovernmental entities in effectuating the plan;

(5) provision for identification, procurement, maintenance, and storage of response equipment and supplies;

(6) a method for and assignment of responsibility for reporting the existence of such facilities which may be located on federally owned or controlled properties and any releases of hazardous substances from such facilities;

(7) means of assuring that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances or contaminated materials;

⁴⁵Probably should refer to section 311(d)(2), pursuant to general amendments made to such section by section 4201(a) of Public Law 101-380.

(8)(A) criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action. Criteria and priorities under this paragraph shall be based upon relative risk or danger to public health or welfare or the environment, in the judgment of the President, taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive eco-systems, the damage to natural resources which may affect the human food chain and which is associated with any release or threatened release, the contamination or potential contamination of the ambient air which is associated with the release or threatened release, State preparedness to assume State costs and responsibilities, and other appropriate factors;

(B) based upon the criteria set forth in subparagraph (A) of this paragraph, the President shall list as part of the plan national priorities among the known releases or threatened releases throughout the United States and shall revise the list no less often than annually. Within one year after the date of enactment of this Act, and annually thereafter, each State shall establish and submit for consideration by the President priorities for remedial action among known releases and potential releases in that State based upon the criteria set forth in subparagraph (A) of this paragraph. In assembling or revising the national list, the President shall consider any priorities established by the States. To the extent practicable, the highest priority facilities shall be designated individually and shall be referred to as the "top priority among known response targets", and, to the extent practicable, shall include among the one hundred highest priority facilities one such facility from each State which shall be the facility designated by the State as presenting the greatest danger to public health or welfare or the environment among the known facilities in such State. A State shall be allowed to designate its highest priority facility only once. Other priority facilities or incidents may be listed singly or grouped for response priority purposes;

(C) *provision that, to the extent practicable, in listing a facility on the National Priorities List, the Administrator will not include any parcel of real property at which no release has actually occurred, but to which a released hazardous substance, pollutant, or contaminant has migrated in ground water that has moved through subsurface strata from another parcel of real estate at which the release actually occurred, unless—*

(i) the ground water is in use as a public drinking water supply or was in such use at the time of the release; and

(ii) the owner or operator of the facility is liable, or is affiliated with any other person that is liable, for any response costs at the facility, through any direct or indirect familial relationship, or any contractual, corporate, or fi-

nancial relationship other than that created by the instruments by which title to the facility is conveyed or financed.

(9) specified roles for private organizations and entities in preparation for response and in responding to releases of hazardous substances, including identification of appropriate qualifications and capacity therefor and including consideration of minority firms in accordance with subsection (f); **[and]**

(10) standards and testing procedures by which alternative or innovative treatment technologies can be determined to be appropriate for utilization in response actions authorized by this Act **[.]; and**

(11) *procedures for conducting response actions, including facility evaluations, remedial investigations, feasibility studies, remedial action plans, remedial designs, and remedial actions, which procedures shall—*

(A) use a results-oriented approach to minimize the time required to conduct response measures and reduce the potential for exposure to the hazardous substances, pollutants, and contaminants in an efficient, timely, and cost-effective manner;

(B) require, at a minimum, expedited facility evaluations and risk assessments, timely negotiation of response action goals, a single engineering study, streamlined oversight of response actions, and consultation with interested parties throughout the response action process;

(C) be subject to the requirements of sections 117, 120, 121, and 133 in the same manner and to the same degree as those sections apply to response actions; and

(D) be required to be used for each remedial action conducted under this Act unless the Administrator determines that their use would not be cost-effective or result in the selection of a response action that achieves the goals of protecting human health and the environment stated in section 121(a)(1)(B).

The plan shall specify procedures, techniques, materials, equipment, and methods to be employed in identifying, removing, or remedying releases of hazardous substances comparable to those required under section 311(c)(2) (F) and (G) and (j)(1) of the Federal Water Pollution Control Act. Following publication of the revised national contingency plan, the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions of the plan. The President may, from time to time, revise and republish the national contingency plan.

(b) **REVISION OF PLAN.**—Not later than 18 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the President shall revise the National Contingency Plan to reflect the requirements of such amendments. The portion of such Plan known as “the National Hazardous Substance Response Plan” shall be revised to provide procedures and standards for remedial actions undertaken pursuant to this Act which are consistent with amendments made by the Superfund Amendments and Reauthorization Act of 1986 relating to the selection of remedial action.

(c) **HAZARD RANKING SYSTEM.**—

(1) REVISION.—Not later than 18 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986 and after publication of notice and opportunity for submission of comments in accordance with section 553 of title 5, United States Code, the President shall by rule promulgate amendments to the hazard ranking system in effect on September 1, 1984. Such amendments shall assure, to the maximum extent feasible, that the hazard ranking system accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review. The President shall establish an effective date for the amended hazard ranking system which is not later than 24 months after enactment of the Superfund Amendments and Reauthorization Act of 1986. Such amended hazard ranking system shall be applied to any site or facility to be newly listed on the National Priorities List after the effective date established by the President. Until such effective date of the regulations, the hazard ranking system in effect on September 1, 1984, shall continue in full force and effect.

(2) HEALTH ASSESSMENT OF WATER CONTAMINATION RISKS.—In carrying out this subsection, the President shall ensure that the human health risks associated with the contamination or potential contamination (either directly or as a result of the runoff of any hazardous substance or pollutant or contaminant from sites or facilities) of surface water are appropriately assessed where such surface water is, or can be, used for recreation or potable water consumption. In making the assessment required pursuant to the preceding sentence, the President shall take into account the potential migration of any hazardous substance or pollutant or contaminant through such surface water to downstream sources of drinking water.

(3) REEVALUATION NOT REQUIRED.—The President shall not be required to reevaluate, after the date of the enactment of the Superfund Amendments and Reauthorization Act of 1986, the hazard ranking of any facility which was evaluated in accordance with the criteria under this section before the effective date of the amendments to the hazard ranking system under this subsection and which was assigned a national priority under the National Contingency Plan.

(4) NEW INFORMATION.—Nothing in paragraph (3) shall preclude the President from taking new information into account in undertaking response actions under this Act.

(d) PETITION FOR ASSESSMENT OF RELEASE.—Any person who is, or may be, affected by a release or threatened release of a hazardous substance or pollutant or contaminant, may petition the President to conduct a preliminary assessment of the hazards to public health and the environment which are associated with such release or threatened release. If the President has not previously conducted a preliminary assessment of such release, the President shall, within 12 months after the receipt of any such petition, complete such assessment or provide an explanation of why the assessment is not appropriate. If the preliminary assessment indicates that the release or threatened release concerned may pose a threat to human health or the environment, the President shall promptly

evaluate such release or threatened release in accordance with the hazard ranking system referred to in paragraph (8)(A) of subsection (a) to determine the national priority of such release or threatened release.

(e) **RELEASES FROM EARLIER SITES.**—Whenever there has been, after January 1, 1985, a significant release of hazardous substances or pollutants or contaminants from a site which is listed by the President as a “Site Cleaned Up To Date” on the National Priorities List (revised edition, December 1984) the site shall be restored to the National Priorities List, without application of the hazard ranking system.

(f) **MINORITY CONTRACTORS.**—In awarding contracts under this Act, the President shall consider the availability of qualified minority firms. The President shall describe, as part of any annual report submitted to the Congress under this Act, the participation of minority firms in contracts carried out under this Act. Such report shall contain a brief description of the contracts which have been awarded to minority firms under this Act and of the efforts made by the President to encourage the participation of such firms in programs carried out under this Act.

(g) **SPECIAL STUDY WASTES.**—

(1) **APPLICATION.**—This subsection applies to facilities—

(A) which as of the date of enactment of the Superfund Amendments and Reauthorization Act of 1986 were not included on, or proposed for inclusion on, the National Priorities List; and

(B) at which special study wastes described in paragraph (2), (3)(A)(ii) or (3)(A)(iii) of section 3001(b) of the Solid Waste Disposal Act are present in significant quantities, including any such facility from which there has been a release of a special study waste.

(2) **CONSIDERATIONS IN ADDING FACILITIES TO NPL.**—Pending revision of the hazard ranking system under subsection (c), the President shall consider each of the following factors in adding facilities covered by this section to the National Priorities List:

(A) The extent to which hazard ranking system score for the facility is affected by the presence of any special study waste at, or any release from, such facility.

(B) Available information as to the quantity, toxicity, and concentration of hazardous substances that are constituents of any special study waste at, or released from such facility, the extent of or potential for release of such hazardous constituents, the exposure or potential exposure to human population and the environment, and the degree of hazard to human health or the environment posed by the release of such hazardous constituents at such facility. This subparagraph refers only to available information on actual concentrations of hazardous substances and not on the total quantity of special study waste at such facility.

(3) **SAVINGS PROVISIONS.**—Nothing in this subsection shall be construed to limit the authority of the President to remove any facility which as of the date of enactment of the Superfund Amendments and Reauthorization Act of 1986 is included on

the National Priorities List from such List, or not to list any facility which as of such date is proposed for inclusion on such list.

(4) INFORMATION GATHERING AND ANALYSIS.—Nothing in this Act shall be construed to preclude the expenditure of monies from the Fund for gathering and analysis of information which will enable the President to consider the specific factors required by paragraph (2).

(h) LISTING OF PARTICULAR PARCELS.—

(1) DEFINITION.—*In subsection (a)(8)(C) and paragraph (2) of this subsection, the term “parcel of real property” means a parcel, lot, or tract of land that has a separate legal description from that of any other parcel, lot, or tract of land the legal description and ownership of which has been recorded in accordance with the law of the State in which it is located.*

(2) STATUTORY CONSTRUCTION.—*Nothing in subsection (a)(8)(C) shall be construed to limit the Administrator’s authority under section 104 to obtain access to and undertake response actions at any parcel of real property to which a released hazardous substance, pollutant, or contaminant has migrated in the ground water.*

[42 U.S.C. 9605]

ABATEMENT ACTION

SEC. 106. [(a) In addition] (a) ORDER.—

(1) IN GENERAL.—*In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.*

(2) CONTENTS OF ORDER.—*An order under paragraph (1) shall provide information concerning the evidence that indicates that each element of liability described in section 107(a)(1) (A), (B), (C), and (D), as applicable, is present.*

(b)(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than \$25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action,

plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 107(a) may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28 of the United States Code.

(c) Within one hundred and eighty days after enactment of this Act, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this Act. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 311(c)(2),⁴⁶ 308, 309, and 504(a) of the Federal Water Pollution Control Act, (2) sections 3007, 3008, 3013, and 7003 of the Solid Waste Disposal Act, (3) sections 1445 and 1431 of the Safe Drinking Water Act, (4) sections 113, 114, and 303 of the Clean Air Act, and (5) section 7 of the Toxic Substances Control Act.

[42 U.S.C. 9606]

【LIABILITY

【SEC. 107. (a) Notwithstanding】

⁴⁶See footnote 1 under section 105.

SEC. 107. LIABILITY.

(a) *IN GENERAL.*—

(1) *PERSONS LIABLE.*—Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) **[of this section]** and the exemptions and limitations stated in this section—

[(1)] (A) the owner and operator of a vessel or a facility,

[(2)] (B) 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)] (C) 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)] (D) 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—]** hazardous substance;

shall be liable for the costs and damages described in paragraph (2).

(2) *COSTS AND DAMAGES.*—A person described in paragraph (1) shall be liable for—

(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).

[The amounts]

(3) *INTEREST.*—The amounts recoverable in an action under this section shall include interest on the amounts recoverable under **[subparagraphs (A) through (D)]** paragraph (2). 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. For purposes of applying such amendments to interest under this subsection, the term “comparable matu-

rity” shall be determined with reference to the date on which interest accruing under this subsection commences.⁴⁷

(b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from [a published tariff and acceptance] a contract for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a)⁴⁸ he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b)⁴⁹ he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c)(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, \$300 per gross ton, or \$5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, \$300 per gross ton, or \$500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a) of title 49, United States Code), or rolling stock, \$50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than \$5,000,000 (or, for releases of hazardous substances as defined in section 101(14)(A) of this title into the navigable waters, \$8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

⁴⁷Section 209 of the Water Resources Development Act of 1996 (Public Law 104–303; 110 Stat. 3681) provides:

SEC. 209. [42 U.S.C. 9607 note] RECOVERY OF COSTS.

Amounts recovered under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) for any response action taken by the Secretary in support of the civil works program of the Department of the Army and any other amounts recovered by the Secretary from a contractor, insurer, surety, or other person to reimburse the Department of the Army for any expenditure for environmental response activities in support of the Army civil works program shall be credited to the appropriate trust fund account from which the cost of such response action has been paid or will be charged.

⁴⁸So in law. Probably should be “(A)”.

⁴⁹So in law. Probably should be “(B)”.

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus \$50,000,000 for any damages under this title.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of title 49 of the United States Code or vessels subject to the provisions of title 33 or 46 of the United States Code, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 112(c) of this Act. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) RENDERING CARE OR ADVICE.—

(1) IN GENERAL.—Except as provided in paragraph (2), no person shall be liable under this title for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan (“NCP”) or at the direction of an on-scene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) STATE AND LOCAL GOVERNMENTS.—No State or local government shall be liable under this title for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of

the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) SAVINGS PROVISION.—This subsection shall not alter the liability of any person covered by [the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section] subsection a with respect to the release or threatened release concerned.

(e)(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this title, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f)(1) NATURAL RESOURCES LIABILITY.—In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: *Provided, however,* That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a), where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State⁵⁰ as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State.¹³ The

⁵⁰ [The words "or the Indian tribe" were apparently intended to be inserted after the word "State" in this sentence. (See sections 107(d)(2) and 207(c)(2)(D) of the Superfund Amendments and Reauthorization Act of 1986). Two simultaneous amendments were inadvertently made to the same provision.]

measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this Act for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.】

(I) NATURAL RESOURCES LIABILITY.—

(A) GENERAL.—In the case of an injury to, destruction of, or loss of natural resources under subsection (a)(4)(C), liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian Tribe for natural resources belonging to, managed by, controlled by, or appertaining to such Tribe, or held in trust for the benefit of such Tribe if such resources are subject to a trust restriction on alienation.

(B) ACTION AS TRUSTEE.—The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages for the natural resource injured, destroyed or lost by the release of a hazardous substance.

(C) MEASURE OF DAMAGES.—Any person liable for an injury to, destruction of, or loss of a natural resource caused by the release of a hazardous substance shall be liable for—

(i) the costs of restoring the natural resource to the condition that would have existed but for the release of the hazardous substance, replacing or acquiring the equivalent of the natural resource if the resource will not be restored to that condition as a result of any response action;

(ii) replacement of the lost services provided by the injured, destroyed, or lost natural resource; and

(iii) the reasonable costs of assessing damages, including the costs associated with the development and consideration of alternative restoration measures but not including the costs of conducting any type of study relying on the use of contingent valuation methodology.

(D) LIMITATIONS ON LIABILITY.—

(i) COMMITMENT OF NATURAL RESOURCES IN AN ENVIRONMENTAL IMPACT STATEMENT.—No liability to the United States or State or Indian Tribe shall be imposed under subsection (a)(4)(C) where the party sought to be charged has demonstrated that the injury to, destruction of, or loss of natural resources complained of was specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environmental analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian Tribe occurring

pursuant to a Federal permit or license, the issuance of the permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian Tribe.

(ii) *NO DOUBLE RECOVERY.*—A person shall not be liable for damages, response costs, assessment costs, or any other costs for an injury to, destruction of, or loss of a natural resource, or a loss of the services provided by the natural resource, that have been recovered under this Act or any other Federal, State or Tribal law for the same injury to, destruction of or loss of the natural resource or loss of the services provided by the natural resource.

(iii) *RELEASES BEFORE DECEMBER 11, 1980.*—There shall be no recovery under this section where the natural resource injury, destruction, or loss for which restoration, replacement or acquisition is sought and the release of the hazardous substance that caused the injury, destruction, or loss occurred wholly before December 11, 1980.

(iv) *LOST USE DAMAGES BEFORE DECEMBER 11, 1980.*—There shall be no recovery from any person under this section for the value of the lost services provided by a natural resource before December 11, 1980.

(E) *USE OF RECOVERED SUMS.*—

(i) *UNITED STATES GOVERNMENT AS TRUSTEE.*—Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources.

(ii) *STATE AS TRUSTEE.*—Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State.

(iii) *TRIBE AS TRUSTEE.*—Sums recovered by an Indian Tribe as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the Indian Tribe.

(F) *PAYMENT PERIOD.*—In entering into an agreement regarding the payment of damages for an injury to, destruction of or loss of a natural resource under this section, a trustee may permit payment over a period of time that is appropriate in view of the amount of the damages, the financial ability of the responsible party to pay the damages, and the time period over which and the pace at which expenditures are expected to be made for the restoration, replacement or acquisition activities.

(2) *DESIGNATION OF FEDERAL AND STATE OFFICIALS.*—

(A) *FEDERAL.*—The President shall designate in the National Contingency Plan published under section 105 of this Act the Federal officials who shall act on behalf of the public as trustees for natural resources under this Act and section 311 of the Federal Water Pollution Control Act. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this Act and such section 311 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal

officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) STATE.—The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this Act and section 311 of the Federal Water Pollution Control Act and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this Act and such section 311 for those natural resources under their trusteeship.

(C) REBUTTABLE PRESUMPTION.—Any determination or assessment of damages to natural resources for the purposes of this Act and section 311 of the Federal Water Pollution Control Act made by a Federal or State trustee in accordance with the regulations promulgated under section 301(c) of this Act shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act or section 311 of the Federal Water Pollution Control Act.

(3) CONSIDERATION OF ALTERNATIVE RESTORATION MEASURES.—

(A) ALTERNATIVE MEASURES.—*A trustee seeking damages under this section for an injury to, destruction of or loss of a natural resource shall, on the basis of the best scientific information available, consider alternative measures to achieve the restoration of the natural resource, including an alternative that relies on natural restoration. The trustee shall select measures that achieve an appropriate balance among the following factors:*

(i) Technical feasibility.

(ii) Cost effectiveness.

(iii) The period of time in which the natural resource is likely to be restored.

(B) CONSIDERATION OF INTRINSIC VALUES.—*In selecting measures to restore, replace or acquire the equivalent of a natural resource injured, destroyed, or lost by the release of a hazardous substance pursuant to paragraph (1)(C)(i), the trustee may take into consideration unique intrinsic values associated with the natural resource to justify the selection of measures that will provide for expedited or enhanced restoration of the natural resource to replace the intrinsic values lost, provided that the incremental costs associated with the measures selected are reasonable.*

(4) RELATIONSHIP TO RESPONSE ACTION.—*A natural resource trustee selecting a restoration alternative under this subsection shall take into account what any removal or remedial action carried out or planned for the facility under this Act or any other Federal or State law has accomplished or will accomplish to restore, replace or acquire the equivalent of the natural resource injured, destroyed or lost by the release of a hazardous substance.*

(g) FEDERAL AGENCIES.—For provisions relating to Federal agencies, see section 120 of this Act.

(h) The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided

under section 114 of this Act notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) or the absence of any physical damage to the proprietary interest of the claimant.

[(i) No person]

(i) PESTICIDES.—

(1) *IN GENERAL.*—No person (including the United States or any State) or Indian tribe may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(2) *APPLICATION IN COMPLIANCE WITH LAW.*—For the purposes of paragraph (1), the term “application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act” includes a release of a hazardous substance resulting from the application, before the date of enactment of this subsection, of any pesticide, insecticide, or similar product in compliance with a Federal or State law (including a regulation) requiring the treatment of livestock to prevent, suppress, control, or eradicate any dangerous, contagious, or infectious disease or any vector organism for such a disease.

(j) Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 101(10) (B) or (C) shall be recoverable in an action brought under section 309(b) of the Clean Water Act.

(k)(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act, shall be transferred to and assumed by the Post-closure Liability Fund established by section 232⁵¹ of this Act when—

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to ex-

⁵¹Section 232 was repealed by section 514(b) of Public Law 99-499.

ceed four years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act) that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 232⁵² of this Act, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 232¹ of this Act may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after the date of enactment of this Act, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in title II of this Act.

(B) Not later than eighteen months after the date of enactment of this Act and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial re-

⁵²See footnote 1 on previous page.

sponsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this Act and this subsection. Such rules shall also specify reasonable expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under title II of this Act.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) SUSPENSION OF LIABILITY TRANSFER.—Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 111 of this Act, no liability shall be transferred to or assumed by the Post-Closure Liability Trust Fund established by section 232 of this Act prior to completion of the study required under paragraph (6) of this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) STUDY OF OPTIONS FOR POST-CLOSURE PROGRAM.—

(A) STUDY.—The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 and assures the protection of human health and the environment.

(B) PROGRAM ELEMENTS.—The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and that resources will be available to address any problems that may arise and to cover costs of long-term monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and

close such facilities in a manner which assures protection of human health and the environment.

(C) ASSESSMENTS.—The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act and the likelihood of future insolvency on the part of owners and operators of such facilities. Separate assessments shall be made for different classes of facilities and for different classes of land disposal facilities and shall include but not be limited to—

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) PROCEDURES.—In carrying out the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) CONSIDERATION OF OPTIONS.—In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 to serve the purposes set forth in subparagraph (B) and to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to—

(i) revisions to closure, post-closure, and financial responsibility requirements under subtitles C and I of the Solid Waste Disposal Act;

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund previously established by section 232 of this Act, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

(vii) coinsurance, reinsurance, or pooled-risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a federally chartered corporation.

(F) RECOMMENDATIONS.—The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appropriate committees of Congress for additional authority to implement such program.

(I) FEDERAL LIEN.—

(1) IN GENERAL.—All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a)) shall constitute a lien in favor of the United States upon all real property and rights to such property which—

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) DURATION.—The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this Act.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113.

(3) NOTICE AND VALIDITY.—The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms “purchaser” and “security interest” shall have the definitions provided under section 6323(h) of the Internal Revenue Code of 1954.

(4) ACTION IN REM.—The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against

any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(m) **MARITIME LIEN.**—All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(1) with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(n) ⁵³ **LIABILITY OF FIDUCIARIES.**—

(1) **IN GENERAL.**—The liability of a fiduciary under any provision of this Act for the release or threatened release of a hazardous substance at, from, or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity.

(2) **EXCLUSION.**—Paragraph (1) does not apply to the extent that a person is liable under this Act independently of the person's ownership of a vessel or facility as a fiduciary or actions taken in a fiduciary capacity.

(3) **LIMITATION.**—Paragraphs (1) and (4) do not limit the liability pertaining to a release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

(4) **SAFE HARBOR.**—A fiduciary shall not be liable in its personal capacity under this Act for—

(A) undertaking or directing another person to undertake a response action under subsection (d)(1) or under the direction of an on scene coordinator designated under the National Contingency Plan;

⁵³ Subtitle E of title II of Public Law 104–208 added subsection (n) to section 107. Sections 2504 and 2505 of that subtitle provide:

SEC. 2504. LENDER LIABILITY RULE.

(a) **IN GENERAL.**—Effective on the date of enactment of this Act, the portion of the final rule issued by the Administrator of the Environmental Protection Agency on April 29, 1992 (57 Fed. Reg. 18,344), prescribing section 300.1105 of title 40, Code of Federal Regulations, shall be deemed to have been validly issued under authority of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) and to have been effective according to the terms of the final rule. No additional judicial proceedings shall be necessary or may be held with respect to such portion of the final rule. Any reference in that portion of the final rule to section 300.1100 of title 40, Code of Federal Regulations, shall be deemed to be a reference to the amendments made by this subtitle.

(b) **JUDICIAL REVIEW.**—Notwithstanding section 113(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9613(a)), no court shall have jurisdiction to review the portion of the final rule issued by the Administrator of the Environmental Protection Agency on April 29, 1992 (57 Fed. Reg. 18,344) that prescribed section 300.1105 of title 40, Code of Federal Regulations.

(c) **AMENDMENT.**—No provision of this section shall be construed as limiting the authority of the President or a delegatee of the President to amend the portion of the final rule issued by the Administrator of the Environmental Protection Agency on April 29, 1992 (57 Fed. Reg. 18,344), prescribing section 300.1105 of title 40, Code of Federal Regulations, consistent with the amendments made by this subtitle and other applicable law.

(d) **JUDICIAL REVIEW.**—No provision of this section shall be construed as precluding judicial review of any amendment of section 300.1105 of title 40, Code of Federal Regulations, made after the date of enactment of this Act.

SEC. 2505. EFFECTIVE DATE.

The amendments made by this subtitle shall be applicable with respect to any claim that has not been finally adjudicated as of the date of enactment of this Act.

(B) undertaking or directing another person to undertake any other lawful means of addressing a hazardous substance in connection with the vessel or facility;

(C) terminating the fiduciary relationship;

(D) including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;

(E) monitoring or undertaking 1 or more inspections of the vessel or facility;

(F) providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

(G) restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

(H) administering, as a fiduciary, a vessel or facility that was contaminated before the fiduciary relationship began; or

(I) declining to take any of the actions described in subparagraphs (B) through (H).

(5) DEFINITIONS.—As used in this Act:

(A) FIDUCIARY.—The term “fiduciary”—

(i) means a person acting for the benefit of another party as a bona fide—

(I) trustee;

(II) executor;

(III) administrator;

(IV) custodian;

(V) guardian of estates or guardian ad litem;

(VI) receiver;

(VII) conservator;

(VIII) committee of estates of incapacitated persons;

(IX) personal representative;

(X) trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

(XI) representative in any other capacity that the Administrator, after providing public notice, determines to be similar to the capacities described in subclauses (I) through (X); and

(ii) does not include—

(I) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, 1 or more estate plans or because of the incapacity of a natural person; or

(II) a person that acquires ownership or control of a vessel or facility with the objective purpose of avoiding liability of the person or of any other person.

(B) FIDUCIARY CAPACITY.—The term “fiduciary capacity” means the capacity of a person in holding title to a vessel or facility, or otherwise having control of or an interest in the vessel or facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

(6) SAVINGS CLAUSE.—Nothing in this subsection—

(A) affects the rights or immunities or other defenses that are available under this Act or other law that is applicable to a person subject to this subsection; or

(B) creates any liability for a person or a private right of action against a fiduciary or any other person.

(7) NO EFFECT ON CERTAIN PERSONS.—Nothing in this subsection applies to a person if the person—

(A)(i) acts in a capacity other than that of a fiduciary or in a beneficiary capacity; and

(ii) in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

(B)(i) is a beneficiary and a fiduciary with respect to the same fiduciary estate; and

(ii) as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(8) LIMITATION.—This subsection does not preclude a claim under this Act against—

(A) the assets of the estate or trust administered by the fiduciary; or

(B) a nonemployee agent or independent contractor retained by a fiduciary.

(o) CONTIGUOUS PROPERTIES.—

(1) NOT CONSIDERED TO BE AN OWNER OR OPERATOR.—A person that owns or operates real property that is contiguous to or otherwise similarly situated with respect to real property on which there has been a release or threatened release of a hazardous substance and that is or may be contaminated by the release shall not be considered to be an owner or operator of a vessel or facility under subparagraph (C) or (D) of subsection (a)(1) solely by reason of the contamination if—

(A) the person did not cause, contribute, or consent to the release or threatened release;

(B) the person is not affiliated through any familial or corporate relationship with any person that is or was a party potentially responsible for response costs as the facility; and

(C) the person exercised appropriate care with respect to each hazardous substance found at the facility by taking reasonable steps to stop any continuing release, prevent any threatened future release and prevent or limit human or natural resource exposure to any previously released hazardous substance.

(2) *COOPERATION, ASSISTANCE, AND ACCESS.*—Notwithstanding paragraph (1), the President may decline to offer a settlement to a potentially responsible party under this paragraph if the President determines that the potentially responsible party has failed to substantially comply with the requirement stated in subsection (y) with respect to the facility.

(3) *ASSURANCES.*—The Administrator may—

(A) issue an assurance that no enforcement action under this Act will be initiated against a person described in paragraph (1); and

(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 113(f).

(p) *PROSPECTIVE PURCHASER AND WINDFALL LIEN.*—

(1) *LIMITATION ON LIABILITY.*—Notwithstanding subsection (a), a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

(2) *LIEN.*—If there are unrecovered response costs at a facility for which an owner of the facility is not liable by reason of subsection (n)(1) and each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may obtain from appropriate responsible party a lien on any other property or other assurances of payment satisfactory to the Administrator, for such unrecovered costs.

(3) *CONDITIONS.*—The conditions referred to in paragraph (1) are the following:

(A) *RESPONSE ACTION.*—A response action for which there are unrecovered costs is carried out at the facility.

(B) *FAIR MARKET VALUE.*—The response action increases the fair market value of the facility above the fair market value of the facility that existed 180 days before the response action was initiated.

(C) *SALE.*—A sale or other disposition of all or a portion of the facility has occurred.

(4) *AMOUNT.*—A lien under paragraph (2)—

(A) shall not exceed the increase in fair market value of the property attributable to the response action at the time of a subsequent sale or other disposition of the property;

(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

(C) shall be subject to the requirements of subsection (l)(3); and

(D) shall continue until the earlier of satisfaction of the lien or recovery of all response costs incurred at the facility.

(q) *LIABILITY EXEMPTION FOR MUNICIPAL SOLID WASTE AND SEWAGE SLUDGE.*—

(1) *IN GENERAL.*—No person shall be liable to the United States or to any other person (including liability for contribu-

tion) under this section or any other Federal or State law for any response costs incurred after the date of enactment of this subsection at a facility listed on the National Priorities List to the extent that—

(A) the person is liable solely under subparagraph (C) or (D) of subsection (a)(1); and

(B) the person is—

(i) an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated;

(ii) a business entity that, during the tax year preceding the date of transmittal of written notification that the business is potentially liable, employs not more than 100 individuals; or

(iii) a nonprofit organization described in section 501(c)(3) of the Internal Revenue Code of 1986 that employs not more than 100 individuals, from which all of the person's municipal solid waste was generated.

(2) **EXCEPTIONS.**—Paragraph (1) shall not apply in a case in which the person has failed to substantially comply with the requirement stated in subsection (y) with respect to the facility.

(3) **COSTS AND FEES.**—A person that, lacking a reasonable basis in law or fact, commences an action for recovery of response costs or for contribution against a person that is not liable by operation of this subsection shall be liable to the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees.

(r) **DE MICROMIS CONTRIBUTOR EXEMPTION.**—

(1) **IN GENERAL.**—In the case of a vessel or facility listed on the National Priorities List, no person described in subparagraph (C) or (D) of subsection (a)(1) shall be liable to the United States or to any other person (including liability for contribution) for any response costs under this section or any other Federal or State law incurred after the date of enactment of this subsection, if the activity specifically attributable to the person resulted in the disposal or treatment of not more than 200 pounds or 110 gallons of material containing a hazardous substance at the vessel or facility before January 1, 1997, or such greater amount as the Administrator may determine by regulation.

(2) **EXCEPTION.**—Paragraph (1) shall not apply in a case in which the Administrator determines that—

(A) material described in paragraph (1) has contributed or may contribute significantly, individually, to the amount of response costs at the facility; or

(B) the person has failed to substantially comply with the requirement stated in subsection (y) with respect to the vessel or facility.

(3) **COSTS AND FEES.**—A person that, lacking a reasonable basis in law or fact, commences an action for recovery of response costs or for contribution against a person that is not liable by operation of this subsection shall be liable to the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees.

(s) *SMALL BUSINESS EXEMPTION.—*

(1) *IN GENERAL.—No person shall be liable to the United States or to any person (including liability for contribution) under this section or any other Federal or State law for any response costs at a facility listed on the National Priorities List incurred after the date of enactment of this subsection if—*

(A) *the person is a business that—*

(i) *during the taxable year preceding the date of transmittal of notification that the business is a potentially responsible party, had full- and part-time employees whose combined time was equivalent to 75 or fewer full-time employees; or*

(ii) *for that taxable year reported \$3,000,000 or less in gross revenue;*

(B) *the activity specifically attributable to the person resulted in the disposal or treatment of material containing a hazardous substance at the vessel or facility before January 1, 1997; and*

(C) *the person is not affiliated through any familial or corporate relationship with any person that is or was a party potentially responsible for response costs at the facility.*

(2) *EXCEPTION.—Paragraph (1) shall not apply in a case in which—*

(A) *the material containing a hazardous substance referred to in subparagraph (A) contributed significantly or could contribute significantly to the cost of the response action with respect to the facility; or*

(B) *the person has failed to substantially comply with the requirement stated in subsection (y) with respect to the facility.*

(3) *COSTS AND FEES.—A person that, lacking a reasonable basis in law or fact, commences an action for recovery of response costs or for contribution against a person that is not liable by operation of this subsection shall be liable to the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees.*

(t) *CODISPOSAL LANDFILL EXEMPTION AND LIMITATIONS.—*

(1) *LIABILITY CAP APPLICABLE TO GENERATORS AND TRANSPORTERS OF MUNICIPAL SOLID WASTE.—*

(A) *ALLOCATION PROCESS.—A person liable as a generator or transporter of municipal solid waste or sewage sludge (not otherwise exempted by subsection (q)) shall have its potential liability determined in an expedited settlement process under section 137(e) or an allocation process under section 137(f).*

(B) *LIABILITY CAP.—To the extent that a person or group of persons is liable as a generator or transporter of municipal solid waste or sewage sludge (not otherwise exempted by subsection (q)), the total aggregate liability for all such persons or groups of persons for response costs incurred after the date of enactment of this section, pursuant to this section or any other Federal or State law, shall not be greater than 10 percent of such costs.*

(2) MUNICIPAL OWNERS AND OPERATORS.—

(A) AGGREGATE LIABILITY OF LARGE MUNICIPALITIES.—

(i) *IN GENERAL.*—With respect to a codisposal landfill that is owned or operated in whole or in part by municipalities with a population of 100,000 or more (according to the 1990 census), and that is not subject to the criteria for solid waste landfills published under subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 *et seq.*) at part 258 of title 40, Code of Federal Regulations (or a successor regulation), the aggregate amount of liability of such municipal owners and operators for response costs incurred after the date of enactment of this section under this section or any other Federal or State law shall be not greater than 20 percent of such costs.

(ii) *INCREASED AMOUNT.*—The President or the allocator may increase the percentage under clause (i) to not more than 35 percent with respect to a municipality if the President or allocator determines that the municipality committed specific acts that exacerbated environmental contamination or exposure with respect to the facility.

(iii) *DECREASED AMOUNT.*—The President or the allocator may decrease the percentage under clause (i) with respect to a municipality to not less than 10 percent if the President or allocator determines that the municipality took specific acts of mitigation during the operation of the facility to avoid environmental contamination or exposure with respect to the facility.

(B) AGGREGATE LIABILITY OF SMALL MUNICIPALITIES.—

(i) *IN GENERAL.*—With respect to a codisposal landfill that is owned or operated in whole or in part by municipalities with a population of less than 100,000 (according to the 1990 census), that is not subject to the criteria for solid waste landfills published under subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 *et seq.*) at part 258 of title 40, Code of Federal Regulations (or a successor regulation), the aggregate amount of liability of such municipal owners and operators for response costs incurred after the date of enactment of this section under this section or any other Federal or State law shall be not greater than 10 percent of such costs.

(ii) *INCREASED AMOUNT.*—The President or the allocator may increase the percentage under clause (i) to not more than 20 percent with respect to a municipality if the President or allocator determines that the municipality committed specific acts that exacerbated environmental contamination or exposure with respect to the facility.

(iii) *DECREASED AMOUNT.*—The President or the allocator may decrease the percentage under clause (i) with respect to a municipality to not less than 5 percent if the President or allocator determines that the

municipality took specific acts of mitigation during the operation of the facility to avoid environmental contamination or exposure with respect to the facility.

(C) *SETTLEMENT AMOUNT.*—*The President, as soon as reasonably practicable after the date of enactment of this subsection, shall offer a settlement to a municipality with respect to the liability described in subparagraph (A) or (B).*

(3) *APPLICABILITY.*—*This subsection shall not apply to—*

(A) *a person that acted in violation of subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) at a facility that is subject to a response action under this title, if the violation pertains to a hazardous substance the release of threat of release of which caused the incurrence of response costs at the facility;*

(B) *a person that owned or operated a codisposal landfill in violation of the applicable requirements for municipal solid waste landfill units under subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 et seq.) after October 9, 1991, if the violation pertains to a hazardous substance the release of threat of release of which caused the incurrence of response costs at the facility; or*

(C) *a person described in section 137(s).*

(4) *PERFORMANCE OF RESPONSE ACTIONS.*—*As a condition of a settlement with a municipality under this subsection, the President may require that the municipality perform or participate in the performance of the response actions at the facility.*

(5) *WAIVER OF CLAIMS.*—*The President shall require, as a condition of a settlement under this subsection, that a municipality or combination of 2 or more municipalities waive claims (including a claim for contribution under section 113) that the party may have against other potentially responsible parties for all response costs incurred after the date of enactment of this subsection addressed in the settlement at the facility.*

(6) *EXCEPTIONS.*—*The President may decline to offer a settlement under this subsection with respect to a facility if the President determines that—*

(A) *all known potentially responsible parties are insolvent, defunct, or eligible for a settlement under this subsection or section 122(g); or*

(B) *the municipal owner or operator has failed to substantially comply with the requirement stated in subsection (y) with respect to the facility.*

(u) *CERTAIN FACILITIES OWNED BY LOCAL GOVERNMENTS.*—*A general purpose unit of local government that, as a result of tax forfeiture, abandonment, bankruptcy, or foreclosure, has acquired a facility—*

(1) *at which there has been a release or threatened release of a hazardous substance; and*

(2) *that is or may be contaminated by the release;*

shall not be considered to be an owner or operator of the property for the purposes of this section or any other provision of this Act.

(v) *RELIGIOUS, CHARITABLE, SCIENTIFIC, AND EDUCATIONAL ORGANIZATIONS.*—

(1) *LIMITATION ON LIABILITY.*—Subject to paragraph (2), if an organization described in section 101(20)(I) holds legal or equitable title to a vessel or facility as a result of a charitable gift that is allowable as a deduction under section 170, 2055, or 2522 of the Internal Revenue Code of 1986 (determined without regard to dollar limitations), the liability of the organization shall be limited to the lesser of the fair market value of the vessel or facility or the actual proceeds of the sale of the vessel or facility received by the organization.

(2) *CONDITIONS.*—In order for an organization described in section 101(20)(I) to be eligible for the limited liability described in paragraph (1), the organization shall—

(A) substantially comply with the requirement of subsection (y) with respect to the vessel or facility;

(B) provide full cooperation and assistance to the United States in identifying and locating persons who recently owned, operated, or otherwise controlled activities at the vessel or facility;

(C) establish by a preponderance of the evidence that all active disposal of hazardous substances at the vessel or facility occurred before the organization acquired the vessel or facility; and

(D) establish by a preponderance of the evidence that the organization did not cause or contribute to a release or threatened release of hazardous substances at the vessel or facility.

(3) *LIMITATION.*—Nothing in this subsection affects the liability of a person other than a person described in section 101(20)(I) that meets the conditions specified in paragraph (2).

(w) *LIMITATION ON LIABILITY OF RAILROAD OWNERS.*—Notwithstanding subsection (a)(1), a person that substantially complies with the requirement of subsection (y) with respect to a facility shall not be liable under this Act to the extent that liability is based solely on the status of the person as a railroad owner or operator of a spur track, including a spur track over land subject to an easement, to a facility that is owned or operated by a person that is not affiliated with the railroad owner or operator, if—

(1) the spur track provides access to a main line or branch line track that is owned or operated by the railroad;

(2) the spur track is 10 miles long or less; and

(3) the railroad owner or operator does not cause or contribute to a release or threatened release at the spur track.

(x) *LIABILITY OF RECYCLERS.*—

(1) *RELIEF FROM LIABILITY.*—Except as provided in paragraph (6), a person that arranges for the recycling of recyclable material at a consuming facility shall not be liable for response costs under subparagraph (C) or (D) of subsection (a)(1).

(2) *SCRAP GLASS, PAPER, PLASTIC, RUBBER, OR TEXTILE.*—For the purposes of paragraph (1), a person shall be considered to arrange for the recycling of scrap glass, paper, plastic, rubber, or textile if the person that arranged for the transaction (by selling or otherwise arranging for the recycling of the recyclable material) demonstrates by a preponderance of the evidence that all of the following were met at the time of the transaction—

(A) *the recyclable material meets a commercial specification grade;*

(B) *a market exists for the recyclable material;*

(C) *a substantial portion of the recyclable material is made available for use as a feedstock for the manufacture of a new saleable product;*

(D)(i) *the recyclable material is a replacement or substitute for a virgin raw material;*

(ii) *the product to be made from the recyclable material is a replacement or substitute for a product made, in whole or in part, from a virgin raw material; and*

(E) *in the case of a transaction that occurs 90 days or more after the date of enactment of this section, the person exercises reasonable care to determine that the consuming facility was in compliance with the substantive (not procedural or administrative) provisions of each Federal, State, and local environmental law (including a regulation and any compliance decree issued pursuant to an environmental law) applicable to the handling, storage, or other management activities associated with recyclable material.*

(3) **SCRAP METAL.**—*For the purposes of paragraph (1), a person shall be considered to arrange for the recycling of scrap metal if the person that arranges the transaction (by selling or otherwise arranging for the recycling of the scrap metal) demonstrates by a preponderance of the evidence that at the time of the transaction—*

(A) *the conditions stated in subparagraphs (A) through (E) of paragraph (2) are met; and*

(B) *in the case of a transaction that occurs after the effective date of a standard, established by the Administrator by regulation under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), regarding the storage, transport, management, or other activity associated with the recycling of scrap metal, the person is in compliance with the standard.*

(4) **SPENT BATTERIES.**—*For the purposes of paragraph (1), a person shall be considered to arrange for the recycling of a spent lead-acid battery, nickel-cadmium battery, or other battery if the person that arranges the transaction (by selling or arranging for the recycling of the battery) demonstrates by a preponderance of the evidence that at the time of the transaction—*

(A) *the conditions stated in subparagraphs (A) through (E) of paragraph (2) are met;*

(B) *the person does not reclaim the valuable components of the battery; and*

(C) *in the case of a transaction that occurs after the effective date of a standard, established by the Administrator by regulation under authority of the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or the Mercury-Containing and Rechargeable Battery Management Act), regarding the storage, transport, management, or other activity associated with the recycling of batteries, the person is in compliance with the standard.*

(5) **EXCEPTIONS FROM LIABILITY RELIEF.**—

(A) *IN GENERAL.*—A person that arranges for the recycling of recyclable material that, but for paragraph (2), would be liable under subparagraph (C) or (D) of subsection (a)(1) shall be liable notwithstanding that paragraph if—

(i) the person had an objectively reasonable basis to believe at the time of the recycling transaction that—

(I) the recyclable material will not be recycled;

(II) the recyclable material will be burned as fuel, for energy recovery or incineration;

(III) in the case of a transaction that occurs 90 days after the date of enactment of this section, the consuming facility is not in compliance with a substantive (not procedural or administrative) provision of any Federal, State, or local environmental law (including a regulation), or a compliance order or decree issued under such a law, applicable to the handling, processing, reclamation, or other management activity associated with the recyclable material; or

(IV) a hazardous substance has been added to the recyclable material for purposes other than processing for recycling;

(ii) the person fails to exercise reasonable care with respect to the management or handling of the recyclable material (including adhering to customary industry practice current at the time of the recycling transaction); or

(iii) any item of the recyclable material contains—

(I) polychlorinated biphenyls at a concentration in excess of 50 parts per million (or any different concentration specified in any applicable standard that may be issued under other Federal law after the date of enactment of this subsection); or

(II) in the case of a transaction involving scrap paper, any concentration of a hazardous substance that the Administrator determines by regulation, issued after the date of enactment of this subsection and before the date of the transaction, to present a significant risk to human health or the environment as a result of its inclusion in the paper recycling process.

(B) *OBJECTIVELY REASONABLE BASIS FOR BELIEF.*—Whether a person has an objectively reasonable basis for belief described in subparagraph (A)(i) shall be determined using criteria that include—

(i) the size of the person's business;

(ii) customary industry practices current at the time of the recycling transaction (including practices designed to minimize, through source control, contamination of recyclable material by hazardous substances);

(iii) the price paid or received in the recycling transaction; and

(iv) the ability of the person to detect the nature of the consuming facility's operations concerning handling, processing, or reclamation of the recyclable material or other management activities associated with the recyclable material.

(C) REASONABLE CARE.—

(i) IN GENERAL.—For the purposes of subparagraph (A)(ii), whether a person exercised reasonable care shall be determined using criteria that include—

(I) the price paid in the recycling transaction;

(II) the ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with recyclable material; and

(III) the result of inquiries made to the appropriate Federal, State, or local agencies regarding the consuming facility's past and current compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law applicable to the handling, processing, reclamation, storage, or other management activities associated with recyclable material.

(D) SUBSTANTIVE PROVISION.—For the purposes of subparagraph (A), a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activity associated with recyclable material constitutes a substantive provision.

(6) REGULATIONS.—The Administrator may issue a regulation that clarifies the meaning of any term used in this subsection or by any other means makes clear the application of this subsection to any person.

(7) LIABILITY FOR ATTORNEY'S FEES FOR CERTAIN ACTIONS.—A person that, after the date of enactment of this subsection, commences a civil action in contribution against a person that is not liable by operation of this subsection shall be liable to that person for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees.

(8) RELATIONSHIP TO LIABILITY UNDER OTHER LAWS.—Nothing in this subsection shall affect—

(A) liability under any other Federal, State, or local law (including a regulation); or

(B) the authority of the Administrator to issue regulations under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or any other law.

(C) EFFECT ON NONRECYCLERS.—

(i) COSTS BORNE BY THE UNITED STATES.—The estimated contribution share attributable to a person engaged in a recycling transaction occurring before the date of enactment of this section at a mandatory allocation facility listed on the National Priorities List before the date of enactment of this section that, absent this subsection, would be borne by a person that is re-

lieved of liability (in whole or in part) by this subsection shall be borne by the United States, to the extent that the person is relieved of liability.

(i) *COSTS BORNE BY REMAINING POTENTIALLY RESPONSIBLE PARTIES.*—At a facility not described in subparagraph (C)(i), the liability of any party relieved of liability (in whole or in part) by this subsection shall be borne by the parties remaining liable under this section.

(y) *REQUIREMENT THAT COOPERATION, ASSISTANCE, AND ACCESS BE PROVIDED.*—The requirement of this subsection, applicable to a person or other entity described in subsection (o), (p), (r), (s), (t), (u), (v), (w), or (x) or section 112(g) is that—

(1) to the extent that the person or entity has operational control over a vessel or facility—

(A) the person or entity provide full cooperation to, assistance to, and access to the vessel or facility by, persons that are responsible for response actions at the vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the vessel or facility); and

(B) the person or entity take no action to impede the effectiveness or integrity of any institutional control employed under section 121 at the vessel or facility; and

(2) the person or entity comply with any request for information or administrative subpoena issued by the President under this Act.

[42 U.S.C. 9607]

FINANCIAL RESPONSIBILITY

SEC. 108. (a)(1) The owner or operator of each vessel (except a non-self-propelled barge that does not carry hazardous substances as cargo) over three hundred gross tons that uses any port or place in the United States or the navigable waters or any offshore facility, shall establish and maintain, in accordance with regulations promulgated by the President, evidence of financial responsibility of \$300 per gross ton (or for a vessel carrying hazardous substances as cargo, or \$5,000,000, whichever is greater) to cover the liability prescribed under paragraph (1) of section 107(a) of this Act. Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, or qualification as a self-insurer. Any bond filed shall be issued by a bonding company authorized to do business in the United States. In cases where an owner or operator owns, operates, or charters more than one vessel subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability applicable to the largest of such vessels.

(2) The Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes of the United States of any vessel subject to this subsection that does not have certification furnished by the President that the financial re-

sponsibility provisions of paragraph (1) of this subsection have been complied with.

(3) The Secretary of Transportation, in accordance with regulations issued by him, shall (A) deny entry to any port or place in the United States or navigable waters to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection that, upon request, does not produce certification furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(4) In addition to the financial responsibility provisions of paragraph (1) of this subsection, the President shall require additional evidence of financial responsibility for incineration vessels in such amounts, and to cover such liabilities recognized by law, as the President deems appropriate, taking into account the potential risks posed by incineration and transport for incineration, and any other factors deemed relevant.

(b)(1) Beginning not earlier than five years after the date of enactment of this Act, the President shall promulgate requirements (for facilities in addition to those under subtitle C of the Solid Waste Disposal Act and other Federal law) that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. Not later than three years after the date of enactment of the Act, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register. Priority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators which the President determines present the highest level of risk of injury.

(2) The level of financial responsibility shall be initially established, and, when necessary, adjusted to protect against the level of risk which the President in his discretion believes is appropriate based on the payment experience of the Fund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction. To the maximum extent practicable, the President shall cooperate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements. Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. In promulgating requirements under this section, the President is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing such evidence of financial responsibility in order to effectuate the purposes of this Act.

(3) Regulations promulgated under this subsection shall incrementally impose financial responsibility requirements as quickly as can reasonably be achieved but in no event more than 4 years after the date of promulgation. Where possible, the level of financial responsibility which the President believes appropriate as a final requirement shall be achieved through incremental, annual increases in the requirements.

(4) Where a facility is owned or operated by more than one person, evidence of financial responsibility covering the facility may be established and maintained by one of the owners or operators, or, in consolidated form, by or on behalf of two or more owners or operators. When evidence of financial responsibility is established in a consolidated form, the proportional share of each participant shall be shown. The evidence shall be accompanied by a statement authorizing the applicant to act for and in behalf of each participant in submitting and maintaining the evidence of financial responsibility.

(5) The requirements for evidence of financial responsibility for motor carriers covered by this Act shall be determined under section 30 of the Motor Carrier Act of 1980, Public Law 96-296.

(c) DIRECT ACTION.—

(1) RELEASES FROM VESSELS.—In the case of a release or threatened release from a vessel, any claim authorized by section 107 or 111 may be asserted directly against any guarantor providing evidence of financial responsibility for such vessel under subsection (a). In defending such a claim, the guarantor may invoke all rights and defenses which would be available to the owner or operator under this title. The guarantor may also invoke the defense that the incident was caused by the willful misconduct of the owner or operator, but the guarantor may not invoke any other defense that the guarantor might have been entitled to invoke in a proceeding brought by the owner or operator against him.

(2) RELEASES FROM FACILITIES.—In the case of a release or threatened release from a facility, any claim authorized by section 107 or 111 may be asserted directly against any guarantor providing evidence of financial responsibility for such facility under subsection (b), if the person liable under section 107 is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or if, with reasonable diligence, jurisdiction in the Federal courts cannot be obtained over a person liable under section 107 who is likely to be solvent at the time of judgment. In the case of any action pursuant to this paragraph, the guarantor shall be entitled to invoke all rights and defenses which would have been available to the person liable under section 107 if any action had been brought against such person by the claimant and all rights and defenses which would have been available to the guarantor if an action had been brought against the guarantor by such person.

(d) LIMITATION OF GUARANTOR LIABILITY.—

(1) TOTAL LIABILITY.—The total liability of any guarantor in a direct action suit brought under this section shall be limited to the aggregate amount of the monetary limits of the policy of insurance, guarantee, surety bond, letter of credit, or similar instrument obtained from the guarantor by the person subject to liability under section 107 for the purpose of satisfying the requirement for evidence of financial responsibility.

(2) OTHER LIABILITY.—Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual, or common law liability of a guarantor, including, but not limited to, the liability of such guarantor for bad faith ei-

ther in negotiating or in failing to negotiate the settlement of any claim. Nothing in this subsection shall be construed, interpreted, or applied to diminish the liability of any person under section 107 of this Act or other applicable law.

[42 U.S.C. 9608]

CIVIL PENALTIES AND AWARDS

SEC. 109. (a) CLASS I ADMINISTRATIVE PENALTY.—

(1) VIOLATIONS.—A civil penalty of not more than \$25,000 per violation may be assessed by the President in the case of any of the following—

(A) A violation of the requirements of section 103 (a) or (b) (relating to notice).

(B) A violation of the requirements of section 103(d)(2) (relating to destruction of records, etc.).

(C) A violation of the requirements of section 108 (relating to financial responsibility, etc.), the regulations issued under section 108, or with any denial or detention order under section 108.

(D) A violation of an order under section 122(d)(3) (relating to settlement agreements for action under section 104(b)).

(E) Any failure or refusal referred to in section 122(l) (relating to violations of administrative orders, consent decrees, or agreements under section 120).

(2) NOTICE AND HEARINGS.—No civil penalty may be assessed under this subsection unless the person accused of the violation is given notice and opportunity for a hearing with respect to the violation.

(3) DETERMINING AMOUNT.—In determining the amount of any penalty assessed pursuant to this subsection, the President shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(4) REVIEW.—Any person against whom a civil penalty is assessed under this subsection may obtain review thereof in the appropriate district court of the United States by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the President. The President shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed. If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the United States, the President may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty on the record.

(5) SUBPOENAS.—The President may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) CLASS II ADMINISTRATIVE PENALTY.—A civil penalty of not more than \$25,000 per day for each day during which the violation continues may be assessed by the President in the case of any of the following—

(1) A violation of the notice requirements of section 103 (a) or (b).

(2) A violation of section 103(d)(2) (relating to destruction of records, etc.).

(3) A violation of the requirements of section 108 (relating to financial responsibility, etc.), the regulations issued under section 108, or with any denial or detention order under section 108.

(4) A violation of an order under section 122(d)(3) (relating to settlement agreements for action under section 104(b)).

(5) Any failure or refusal referred to in section 122(l) (relating to violations of administrative orders, consent decrees, or agreements under section 120).

In the case of a second or subsequent violation the amount of such penalty may be not more than \$75,000 for each day during which the violation continues. Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for hearing on the record in accordance with section 554 of title 5 of the United States Code. In any proceeding for the assessment of a civil penalty under this subsection the President may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents and may promulgate rules for discovery procedures. Any person who requested a hearing with respect to a civil penalty under this subsection and who is aggrieved by an order assessing the civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued.

(c) JUDICIAL ASSESSMENT.—The President may bring an action in the United States district court for the appropriate district to assess and collect a penalty of not more than \$25,000 per day for

each day during which the violation (or failure or refusal) continues in the case of any of the following—

(1) A violation of the notice requirements of section 103 (a) or (b).

(2) A violation of section 103(d)(2) (relating to destruction of records, etc.).

(3) A violation of the requirements of section 108 (relating to financial responsibility, etc.), the regulations issued under section 108, or with any denial or detention order under section 108.

(4) A violation of an order under section 122(d)(3) (relating to settlement agreements for action under section 104(b)).

(5) Any failure or refusal referred to in section 122(l) (relating to violations of administrative orders, consent decrees, or agreements under section 120).

In the case of a second or subsequent violation (or failure or refusal), the amount of such penalty may be not more than \$75,000 for each day during which the violation (or failure or refusal) continues. For additional provisions providing for judicial assessment of civil penalties for failure to comply with a request or order under section 104(e) (relating to information gathering and access authorities), see section 104(e).

(d) AWARDS.—The President may pay an award of up to \$10,000 to any individual who provides information leading to the arrest and conviction of any person for a violation subject to a criminal penalty under this Act, including any violation of section 103 and any other violation referred to in this section. The President shall, by regulation, prescribe criteria for such an award and may pay any award under this subsection from the Fund, as provided in section 111.

(e) PROCUREMENT PROCEDURES.—Notwithstanding any other provision of law, any executive agency may use competitive procedures or procedures other than competitive procedures to procure the services of experts for use in preparing or prosecuting a civil or criminal action under this Act, whether or not the expert is expected to testify at trial. The executive agency need not provide any written justification for the use of procedures other than competitive procedures when procuring such expert services under this Act and need not furnish for publication in the Commerce Business Daily or otherwise any notice of solicitation or synopsis with respect to such procurement.

(f) SAVINGS CLAUSE.—Action taken by the President pursuant to this section shall not affect or limit the President's authority to enforce any provisions of this Act.

[42 U.S.C. 9609]

EMPLOYEE PROTECTION

SEC. 110. (a) No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this Act,

or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

(b) Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination. A copy of the application shall be sent to such person, who shall be the respondent. Upon receipt of such application, the Secretary of Labor shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5, United States Code. Upon receiving the report of such investigation, the Secretary of Labor shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation. If he finds that there was no such violation, he shall issue an order denying the application. Such order issued by the Secretary of Labor under this subparagraph shall be subject to judicial review in the same manner as orders and decisions are subject to judicial review under this Act.

(c) Whenever an order is issued under this section to abate such violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) determined by the Secretary of Labor to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

(d) This section shall have no application to any employee who acting without discretion from his employer (or his agent) deliberately violates any requirement of this Act.

(e) The President shall conduct continuing evaluations of potential loss of shifts of employment which may result from the administration or enforcement of the provisions of this Act, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement. Any employee who is discharged, or laid off, threatened with discharge or layoff, or otherwise discriminated against by any person because of the alleged results of such administration or enforcement, or any representative of such employee, may request the President to conduct a full investigation of the matter and, at the request of any party, shall hold public hearings, require the parties, including the employer involved, to present information relating to the actual or potential effect of such administration or enforcement on employment and any alleged discharge,

layoff, or other discrimination, and the detailed reasons or justification therefore.⁵⁴ Any such hearing shall be of record and shall be subject to section 554 of title 5, United States Code. Upon receiving the report of such investigation, the President shall make findings of fact as to the effect of such administration or enforcement on employment and on the alleged discharge, layoff, or discrimination and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public. Nothing in this subsection shall be construed to require or authorize the President or any State to modify or withdraw any action, standard, limitation, or any other requirement of this Act.

[42 U.S.C. 9610]

USES OF FUND

SEC. 111. (a) IN GENERAL.—For the purposes specified in this section there is authorized to be appropriated from the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1986 [not more than \$8,500,000,000 for the 5-year period beginning on the date of enactment of the Superfund Amendments and Reauthorization Act of 1986, and not more than \$5,100,000,000 for the period commencing October 1, 1991, and ending September 30, 1994,] *a total of \$7,500,000,000 for fiscal years 1999 through 2003* and such sums shall remain available until expended. The preceding sentence constitutes a specific authorization for the funds appropriated under title II of Public Law 99–160 (relating to payment to the Hazardous Substances Trust Fund). The President shall use the money in the Fund for the following purposes:

(1) Payment of governmental response costs incurred pursuant to section 104 of this title, including costs incurred pursuant to the Intervention on the High Seas Act.

(2) Payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 311(c)⁵⁵ of the Clean Water Act and amended by section 105 of this title: *Provided, however,* That such costs must be approved under said plan and certified by the responsible Federal official.

(3) Payment of any claim authorized by subsection (b) of this section and finally decided pursuant to section 112 of this title, including those costs set out in subsection 112(c)(3) of this title.

(4) Payment of costs specified under subsection (c) of this section.

(5) GRANTS FOR TECHNICAL ASSISTANCE.—The cost of grants under section [117(e)] 117(f) (relating to public participation grants for technical assistance).

(6) LEAD CONTAMINATED SOIL.—Payment of not to exceed \$15,000,000 for the costs of a pilot program for removal, decontamination, or other action with respect to lead-contaminated soil in one to three different metropolitan areas.

⁵⁴ So in law.

⁵⁵ Probably should refer to section 311(d). See footnote 1 under section 105.

The President shall not pay for any administrative costs or expenses out of the Fund unless such costs and expenses are reasonably necessary for and incidental to the implementation of this title.

(7) *GRANTS TO AUTHORIZED STATES AND DELEGATED STATES.*—*Making a grant to an authorized State or delegated State under section 130(g).*

(8) *ORPHAN SHARE FUNDING.*—*Payment of orphan shares under section 137, which shall be mandatory direct spending to the extent of—*

(A) *for fiscal year 1999, \$200,000,000;*

(B) *for fiscal year 2000, \$350,000,000;*

(C) *for fiscal year 2001, \$300,000,000;*

(D) *for fiscal year 2002, \$300,000,000;*

(E) *for fiscal year 2003, \$300,000,000; and*

(F) *for fiscal year 2004 and each fiscal year thereafter, \$250,000,000.*

(9) *REIMBURSEMENT OF POTENTIALLY RESPONSIBLE PARTIES.*—*If—*

(A) *a potentially responsible party and the Administrator enter into a settlement under this Act under which the Administrator is reimbursed for the response costs of the Administrator; and*

(B) *the Administrator determines, through a Federal audit of response costs, that the costs for which the Administrator is reimbursed—*

(i) *are unallowable due to contractor fraud;*

(ii) *are unallowable under the Federal Acquisition Regulation; or*

(iii) *should be adjusted due to routine contract and Environmental Protection Agency response cost audit procedures,*

a potentially responsible party may be reimbursed for those costs.

(b)(1) *IN GENERAL.*—*Claims asserted and compensable but unsatisfied under provisions of section 311 of the Clean Water Act, which are modified by section 304 of this Act may be asserted against the Fund under this title; and other claims resulting from a release or threat of release of a hazardous substance from a vessel or a facility may be asserted against the Fund under this title for injury to, or destruction or loss of, natural resources, including cost for damage assessment: Provided, however, That any such claim may be asserted only by the President, as trustee, for natural resources over which the United States has sovereign rights, or natural resources within the territory or the fishery conservation zone of the United States to the extent they are managed or protected by the United States, or by any State for natural resources within the boundary of that State belonging to, managed by, controlled by, or appertaining to the State, or by any Indian tribe or by the United States acting on behalf of any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation.*

(2) LIMITATION ON PAYMENT OF NATURAL RESOURCE CLAIMS.—

(A) GENERAL REQUIREMENTS.—No natural resource claim may be paid from the Fund unless the President determines that the claimant has exhausted all administrative and judicial remedies to recover the amount of such claim from persons who may be liable under section 107.

(B) DEFINITION.—As used in this paragraph, the term “natural resource claim” means any claim for injury to, or destruction or loss of, natural resources. The term does not include any claim for the costs of natural resource damage assessment.

(c) Uses of the Fund under subsection (a) of this section include—

(1) The costs of assessing both short-term and long-term injury to, destruction of, or loss of any natural resources resulting from a release of a hazardous substance.

(2) The costs of Federal or State or Indian tribe efforts in the restoration, rehabilitation, or replacement or acquiring the equivalent of any natural resources injured, destroyed, or lost as a result of a release of a hazardous substance.

(3) Subject to such amounts as are provided in appropriation Acts, the costs of a program to identify, investigate, and take enforcement and abatement action against releases of hazardous substances.

(4) Any costs incurred in accordance with subsection (m) of this section (relating to ATSDR) and section 104(i), including the costs of epidemiologic and laboratory studies, health assessments, preparation of toxicologic profiles, development and maintenance of a registry of persons exposed to hazardous substances to allow long-term health effect studies, and diagnostic services not otherwise available to determine whether persons in populations exposed to hazardous substances in connection with a release or a suspected release are suffering from long-latency diseases.

(5) Subject to such amounts as are provided in appropriation Acts, the costs of providing equipment and similar overhead, related to the purposes of this Act and section 311 of the Clean Water Act, and needed to supplement equipment and services available through contractors or other non-Federal entities, and of establishing and maintaining damage assessment capability, for any Federal agency involved in strike forces, emergency task forces, or other response teams under the national contingency plan.

(6) Subject to such amounts as are provided in appropriation Acts, the costs of a program to protect the health and safety of employees involved in response to hazardous substance releases. Such program shall be developed jointly by the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health and shall include, but not be limited to, measures for identifying and assessing hazards to which persons engaged in removal, remedy, or other response to hazardous substances may be exposed, methods to protect workers

from such hazards, and necessary regulatory and enforcement measures to assure adequate protection of such employees.

(7) EVALUATION COSTS UNDER PETITION PROVISIONS OF SECTION 105(d).—Costs incurred by the President in evaluating facilities pursuant to petitions under section 105(d) (relating to petitions for assessment of release).

(8) CONTRACT COSTS UNDER SECTION 104(a)(1).—The costs of contracts or arrangements entered into under section 104(a)(1) to oversee and review the conduct of remedial investigations and feasibility studies undertaken by persons other than the President and the costs of appropriate Federal and State oversight of remedial activities at National Priorities List sites resulting from consent orders or settlement agreements.

(9) ACQUISITION COSTS UNDER SECTION 104(j).—The costs incurred by the President in acquiring real estate or interests in real estate under section 104(j) (relating to acquisition of property).

(10) RESEARCH, DEVELOPMENT, AND DEMONSTRATION COSTS UNDER SECTION 311.—The cost of carrying out section 311 (relating to research, development, and demonstration), except that the amounts available for such purposes shall not exceed the amounts specified in subsection (n) of this section.

(11) LOCAL GOVERNMENT REIMBURSEMENT.—Reimbursements to local governments under section 123, except that during the 8-fiscal year period beginning October 1, 1986, not more than 0.1 percent of the total amount appropriated from the Fund may be used for such reimbursements.

(12) WORKER TRAINING AND EDUCATION GRANTS.—The costs of grants under section 126(g) of the Superfund Amendments and Reauthorization Act of 1986 for training and education of workers to the extent that such costs do not exceed \$10,000,000⁵⁶ for each of the fiscal years 1987, 1988, 1989, 1990, 1991, 1992, 1993, and 1994.

(13) AWARDS UNDER SECTION 109.—The costs of any awards granted under section 109(d).

(14) LEAD POISONING STUDY.—The cost of carrying out the study under subsection (f) of section 118 of the Superfund Amendments and Reauthorization Act of 1986 (relating to lead poisoning in children).

(d)(1) No money in the Fund may be used under subsection (c)(1) and (2) of this section, nor for the payment of any claim under subsection (b) of this section, where the injury, destruction, or loss of natural resources and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.

(2) No money in the Fund may be used for the payment of any claim under subsection (b) of this section where such expenses are associated with injury or loss resulting from long-term exposure to

⁵⁶Public Law 101-144 (103 Stat. 857) purported to amend section 9611(c)(12) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) by striking "\$10,000,000" and inserting "\$20,000,000". The amendment made by Public Law 101-144 probably should have been made to section 111(c)(12) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, which is designated as section 9611 in title 42, United States Code.

ambient concentrations of air pollutants from multiple or diffuse sources.

(e)(1) Claims against or presented to the Fund shall not be valid or paid in excess of the total money in the Fund at any one time. Such claims become valid only when additional money is collected, appropriated, or otherwise added to the Fund. Should the total claims outstanding at any time exceed the current balance of the Fund, the President shall pay such claims, to the extent authorized under this section, in full in the order in which they were finally determined.

(2) In any fiscal year, 85 percent of the money credited to the Fund under title II of this Act shall be available only for the purposes specified in paragraphs (1), (2), and (4) of subsection (a) of this section. No money in the Fund may be used for the payment of any claim under subsection (a)(3) or subsection (b) of this section in any fiscal year for 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.

(3) No money in the Fund shall be available for remedial action, other than actions specified in subsection (c) of this section, with respect to federally owned facilities; except that money in the Fund shall be available for the provision of alternative water supplies (including the reimbursement of costs incurred by a municipality) in any case involving groundwater contamination outside the boundaries of a federally owned facility in which the federally owned facility is not the only potentially responsible party.

(4) Paragraphs (1) and (4) of subsection (a) of this section shall in the aggregate be subject to such amounts as are provided in appropriation Acts.

(f) The President is authorized to promulgate regulations designating one or more Federal officials who may obligate money in the Fund in accordance with this section or portions thereof. The President is also authorized to delegate authority to obligate money in the Fund or to settle claims to officials of a State or Indian tribe operating under a contract or cooperative agreement with the Federal Government pursuant to section 104(d) of this title.

(g) The President shall provide for the promulgation of rules and regulations with respect to the notice to be provided to potential injured parties by an owner and operator of any vessel, or facility from which a hazardous substance has been released. Such rules and regulations shall consider the scope and form of the notice which would be appropriate to carry out the purposes of this title. Upon promulgation of such rules and regulations, the owner and operator of any vessel or facility from which a hazardous substance has been released shall provide notice in accordance with such rules and regulations. With respect to releases from public vessels, the President shall provide such notification as is appropriate to potential injured parties. Until the promulgation of such rules and regulations, the owner and operator of any vessel or facility from which a hazardous substance has been released shall provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area.

[Subsection (h) repealed.]

(i) Except in a situation requiring action to avoid an irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action, funds may not be used under this Act for the restoration, rehabilitation, or replacement or acquisition of the equivalent of any natural resources until a plan for the use of such funds for such purposes has been developed and adopted by affected Federal agencies and the Governor or Governors of any State having sustained damage to natural resources within its borders, belonging to, managed by or appertaining to such State, and by the governing body of any Indian tribe having sustained damage to natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation, after adequate public notice and opportunity for hearing and consideration of all public comment.

(j) The President shall use the money in the Post-closure Liability Fund for any of the purposes specified in subsection (a) of this section with respect to a hazardous waste disposal facility for which liability has transferred to such fund under section 107(k) of this Act, and, in addition, for payment of any claim or appropriate request for costs of response, damages, or other compensation for injury or loss under section 107 of this Act or any other State or Federal law, resulting from a release of a hazardous substance from such a facility.

(k) INSPECTOR GENERAL.—In each fiscal year, the Inspector General of each department, agency, or instrumentality of the United States which is carrying out any authority of this Act shall conduct an annual audit of all payments, obligations, reimbursements, or other uses of the Fund in the prior fiscal year, to assure that the Fund is being properly administered and that claims are being appropriately and expeditiously considered. The audit shall include an examination of a sample of agreements with States (in accordance with the provisions of the Single Audit Act) carrying out response actions under this title and an examination of remedial investigations and feasibility studies prepared for remedial actions. The Inspector General shall submit to the Congress an annual report regarding the audit report required under this subsection. The report shall contain such recommendations as the Inspector General deems appropriate. Each department, agency, or instrumentality of the United States shall cooperate with its inspector general in carrying out this subsection.

(l) To the extent that the provisions of this Act permit, a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim if—

(1) the release of a hazardous substance occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;

(2) the claimant is not otherwise compensated for his loss;

(3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act, as amended (43

U.S.C. 1331 et seq.) or the Deepwater Port Act of 1974, as amended (33 U.S.C. 1501 et seq.); and

(4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials, certifies that such country provides a comparable remedy for United States claimants.

[(m) AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY.—There shall be directly available to the Agency for Toxic Substances and Disease Registry to be used for the purpose of carrying out activities described in subsection (c)(4) and section 104(i) not less than \$50,000,000 per fiscal year for each of fiscal years 1987 and 1988, not less than \$55,000,000 for fiscal year 1989, and not less than \$60,000,000 per fiscal year for each of fiscal years 1990, 1991, 1992, 1993, and 1994. Any funds so made available which are not obligated by the end of the fiscal year in which made available shall be returned to the Fund.]

(m) HEALTH AUTHORITIES.—

(1) IN GENERAL.—*There are authorized to be appropriated from the Fund to the Secretary of Health and Human Services to be used for the purposes of carrying out the activities described in subsection (c)(4) and the activities described in section 104(i), \$50,000,000 for each of fiscal years 1999 through 2003.*

(2) RETURN OF UNOBLIGATED FUNDS.—*Funds appropriated under this subsection for a fiscal year, but not obligated by the end of the fiscal year, shall be returned to the Fund.*

[(n) LIMITATIONS ON RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROGRAM.—

[(1) SECTION 311(b).—For each of the fiscal years 1987, 1988, 1989, 1990, 1991, 1992, 1993, and 1994, not more than \$20,000,000 of the amounts available in the Fund may be used for the purposes of carrying out the applied research, development, and demonstration program for alternative or innovative technologies and training program authorized under section 311(b) (relating to research, development, and demonstration) other than basic research. Such amounts shall remain available until expended.

[(2) SECTION 311(a).—From the amounts available in the Fund, not more than the following amounts may be used for the purposes of section 311(a) (relating to hazardous substance research, demonstration, and training activities):

[(A) For the fiscal year 1987, \$3,000,000.

[(B) For the fiscal year 1988, \$10,000,000.

[(C) For the fiscal year 1989, \$20,000,000.

[(D) For the fiscal year 1990, \$30,000,000.

[(E) For each of the fiscal years 1991, 1992, 1993, and 1994, \$35,000,000.

[No more than 10 percent of such amounts shall be used for training under section 311(a) in any fiscal year.

[(3) SECTION 311(d).—For each of the fiscal years 1987, 1988, 1989, 1990, 1991, 1992, 1993, and 1994, not more than \$5,000,000 of the amounts available in the Fund may be used

for the purposes of section 311(d) (relating to university hazardous substance research centers).】

(n) *LIMITATIONS ON RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROGRAMS.*—

(1) *ALTERNATIVE OR INNOVATIVE TECHNOLOGIES RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROGRAMS.*—

(A) *LIMITATION.*—For each of fiscal years 1999 through 2003, not more than \$30,000,000 of the amounts available in the Fund may be used for the purposes of carrying out the applied research, development, and demonstration program for alternative or innovative technologies and training program authorized under section 311(b) other than basic research.

(B) *CONTINUING AVAILABILITY.*—Amounts under subparagraph (A) shall remain available until expended.

(2) *HAZARDOUS SUBSTANCE RESEARCH, DEMONSTRATION, AND TRAINING.*—

(A) *LIMITATION.*—From the amounts available in the Fund, not more than the following amounts may be used for the purposes of section 311(a):

(i) For fiscal year 1999, \$37,000,000.

(ii) For fiscal year 2000, \$39,000,000.

(iii) For fiscal year 2001, \$41,000,000.

(iv) For each of fiscal years 2002 and 2003, \$43,000,000.

(B) *FURTHER LIMITATION.*—No more than 15 percent of such amounts shall be used for training under section 311(a) for any fiscal year.

(3) *UNIVERSITY HAZARDOUS SUBSTANCE RESEARCH CENTERS.*—For each of fiscal years 1999 through 2003, not more than \$5,000,000 of the amounts available in the Fund may be used for the purposes of section 311(d).

(o) *NOTIFICATION PROCEDURES FOR LIMITATIONS ON CERTAIN PAYMENTS.*—Not later than 90 days after the enactment of this subsection, the President shall develop and implement procedures to adequately notify, as soon as practicable after a site is included on the National Priorities List, concerned local and State officials and other concerned persons of the limitations, set forth in subsection (a)(2) of this section, on the payment of claims for necessary response costs incurred with respect to such site.

(p) *GENERAL REVENUE SHARE OF SUPERFUND.*—

【(1) *IN GENERAL.*—The following sums are authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, to the Hazardous Substance Superfund:

【(A) For fiscal year 1987, \$212,500,000.

【(B) For fiscal year 1988, \$212,500,000.

【(C) For fiscal year 1989, \$212,500,000.

【(D) For fiscal year 1990, \$212,500,000.

【(E) For fiscal year 1991, \$212,500,000.

【(F) For fiscal year 1992, \$212,500,000.

【(G) For fiscal year 1993, \$212,500,000.

【(H) For fiscal year 1994, \$212,500,000.

【In addition there is authorized to be appropriated to the Hazardous Substance Superfund for each fiscal year an amount

equal to so much of the aggregate amount authorized to be appropriated under this subsection (and paragraph (2) of section 221(b)⁵⁷ of the Hazardous Substance Response Revenue Act of 1980) as has not been appropriated before the beginning of the fiscal year involved.】

(1) *AUTHORIZATION OF APPROPRIATIONS.*—

(A) *IN GENERAL.*—*There are authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, to the Hazardous Substance Superfund—*

- (i) *for fiscal year 1999, \$250,000,000;*
- (ii) *for fiscal year 2000, \$250,000,000;*
- (iii) *for fiscal year 2001, \$250,000,000;*
- (iv) *for fiscal year 2002, \$250,000,000; and*
- (v) *for fiscal year 2003, \$250,000,000.*

(B) *ADDITIONAL AMOUNTS.*—*There is authorized to be appropriated to the Hazardous Substance Superfund for each such fiscal year an amount, in addition to the amount authorized by subparagraph (A), equal to so much of the aggregate amount authorized to be appropriated under this subsection and section 9507(b) of the Internal Revenue Code of 1986 as has not been appropriated before the beginning of the fiscal year.*

(2) *COMPUTATION.*—*The amounts authorized to be appropriated under paragraph (1) of this subsection in a given fiscal year shall be available only to the extent that such amount exceeds the amount determined by the Secretary under section 9507(b)(2) of the Internal Revenue Code of 1986 for the prior fiscal year.*

(q) *BROWNFIELD GRANT PROGRAM.*—*For each of fiscal years 1999 through 2003, not more than \$75,000,000 of the amounts available in the Fund may be used to carry out section 127.*

(r) *QUALIFYING STATE VOLUNTARY RESPONSE PROGRAM.*—*For each of fiscal years 1999 through 2003, not more than \$25,000,000 of the amounts available in the Fund may be used for assistance to States to maintain, establish, and administer qualifying State voluntary response programs, during the first 5 full fiscal years following the date of enactment of this subparagraph, distributed among each of the States that notifies the Administrator of the State's intent to establish a qualifying State voluntary response program and each of the States with a qualifying State voluntary response program. For each fiscal year there shall be available to each qualifying State voluntary response program a grant in the amount of at least \$250,000.*

(s) *COMMUNITY ACTION GROUPS.*—*For the period commencing January 1, 1998, and ending September 30, 2003, not more than \$15,000,000 of the amounts available in the Fund may be used to make grants under section 117(i).*

(t) *RECOVERIES.*—*Effective beginning January 1, 1997, any response cost recoveries collected by the United States under this Act shall be credited as offsetting collections to the Superfund appropriations account.*

[42 U.S.C. 9611]

⁵⁷ [Section 221(b) was repealed by section 517(c)(1) of Public Law 99-499].

CLAIMS PROCEDURE

SEC. 112. (a) CLAIMS AGAINST THE FUND FOR RESPONSE COSTS.—No claim may be asserted against the Fund pursuant to section 111(a) unless such claim is presented in the first instance to the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, and to any other person known to the claimant who may be liable under section 107. In any case where the claim has not been satisfied within 60 days of presentation in accordance with this subsection, the claimant may present the claim to the Fund for payment. No claim against the Fund may be approved or certified during the pendency of an action by the claimant in court to recover costs which are the subject of the claim.

(b)(1) PRESCRIBING FORMS AND PROCEDURES.—The President shall prescribe appropriate forms and procedures for claims filed hereunder, which shall include a provision requiring the claimant to make a sworn verification of the claim to the best of his knowledge. Any person who knowingly gives or causes to be given any false information as a part of any such claim shall, upon conviction, be fined in accordance with the applicable provisions of title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both.

(2) PAYMENT OR REQUEST FOR HEARING.—The President may, if satisfied that the information developed during the processing of the claim warrants it, make and pay an award of the claim, except that no claim may be awarded to the extent that a judicial judgment has been made on the costs that are the subject of the claim. If the President declines to pay all or part of the claim, the claimant may, within 30 days after receiving notice of the President's decision, request an administrative hearing.

(3) BURDEN OF PROOF.—In any proceeding under this subsection, the claimant shall bear the burden of proving his claim.

(4) DECISIONS.—All administrative decisions made hereunder shall be in writing, with notification to all appropriate parties, and shall be rendered within 90 days of submission of a claim to an administrative law judge, unless all the parties to the claim agree in writing to an extension or unless the President, in his discretion, extends the time limit for a period not to exceed sixty days.

(5) FINALITY AND APPEAL.—All administrative decisions hereunder shall be final, and any party to the proceeding may appeal a decision within 30 days of notification of the award or decision. Any such appeal shall be made to the Federal district court for the district where the release or threat of release took place. In any such appeal, the decision shall be considered binding and conclusive, and shall not be overturned except for arbitrary or capricious abuse of discretion.

(6) PAYMENT.—Within 20 days after the expiration of the appeal period for any administrative decision concerning an award, or within 20 days after the final judicial determination of any appeal taken pursuant to this subsection, the President shall pay any such award from the Fund. The President shall determine the method, terms, and time of payment.

(c)(1) Payment of any claim by the Fund under this section shall be subject to the United States Government acquiring by subrogation the rights of the claimant to recover those costs of removal or damages for which it has compensated the claimant from the person responsible or liable for such release.

(2) Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for damages or costs resulting from a release of a hazardous substance shall be subrogated to all rights, claims, and causes of action for such damages and costs of removal that the claimant has under this Act or any other law.

(3) Upon request of the President, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this title, and, without regard to any limitation of liability, all interest, administrative and adjudicative costs, and attorney's fees incurred by the Fund by reason of the claim. Such an action may be commenced against any owner, operator, or guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the damages or costs for which compensation was paid.

(d) STATUTE OF LIMITATIONS.—

(1) CLAIMS FOR RECOVERY OF COSTS.—No claim may be presented under this section for recovery of the costs referred to in section 107(a) after the date 6 years after the date of completion of all response action.

(2) CLAIMS FOR RECOVERY OF DAMAGES.—No claim may be presented under this section for recovery of the damages referred to in section 107(a) unless the claim is presented within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which final regulations are promulgated under section 301(c).

(3) MINORS AND INCOMPETENTS.—The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for the minor, or

(B) against an incompetent person until the earlier of the date on which such person's incompetency ends or the date on which a legal representative is duly appointed for such incompetent person.

(e) Regardless of any State statutory or common law to the contrary, no person who asserts a claim against the Fund pursuant to this title shall be deemed or held to have waived any other claim not covered or assertable against the Fund under this title arising from the same incident, transaction, or set of circumstances, nor to have split a cause of action. Further, no person asserting a claim against the Fund pursuant to this title shall as a result of any determination of a question of fact or law made in connection with that claim be deemed or held to be collaterally estopped from raising such question in connection with any other claim not covered or assertable against the Fund under this title arising from the same incident, transaction, or set of circumstances.

(f) **DOUBLE RECOVERY PROHIBITED.**—Where the President has paid out of the Fund for any response costs or any costs specified under section 111(c) (1) or (2), no other claim may be paid out of the Fund for the same costs.

(g) **CONTRIBUTION FROM THE FUND.**—

(1) **COMPLETION OF OBLIGATIONS.**—A person that is undertaking a response action pursuant to an administrative order issued under section 106 or has entered into a settlement decree with the United States or a State as of the date of enactment of this subsection shall complete the person's obligations under the order or settlement decree.

(2) **CONTRIBUTION.**—A person described in paragraph (1) shall receive contribution from the Fund for any portion of the costs (excluding attorneys' fees) incurred for the performance of the response action after the date of enactment of this subsection if the person is not liable for such costs by reason of a liability exemption under section 107.

(3) **APPLICATION FOR CONTRIBUTION.**—

(A) **IN GENERAL.**—Contribution under this section shall be made upon receipt by the Administrator of an application requesting contribution.

(B) **PERIODIC APPLICATIONS.**—Beginning with the 7th month after the date of enactment of this subsection, 1 application for each facility shall be submitted every 6 months for all persons with contribution rights (as determined under subparagraph (2)).

(4) **REGULATIONS.**—Contribution shall be made in accordance with such regulations as the Administrator shall issue within 180 days after the date of enactment of this section.

(5) **DOCUMENTATION.**—The regulations under paragraph (4) shall, at a minimum, require that an application for contribution contain such documentation of costs and expenditures as the Administrator considers necessary to ensure compliance with this subsection.

(6) **EXPEDITION.**—The Administrator shall, consistent with section 137(p), develop and implement such procedures as may be necessary to provide contribution to such persons in an expeditious manner, but in no case shall a contribution be made later than 1 year after submission of an application under this subsection.

(7) **CONSISTENCY WITH NATIONAL CONTINGENCY PLAN.**—No contribution shall be made under this subsection unless the Administrator determines that such costs are consistent with the National Contingency Plan.

[42 U.S.C. 9612]

LITIGATION, JURISDICTION AND VENUE

SEC. 113. (a) Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or

criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by title II of this Act, or to the review of any regulation promulgated under the Internal Revenue Code of 1954.

(d) No provision of this Act shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to enactment of this Act.

(e) NATIONWIDE SERVICE OF PROCESS.—In any action by the United States under this Act, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) CONTRIBUTION.—

(1) CONTRIBUTION.—Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs *and natural resource damages* among liable parties using such equitable factors as the court determines are appropriate. 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 section 106 or section 107.

(2) SETTLEMENT.—A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution *or cost recovery* regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) PERSONS NOT PARTY TO SETTLEMENT.—(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any

person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) PERIOD IN WHICH ACTION MAY BE BROUGHT.—

(1) ACTIONS FOR NATURAL RESOURCE DAMAGES.—Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 101(6)) under this Act, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 301(c).

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 120 (relating to Federal facilities), or any vessel or facility at which a remedial action under this Act is otherwise scheduled, an action for damages under this Act must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this Act with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 104(b) or section 120 (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before the enactment of the Superfund Amendments and Reauthorization Act of 1986.

(2) ACTIONS FOR RECOVERY OF COSTS.—An initial action for recovery of the costs referred to in section 107 must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 104(c)(1)(C) for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or ac-

tions to recover further response costs or damages. A subsequent action or actions under section 107 for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 107 for recovery of costs at any time after such costs have been incurred.

(3) CONTRIBUTION.—No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this Act for recovery of such costs or damages, or

(B) the date of an administrative order under section 122(g) (relating to de minimis settlements) or 122(h) (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) SUBROGATION.—No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this title more than 3 years after the date of payment of such claim.

(5) ACTIONS TO RECOVER INDEMNIFICATION PAYMENTS.—Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 119, an action under section 107 for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) MINORS AND INCOMPETENTS.—The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) TIMING OF REVIEW.—No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 121 (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 104, or to review any order issued under section 106(a), in any action except one of the following:

(1) An action under section 107 to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 106(a) or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 106(b)(2).

(4) An action under section 310 (relating to citizens suits) alleging that the removal or remedial action taken under section 104 or secured under section 106 was in violation of any

requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 106 in which the United States has moved to compel a remedial action.

(i) INTERVENTION.—In any action commenced under this Act or under the Solid Waste Disposal Act in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

(j) JUDICIAL REVIEW.—

(1) LIMITATION.—In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) STANDARD.—In considering objections raised in any judicial action under this Act, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) REMEDY.—If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) PROCEDURAL ERRORS.—In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) ADMINISTRATIVE RECORD AND PARTICIPATION PROCEDURES.—

(1) ADMINISTRATIVE RECORD.—The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) PARTICIPATION PROCEDURES.—

(A) REMOVAL ACTION.—The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) REMEDIAL ACTION.—The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section **117(a)(2)** **117(b)(2)** (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section **117(d)** **117(e)**. The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code to carry out the requirements of this subparagraph.

(C) INTERIM RECORD.—Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this Act shall not include an adjudicatory hearing.

(D) POTENTIALLY RESPONSIBLE PARTIES.—The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(I) NOTICE OF ACTIONS.—Whenever any action is brought under this Act in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

[42 U.S.C. 9613]

RELATIONSHIP TO OTHER LAW

SEC. 114. (a) Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

(b) Any person who receives compensation for removal costs or damages or claims pursuant to this Act shall be precluded from recovering compensation for the same **[removal]** *response* costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for **[removal]** *response* costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same **[removal]** *response* costs or damages or claims as provided in this Act.

(c) RECYCLED OIL.—

(1) **[SERVICE STATION DEALER]** *SERVICE STATION OR AUTOMOBILE DEALERS*, etc.—No person (including the United States or any State) may recover, under the authority of subsection (a)(3) or (a)(4) of section 107, from a **[service station dealer]** *service station or automobile dealer* for any response costs or damages resulting from a release or threatened release of recycled oil, or use the authority of section 106 against a **[service station dealer]** *service station or automobile dealer* other than a person described in subsection (a)(1) or (a)(2) of section 107, if such recycled oil—

(A) is not mixed with any other hazardous substance, and

(B) is stored, treated, transported, or otherwise managed in compliance with regulations or standards promulgated pursuant to section 3014 of the Solid Waste Disposal Act and other applicable authorities.

Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release or threatened release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action.

(2) PRESUMPTION.—Solely for the purposes of this subsection, a service station dealer may presume that a small quantity of used oil is not mixed with other hazardous substances if it—

(A) has been removed from the engine of a light duty motor vehicle or household appliances by the owner of such vehicle or appliances, and

(B) is presented, by such owner, to the dealer for collection, accumulation, and delivery to an oil recycling facility.

(3) DEFINITION.—For purposes of this subsection, the terms “used oil” and “recycled oil” have the same meanings as set forth in sections 1004(36) and 1004(37) of the Solid Waste Disposal Act and regulations promulgated pursuant to that Act.

(4) EFFECTIVE DATE.—The effective date of paragraphs (1) and (2) of this subsection shall be the effective date of regulations or standards promulgated under section 3014 of the Solid Waste Disposal Act that include, among other provisions, a requirement to conduct corrective action to respond to any releases of recycled oil under subtitle C or subtitle I of such Act.

(d) Except as provided in this title, no owner or operator of a vessel or facility who establishes and maintains evidence of financial responsibility in accordance with this title shall be required

under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such vessel or facility. Evidence of compliance with the financial responsibility requirements of this title shall be accepted by a State in lieu of any other requirement of financial responsibility imposed by such State in connection with liability for the release of a hazardous substance from such vessel or facility.

[42 U.S.C. 9614]

AUTHORITY TO DELEGATE, ISSUE REGULATIONS

SEC. 115. The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this title.

[42 U.S.C. 9615]

SEC. 116. SCHEDULES.

(a) ASSESSMENT AND LISTING OF FACILITIES.—It shall be a goal of this Act that, to the maximum extent practicable—

(1) not later than January 1, 1988, the President shall complete preliminary assessments of all facilities that are contained (as of the date of enactment of the Superfund Amendments and Reauthorization Act of 1986) on the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) including in each assessment a statement as to whether a site inspection is necessary and by whom it should be carried out; and

(2) not later than January 1, 1989, the President shall assure the completion of site inspections at all facilities for which the President has stated a site inspection is necessary pursuant to paragraph (1).

(b) EVALUATION.—Within 4 years after enactment of the Superfund Amendments and Reauthorization Act of 1986, each facility listed (as of the date of such enactment) in the CERCLIS shall be evaluated if the President determines that such evaluation is warranted on the basis of a site inspection or preliminary assessment. The evaluation shall be in accordance with the criteria established in section 105 under the National Contingency Plan for determining priorities among release for inclusion on the National Priorities List. In the case of a facility listed in the CERCLIS after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the facility shall be evaluated within 4 years after the date of such listing if the President determines that such evaluation is warranted on the basis of a site inspection or preliminary assessment.

(c) EXPLANATIONS.—If any of the goals established by subsection (a) or (b) are not achieved, the President shall publish an explanation of why such action could not be completed by the specified date.

(d) COMMENCEMENT OF RI/FS.—The President shall assure that remedial investigations and feasibility studies (RI/FS) are commenced for facilities listed on the National Priorities List, in

addition to those commenced prior to the date of enactment of the Superfund Amendments and Reauthorization Act of 1986, in accordance with the following schedule:

(1) not fewer than 275 by the date 36 months after the date of enactment of the Superfund Amendments and Reauthorization Act of 1986, and

(2) if the requirement of paragraph (1) is not met, not fewer than an additional 175 by the date 4 years after such date of enactment, an additional 200 by the date 5 years after such date of enactment, and a total of 650 by the date 5 years after such date of enactment.

(e) COMMENCEMENT OF REMEDIAL ACTION.—The President shall assure that substantial and continuous physical on-site remedial action commences at facilities on the National Priorities List, in addition to those facilities on which remedial action has commenced prior to the date of enactment of the Superfund Amendments and Reauthorization Act of 1986, at a rate not fewer than:

(1) 175 facilities during the first 36-month period after enactment of this subsection; and

(2) 200 additional facilities during the following 24 months after such 36-month period.

[42 U.S.C. 9616]

SEC. 117. PUBLIC PARTICIPATION.

(a) DEFINITIONS.—*In this section:*

(1) AFFECTED COMMUNITY.—*The term “affected community” means a group of 2 or more individuals who may be affected by the release or threatened release of a hazardous substance, pollutant, or contaminant from a covered facility.*

(2) COVERED FACILITY.—*The term “covered facility” means a facility—*

(A) *that has been listed or proposed for listing on the National Priorities List; or*

(B) *at which the Administrator is undertaking a removal action that it is anticipated will exceed—*

(i) *in duration, 1 year; or*

(ii) *in cost, the funding limit under section 104(c)(1).*

[(a)] (b) PROPOSED PLAN.—Before adoption of any plan for remedial action to be undertaken by the President, by a State, or by any other person, under section 104, 106, 120, or 122, the President or State, as appropriate, shall take both of the following actions:

(1) Publish a notice and brief analysis of the proposed plan and make such plan available to the public.

(2) Provide a reasonable opportunity for submission of written and oral comments, *adequate notice*, and an opportunity for a public meeting at or near the facility at issue regarding the proposed plan and regarding any proposed findings under section 121(d)(4) (relating to cleanup standards). The President or the State shall keep a transcript of the meeting and make such transcript available to the public.

The notice and analysis published under paragraph (1) shall include sufficient information as may be necessary to provide a rea-

sonable explanation of the proposed plan and alternative proposals considered.

[(b)] (c) FINAL PLAN.—Notice of the final remedial action plan adopted shall be published and the plan shall be made available to the public before commencement of any remedial action. Such final plan shall be accompanied by a discussion of any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations under subsection (a).

[(c)] (d) EXPLANATION OF DIFFERENCES.—After adoption of a final remedial action plan—

- (1) if any remedial action is taken,
 - (2) if any enforcement action under section 106 is taken,
- or
- (3) if any settlement or consent decree under section 106 or section 122 is entered into,
- and if such action, settlement, or decree differs in any significant respects from the final plan, the President or the State shall publish an explanation of the significant differences and the reasons such changes were made.

[(d)] (e) PUBLICATION.—For the purposes of this section, publication shall include, at a minimum, publication in a [major] local newspaper of general circulation. In addition, each item developed, received, published, or made available to the public under this section shall be available for public inspection and copying at or near the facility at issue.

[(e)] (f) GRANTS FOR TECHNICAL ASSISTANCE.—

[(1) AUTHORITY.—Subject to such amounts as are provided in appropriations Acts and in accordance with rules promulgated by the President, the President may make grants available to any group of individuals which may be affected by a release or threatened release at any facility which is listed on the National Priorities List under the National Contingency Plan. Such grants may be used to obtain technical assistance in interpreting information with regard to the nature of the hazard, remedial investigation and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, or removal action at such facility.

[(2) AMOUNT.—The amount of any grant under this subsection may not exceed \$50,000 for a single grant recipient. The President may waive the \$50,000 limitation in any case where such waiver is necessary to carry out the purposes of this subsection. Each grant recipient shall be required, as a condition of the grant, to contribute at least 20 percent of the total of costs of the technical assistance for which such grant is made. The President may waive the 20 percent contribution requirement if the grant recipient demonstrates financial need and such waiver is necessary to facilitate public participation in the selection of remedial action at the facility. Not more than one grant may be made under this subsection with respect to a single facility, but the grant may be renewed to facilitate public participation at all stages of remedial action.]

(f) AVAILABILITY OF RECORDS.—

(1) IN GENERAL.—Except as provided in paragraph (2), throughout all phases of a response action at a facility and without the need to file a request under section 552 of title 5, United States Code, the President shall make available to the affected community (including the recipient of a technical assistance grant, if one has been awarded under subsection (i) or a local community advisory group (if one has been established under subsection (h)), all records in the possession or control of the United States relating to a release or threatened release of a hazardous substance, pollutant, or contaminant at the facility and that do not relate to liability, for inspection and, subject to reasonable fees, for copying.

(2) EXEMPT RECORDS.—Paragraph (1) shall not apply to a record that is exempt from disclosure under section 552 of title 5, United States Code (including any information protected from disclosure by privilege or as confidential business information), or to any record that is exchanged between parties to a dispute under this Act for the purposes of settling the dispute.

*(g) IMPROVEMENT OF PUBLIC PARTICIPATION IN DECISION-MAKING PROCESS.—**(1) VIEWS AND PREFERENCES.—*

(A) SOLICITATION.—To the extent practicable, in addition to the solicitation of public comments on a proposed remedial action plan under subsection (a)(2), the Administrator, during the response action process (including the responses under subsection (h)(4)(A)), shall—

- (i) disseminate information to the local community;*
- (ii) solicit information from the local community;*
- (iii) consider the views of the local community; and*
- (iv) include, in any administrative record established under section 113(k), the views of the local community and the response of the Administrator to any significant comments, criticisms, or new data submitted in a written or oral presentation.*

(B) PROCEDURE.—To solicit the views and concerns of the local community, the Administrator may conduct, as appropriate—

- (i) face-to-face local community surveys for purposes including the identification of the location of private drinking water wells, historic and current or potential use of water, and other environmental resources in the local community;*
- (ii) public meetings; and*
- (iii) other appropriate participatory activities.*

(C) PUBLIC MEETINGS.—The Administrator shall give particular consideration to providing the opportunity for public meetings in advance of significant decision points in the response action process.

(D) CONSULTATION.—In determining which of the procedures set forth in subparagraph (B) may be appropriate, the Administrator shall consult with a local community advisory group, if one has been established under subsection (h), and members of the affected community.

(E) *NOTIFICATION.*—The Administrator shall notify the local community, affected Indian Tribes, and local government concerning—

(i) the schedule for commencement of construction activities at the covered facility and the location and availability of construction plans;

(ii) the results of the any review under section 121(c) and any modifications to the covered facility made as a result of the review; and

(iii) the execution of and any revision to institutional controls being used as part of a remedial action.

(2) *MEETINGS BETWEEN LEAD AGENCY AND POTENTIALLY RESPONSIBLE PARTIES.*—The Administrator, on a regular basis, shall inform local government officials, Indian Tribes, a local community advisory group (if any) and, to the extent practicable, interested members of the affected community of the progress and substance of technical meetings between the lead agency and potentially responsible parties regarding a covered facility.

(3) *ALTERNATIVES.*—Members of the local community may propose remedial action alternatives in the same manner as alternatives proposed by any other interested parties.

(h) *COMMUNITY ADVISORY GROUPS.*—

(1) *NOTICE.*—The Administrator shall, to the extent practicable, provide notice of an opportunity to form a community advisory group to members of the affected community, particularly persons who are immediately proximate to or may be or may have been affected by the release or threatened release of a hazardous substance, pollutant, or contaminant from the facility.

(2) *ESTABLISHMENT.*—The Administrator shall assist in the establishment of a community advisory group for a covered facility to achieve direct, regular, and meaningful communication among members of the local community throughout the response action process—

(A) at the request of at least 20 individuals residing in, or at least 10 percent of the population of, the area in which that facility is located;

(B) if there is no request under subparagraph (A), at the request of any local government with jurisdiction over the facility; or

(C) if the Administrator determines that a community advisory group would be helpful to achieve the purposes of this Act.

(3) *RESPONSIBILITIES OF A COMMUNITY ADVISORY GROUP.*—A community advisory group shall—

(A) solicit the views of the local community on various issues affecting the development and implementation of response actions at the facility;

(B) serve as a conduit for information between the local community and other entities represented on the community advisory group;

(C) present the views of the local community throughout the response process; and

(D) provide the local community reasonable notice of and opportunities to participate in the meetings and other activities of the community advisory group.

(4) RESPONSIBILITIES OF THE ADMINISTRATOR.—

(A) CONSULTATION.—The Administrator shall—

(i) consult with the community advisory group in developing and implementing the response action for a covered facility, including—

(I) activities to be included in the facility work plan and remedial investigation;

(II) assumptions regarding reasonably anticipated future land uses;

(III) potential remedial alternatives;

(IV) selection and implementation of removal and remedial actions (including operation and maintenance activities) and reviews performed under section 121(c); and

(V) use of institutional controls;

(ii) encourage the Administrator of ATSDR and State, in cooperation with State, Indian Tribe, and local public health officials to consult with the community advisory group regarding health assessments;

(iii) keep the community advisory group informed of progress in the development and implementation of the response action; and

(iv) on request, provide to any person the hazard ranking score of any facility that has been scored under the hazardous ranking system, and the preliminary assessment and site inspection for the facility.

(B) TIMELY SUBMISSION OF COMMENTS.—The Administrator shall consider comments, information, and recommendations that the community advisory group provides in a timely manner.

(C) CONSENSUS.—The community advisory group shall attempt to achieve consensus among its members before providing comments and recommendations to the Administrator. If consensus cannot be reached, the community advisory group shall report or allow presentation of divergent views.

(5) COMPOSITION OF COMMUNITY ADVISORY GROUPS.—

(A) MEMBERS.—The Administrator shall, to the extent practicable, ensure that the membership of a community advisory group reflects the composition of the affected community and a diversity of interests. A community advisory group for a covered facility shall include a minimum of 1 representative of the recipients of a technical assistance grant, if any has been awarded with respect to the facility, and shall include, to the extent practicable, a person from each of the following groups:

(i) Persons who reside or own residential property near the facility.

(ii) Persons who, although they may not reside or own property near the facility, may be affected by the facility contamination.

(iii) *Local public health practitioners or medical practitioners (particularly practitioners that are practicing in the affected community).*

(iv) *Local Indian communities that may be affected by the facility contamination.*

(v) *Local citizen, civic, environmental, or public interest groups.*

(vi) *Members of the local business community.*

(vii) *Employees at the facility during facility operation.*

(B) *LOCAL RESIDENTS.*—Local community members shall comprise a majority of the voting membership of a community advisory group.

(C) *NUMBER OF VOTING MEMBERS.*—The Administrator shall, to the extent practicable, ensure that the voting membership of the community advisory group does not exceed 20 persons.

(D) *COMPENSATION.*—Members of a community advisory group shall serve without compensation.

(E) *NONVOTING MEMBERS.*—The Administrator shall ensure that representatives of the following entities have an opportunity to participate as appropriate (as nonvoting members) in community advisory group meetings for purposes including providing information and technical expertise):

(i) *The Administrator.*

(ii) *The Administrator of the ATSDR.*

(iii) *Other Federal agencies.*

(iv) *Affected States.*

(v) *Affected Indian Tribes.*

(vi) *Representatives of affected local governments, such as city or county governments or local emergency planning committees, and any other governmental unit that regulates land use or land use planning in the vicinity of the facility.*

(vii) *Facility owners.*

(viii) *Potentially responsible parties.*

(6) *TECHNICAL ASSISTANCE GRANTS.*—The Administrator may award a technical assistance grant under subsection (i) to a community advisory group.

(7) *ADMINISTRATIVE SUPPORT.*—The Administrator, to the extent practicable, may provide administrative services and support services to the community advisory group.

(8) *OTHER COMMUNITY ADVISORY GROUPS.*—The President may determine that a Department of Defense restoration advisory board, a Department of Energy site specific advisory board, an ATSDR citizen advisory panel, or an equivalent advisory group can serve the same function as a community advisory group, and in that instance no other community action group shall be required.

(9) *FEDERAL ADVISORY COMMITTEE ACT.*—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to a community advisory group, to a citizen advisory group (designated by the President to serve the functions of a community advisory

group, or to a Department of Defense restoration advisory board, Department of Energy Site Specific advisory board, or an ATSDR citizen advisory panel.

(10) *OTHER PUBLIC INVOLVEMENT.*—The existence of a community advisory group shall not diminish any other obligation of the President to consider the views of any person in selecting response actions under this Act. Nothing in this section affects the status of any community advisory group formed before the date of enactment of this subsection. Nothing in this section affects the status, decisions, or future formation of any Department of Defense Restoration Advisory Board, or Department of Energy Site Specific Advisory Board, and no community advisory group need be established for a facility if any such Board has been established for the facility.

(i) *TECHNICAL ASSISTANCE GRANTS.*—

(1) *AUTHORITY.*—

(A) *IN GENERAL.*—The Administrator may make grants available to members of an affected community for a covered facility in accordance with this subsection.

(B) *ACCESSIBILITY OF APPLICATION PROCESS.*—To ensure that the application process for a technical assistance grant is accessible to all affected citizen groups, the Administrator shall periodically review the application process and, based on the review, implement appropriate changes to improve access.

(2) *SPECIAL RULES.*—

(A) *NO MATCHING CONTRIBUTION.*—No matching contribution shall be required for a technical assistance grant.

(B) *METHODS OF PAYMENT.*—The Administrator may disburse the grant to a recipient in advance of the recipient's making expenditures to be covered by the grant. In the event that the Administrator advances funds, funds shall be advanced in amounts that do not exceed the greater of \$5,000 or 10 percent of the grant amount.

(3) *LIMIT PER FACILITY.*—

(A) *IN GENERAL.*—The Administrator may award not more than 1 technical assistance grant at 1 time with respect to a single covered facility.

(B) *EXTENSION.*—The Administrator may extend a project period established in a grant to facilitate public participation at all stages of a response action.

(4) *FUNDING AMOUNT.*—

(A) *IN GENERAL.*—Except as provided in subparagraph (B), the amount of a technical assistance grant may not exceed \$50,000 for a single grant recipient.

(B) *INCREASE.*—The Administrator may waive the limit on the amount of an initial technical assistance grant if such an increase is necessary to reflect—

- (i) the complexity and duration of the response action;
- (ii) the nature and extent of contamination at the facility;
- (iii) the level of facility activity;

(iv) projected total needs as requested by the grant recipient;

(v) the size of and distances between the affected communities; or

(vi) the ability of the grant recipient to identify and raise funds from other non-Federal sources.

(5) *CONSIDERATIONS.*—In determining how to structure payment of the amount of a technical assistance grant, whether to extend a grant project period under subparagraph (3)(B), or whether to grant a waiver under paragraph (4)(B), the Administrator may consider factors such as the geographical size of the facility and the distances between affected communities.

(6) *USE OF TECHNICAL ASSISTANCE GRANTS.*—

(A) *IN GENERAL.*—A technical assistance grant recipient may use a grant—

(i) to hire experts to assist the recipient in interpreting information and preparing the presentation of the recipient's views with regard to a response action at the facility (including any phase identified in subsection (h)(4)(A));

(ii) to publish newsletters or otherwise disseminate information to other members of the local community; or

(iii) to provide funding for training for interested affected citizens to enable the citizens to more effectively participate in the response process.

(B) *LIMITATION ON USE FOR TRAINING.*—The technical assistance grant recipient may use no more than 10 percent of the amount of a technical assistance grant, or \$5,000, whichever is less, for training under subparagraph (A)(iii).

(7) *GRANT GUIDELINES.*—Not later than 180 days after the date of enactment of this paragraph, the Administrator shall ensure that any guidelines concerning the management of technical assistance grants by grant recipients conform with this section.

[42 U.S.C. 9617]

SEC. 118. HIGH PRIORITY FOR DRINKING WATER SUPPLIES.

For purposes of taking action under section 104 or 106 and listing facilities on the National Priorities List, the President shall give a high priority to facilities where the release of hazardous substances or pollutants or contaminants has resulted in the closing of drinking water wells or has contaminated a principal drinking water supply.

[42 U.S.C. 9618]

SEC. 119. RESPONSE ACTION CONTRACTORS.

(a) *LIABILITY OF RESPONSE ACTION CONTRACTORS.*—

(1) *RESPONSE ACTION CONTRACTORS.*—A person who is a response action contractor with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a vessel or facility shall not be liable under this [title or under any other Federal law] title or under any other

Federal or State law to any person for injuries, costs, damages, expenses, or other liability (including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness or loss of or damage to property or economic loss) which results from such release or threatened release.

[(2) NEGLIGENCE, ETC.—Paragraph (1) shall not apply in the case of a release that is caused by conduct of the response action contractor which is negligent, grossly negligent, or which constitutes intentional misconduct.]

(2) *APPLICATION OF STATE LAW.*—Paragraph (1) shall not apply in determining the liability of a response action contractor under the law of a State if the State has adopted by statute a law determining the liability of a response action contractor.

(3) *EFFECT ON WARRANTIES; EMPLOYER LIABILITY.*—Nothing in this subsection shall affect the liability of any person under any warranty under Federal, State, or common law. Nothing in this subsection shall affect the liability of an employer who is a response action contractor to any employee of such employer under any provision of law, including any provision of any law relating to worker's compensation.

(4) *GOVERNMENTAL EMPLOYEES.*—A state employee or an employee of a political subdivision who provides services relating to response action while acting within the scope of his authority as a governmental employee shall have the same exemption from liability (subject to the other provisions of this section) as is provided to the response action contractor under this section.

(b) *SAVINGS PROVISIONS.*—

(1) *LIABILITY OF OTHER PERSONS.*—The defense provided by section 107(b)(3) shall not be available to any potentially responsible party with respect to any costs or damages caused by any act or omission of a response action contractor. Except as provided in subsection (a)(4) and the preceding sentence, nothing in this section shall affect the liability under this Act or under any other Federal or State law of any person, other than a response action contractor.

(2) *BURDEN OF PLAINTIFF.*—Nothing in this section shall affect the plaintiff's burden of establishing liability under this title.

(c) *INDEMNIFICATION.*—

(1) *IN GENERAL.*—The President may agree to hold harmless and indemnify any response action contractor meeting the requirements of this subsection against any liability (including the expenses of litigation or settlement) for negligence arising out of the contractor's performance in carrying out response action activities under this title, unless such liability was caused by conduct of the contractor which was grossly negligent or which constituted intentional misconduct. *The agreement may apply to a claim for negligence in connection with a response action undertaken pursuant to this Act arising under Federal or State law.*

(2) APPLICABILITY.—This subsection shall apply only with respect to a response action carried out under written agreement with—

- (A) the President;
- (B) any Federal agency;
- (C) a State or political subdivision which has entered into a contract or cooperative agreement in accordance with section 104(d)(1) of this title; or
- (D) any potentially responsible party carrying out any agreement under section 122 (relating to settlements) or section 106 (relating to abatement).

(3) SOURCE OF FUNDING.—This subsection shall not be subject to section 1301 or 1341 of title 31 of the United States Code or section 3732 of the Revised Statutes (41 U.S.C. 11) or to section 3 of the Superfund Amendments and Reauthorization Act of 1986. For purposes of section 111, amounts expended pursuant to this subsection for indemnification of any response action contractor (except with respect to federally owned or operated facilities) shall be considered governmental response costs incurred pursuant to section 104. If sufficient funds are unavailable in the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 to make payments pursuant to such indemnification or if the Fund is repealed, there are authorized to be appropriated such amounts as may be necessary to make such payments.

[(4) REQUIREMENTS.—An indemnification agreement may be provided under this subsection only if the President determines that each of the following requirements are met:

[(A) The liability covered by the indemnification agreement exceeds or is not covered by insurance available, at a fair and reasonable price, to the contractor at the time the contractor enters into the contract to provide response action, and adequate insurance to cover such liability is not generally available at the time the response action contract is entered into.

[(B) The response action contractor has made diligent efforts to obtain insurance coverage from non-Federal sources to cover such liability.

[(C) In the case of a response action contract covering more than one facility, the response action contractor agrees to continue to make such diligent efforts each time the contractor begins work under the contract at a new facility.]

(4) DECISION TO INDEMNIFY.—

(A) IN GENERAL.—*For each response action contract for a vessel or facility, the Administrator shall make a decision whether to enter into an indemnification agreement with a response action contractor.*

(B) STANDARD.—*The Administrator may enter into an indemnification agreement to the extent that the potential liability (including the risk of harm to public health, safety, environment, and property) involved in a response action exceed or are not covered by insurance available to the con-*

tractor at a fair and reasonable price at the time at which the response action is begun (including consideration of premium, policy terms, and deductibles). The Administrator shall assess both the amount of potential liability and the amount of insurance available.

(C) *DILIGENT EFFORTS.*—The Administrator may enter into an indemnification agreement if the Administrator determines that the response action contractor has made diligent efforts to obtain insurance coverage from non-Federal sources to cover potential liabilities.

(D) *CONTINUED DILIGENT EFFORTS.*—An indemnification agreement shall require the response action contractor to continue, not more frequently than annually, to make diligent efforts to obtain insurance coverage from non-Federal sources to cover potential liabilities.

(E) *LIMITATIONS ON INDEMNIFICATION.*—An indemnification agreement provided under this subsection shall include deductibles and shall place limits on the amount of indemnification made available in amounts determined by the contracting agency to be appropriate in light of the unique risk factors associated with the cleanup activity.

(5) *LIMITATIONS.*—

(A) *LIABILITY COVERED.*—Indemnification under this subsection shall apply only to response action contractor liability which results from a release or threatened release of any hazardous substance or pollutant or contaminant if such release or threatened release arises out of response action activities.

(B) *DEDUCTIBLES AND LIMITS.*—An indemnification agreement under this subsection shall include deductibles and shall place limits on the amount of indemnification to be made available.

(C) *CONTRACTS WITH POTENTIALLY RESPONSIBLE PARTIES.*—

(i) *DECISION TO INDEMNIFY.*—In deciding whether to enter into an indemnification agreement with a response action contractor carrying out a written contract or agreement with any potentially responsible party, the President shall determine an amount which the potentially responsible party is able to indemnify the contractor. The President may enter into such an indemnification agreement only if the President determines that such amount of indemnification is inadequate to cover any reasonable potential liability of the contractor arising out of the contractor's negligence in performing the contract or agreement with such party. The President shall make the determinations in the preceding sentences (with respect to the amount and the adequacy of the amount) taking into account the total net assets and resources of potentially responsible parties with respect to the facility at the time of such determinations.

(ii) *CONDITIONS.*—The President may pay a claim under an indemnification agreement referred to in

clause (i) for the amount determined under clause (i) only if the contractor has exhausted all administrative, judicial, and common law claims for indemnification against all potentially responsible parties participating in the clean-up of the facility with respect to the liability of the contractor arising out of the contractor's negligence in performing the contract or agreement with such party. Such indemnification agreement shall require such contractor to pay any deductible established under subparagraph (B) before the contractor may recover any amount from the potentially responsible party or under the indemnification agreement.

(D) RCRA FACILITIES.—No owner or operator of a facility regulated under the Solid Waste Disposal Act may be indemnified under this subsection with respect to such facility.

(E) PERSONS RETAINED OR HIRED.—A person retained or hired by a person described in subsection (e)(2)(B) shall be eligible for indemnification under this subsection only if the President specifically approves of the retaining or hiring of such person.

(6) COST RECOVERY.—For purposes of section 107, amounts expended pursuant to this subsection for indemnification of any person who is a response action contractor with respect to any release or threatened release shall be considered a cost of response incurred by the United States Government with respect to such release.

(7) REGULATIONS.—The President shall promulgate regulations for carrying out the provisions of this subsection. Before promulgation of the regulations, the President shall develop guidelines to carry out this section. Development of such guidelines shall include reasonable opportunity for public comment.

(8) STUDY.—The Comptroller General shall conduct a study in the fiscal year ending September 30, 1989, on the application of this subsection, including whether indemnification agreements under this subsection are being used, the number of claims that have been filed under such agreements, and the need for this subsection. The Comptroller General shall report the findings of the study to Congress no later than September 30, 1989.

(d) EXCEPTION.—The exemption provided under subsection (a) and the authority of the President to offer indemnification under subsection (c) shall not apply to any person covered by the provisions of paragraph (1), (2), (3), or (4) of section 107(a) with respect to the release or threatened release concerned if such person would be covered by such provisions even if such person had not carried out any actions referred to in subsection (e) of this section.

(e) DEFINITIONS.—For purposes of this section—

(1) RESPONSE ACTION CONTRACT.—The term “response action contract” means any written contract or agreement entered into by a response action contractor (as defined in paragraph (2)(A) of this subsection) with—

(A) the President;

(B) any Federal agency;

(C) a State or political subdivision which has entered into a contract or cooperative agreement in accordance with section 104(d)(1) of this Act; or

(D) any potentially responsible party [carrying out an agreement under section 106 or 122];

to provide [any remedial action under this Act at a facility listed on the National Priorities List, or any removal under this Act,] *any response action under this Act*, with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from the facility or to provide any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, or any ancillary services thereto for such facility *or to undertake appropriate action necessary to protect and restore any natural resource damaged by the release or threatened release.*

(2) RESPONSE ACTION CONTRACTOR.—The term “response action contractor” means—

(A) any—

(i) person who enters into a response action contract with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a facility [and is carrying out such contract] *covered by this section and any person (including any subcontractor) hired by a response action contractor; and*⁵⁸

(ii) person, public or nonprofit private entity, conducting a field demonstration pursuant to section 311(b); and

(iii) Recipients⁵⁹ of grants (including sub-grantees) under section 126⁶⁰ for the training and education of workers who are or may be engaged in activities related to hazardous waste removal, containment, or emergency response under this Act; and

(B) any person who is retained or hired by a person described in subparagraph (A) to provide any services relating to a response action; and

(C) any surety who after October 16, 1990, [and before January 1, 1996,] provides a bid, performance or payment bond to a response action contractor, and begins activities to meet its obligations under such bond, but only in connection with such activities or obligations.

(3) INSURANCE.—The term “insurance” means liability insurance which is fair and reasonably priced, as determined by the President, and which is made available at the time the contractor enters into the response action contract to provide response action.

(f) COMPETITION.—Response action contractors and subcontractors for program management, construction management, architec-

⁵⁸ So in original. Clause (iii) was added by section 101(f) of Public Law 100–202 without striking out the “and” at the end of clause (i).

⁵⁹ So in original. “Recipients of grants” probably should be “recipient of a grant”.

⁶⁰ So in original. Should probably be “section 126 of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 9660a)”.

tural and engineering, surveying and mapping, and related services shall be selected in accordance with title IX of the Federal Property and Administrative Services Act of 1949. The Federal selection procedures shall apply to appropriate contracts negotiated by all Federal governmental agencies involved in carrying out this Act. Such procedures shall be followed by response action contractors and subcontractors.

(g) SURETY BONDS.—

(1) If under the Act of August 24, 1935 (40 U.S.C. 270a–270d), commonly referred to as the “Miller Act”, surety bonds are required for any direct Federal procurement of any response action contract and are not waived pursuant to the Act of April 29, 1941 (40 U.S.C. 270e–270f), they shall be issued in accordance with such Act of August 24, 1935.

(2) If under applicable Federal law surety bonds are required for any direct Federal procurement of any response action contract, no right of action shall accrue on the performance bond issued on such response action contract to or for the use of any person other than the obligee named in the bond.

(3) If under applicable Federal law surety bonds are required for any direct Federal procurement of any response action contract, unless otherwise provided for by the procuring agency in the bond, in the event of a default, the surety’s liability on a performance bond shall be only for the cost of completion of the contract work in accordance with the plans and specifications less the balance of funds remaining to be paid under the contract, up to the penal sum of the bond. The surety shall in no event be liable on bonds to indemnify or compensate the obligee for loss or liability arising from personal injury or property damage whether or not caused by a breach of the bonded contract.

(4) Nothing in this subsection shall be construed as preempting, limiting, superseding, affecting, applying to, or modifying any State laws, regulations, requirements, rules, practices or procedures. Nothing in this subsection shall be construed as affecting, applying to, modifying, limiting, superseding, or preempting any rights, authorities, liabilities, demands, actions, causes of action, losses, judgments, claims, statutes of limitation, or obligations under Federal or State law, which do not arise on or under the bond.

(5) This subsection shall not apply to bonds executed before October 17, 1990[, or after December 31, 1995].

(h) LIMITATION ON ACTIONS AGAINST RESPONSE ACTION CONTRACTORS.—

(1) *IN GENERAL.*—No action may be brought under this Act as a result of the performance of services under a response contract against a response action contractor after the date that is 7 years after the date of completion of work at any facility under the contract to recover—

(A) injury to property, real or personal;

(B) personal injury or wrongful death;

(C) other expenses or costs arising out of the performance of services under the contract; or

(D) contribution or indemnity for damages sustained as a result of an injury described in subparagraphs (A) through (C).

(2) EXCEPTION.—Paragraph (1) does not bar recovery for a claim caused by the conduct of the response action contractor that is grossly negligent or that constitutes intentional misconduct.

(3) INDEMNIFICATION.—This subsection does not affect any right of indemnification that a response action contractor may have under this section or may acquire by contract with any person.

[42 U.S.C. 9619]

[SEC. 120. FEDERAL FACILITIES.]⁶¹

SEC. 120. FEDERAL ENTITIES AND FACILITIES.

(a) APPLICATION OF ACT TO FEDERAL GOVERNMENT.—

[(1) IN GENERAL.—Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act. Nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107.]

(1) IN GENERAL.—

(A) DEFINITION OF SERVICE CHARGE.—In this paragraph, the term “service charge” includes—

(i) a fee or charge assessed in connection with—

(I) the processing or issuance of a permit, renewal of a permit, or amendment of a permit;

(II) review of a plan, study, or other document;

or

(III) inspection or monitoring of a facility; and

(ii) any other charge that is assessed in connection with a State, interstate, or local response program.

(B) APPLICATION OF FEDERAL, STATE, AND LOCAL

LAW.—

(i) IN GENERAL.—Each department, agency, and instrumentality of the executive, legislative, or judicial branch of the United States shall be subject to and shall comply with this Act and all other Federal, State, interstate, and local substantive and procedural requirements and other provisions of law relating to a response action or restoration action or the management

⁶¹ Section 120(b) of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99–499) provides:

(b) LIMITED GRANDFATHER.—Section 120 of CERCLA shall not apply to any response action or remedial action for which a plan is under development by the Department of Energy on the date of enactment of this Act [October 17, 1986] with respect to facilities—

(1) owned or operated by the United States and subject to the jurisdiction of such Department;

(2) located in St. Charles and St. Louis counties, Missouri, or the city of St. Louis, Missouri; and

(3) published in the National Priorities List.

In preparing such plans, the Secretary of Energy shall consult with the Administrator of the Environmental Protection Agency.

of a hazardous waste, pollutant, or contaminant in the same manner, and to the same extent, as any non-governmental entity is subject to those provisions of law.

(ii) *PROVISIONS INCLUDED.*—The requirements and other provisions of law referred to in clause (i) include—

(I) a permit requirement;

(II) a reporting requirement;

(III) a provision authorizing injunctive relief (including such sanctions as a court may impose to enforce injunctive relief);

(IV) sections 106 and 107 and similar provisions of Federal, State, interstate, and local law relating to enforcement and liability for cleanup, reimbursement of response costs, (including attorney's fees) contribution, and payment of damages;

(V) a requirement to pay reasonable service charges;

(VI) a requirement to comply with an administrative order; and

(VII) a requirement to pay a civil or administrative penalty, regardless of whether the penalty is punitive or coercive in nature or is imposed for an isolated, intermittent, or continuing violation.

(C) *WAIVER OF SOVEREIGN IMMUNITY.*—

(i) *IN GENERAL.*—The United States waives any immunity applicable to the United States with respect to any provision of law described in subparagraph (B).

(ii) *LIMITATION.*—The waiver of sovereign immunity under clause (i) does not apply to the extent that a State law would apply any standard or requirement to a Federal department, agency, or instrumentality in a manner that is more stringent than the manner in which the standard or requirement would apply to any other person.

(D) *CIVIL AND CRIMINAL LIABILITY.*—

(i) *INJUNCTIVE RELIEF.*—Neither the United States nor any agent, employee, or officer of the United States shall be immune or exempt from any process or sanction of any Federal or State court with respect to the enforcement of injunctive relief referred to in subparagraph (B)(ii)(III).

(ii) *NO PERSONAL LIABILITY FOR CIVIL PENALTY.*—No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal or State law relating to a response action or to management of a hazardous substance, pollutant, or contaminant with respect to any act or omission within the scope of the official duties of the agent, employee, or officer.

(iii) *CRIMINAL LIABILITY.*—An agent, employee, or officer of the United States shall be subject to any criminal sanction (including a fine or imprisonment)

under any Federal or State law relating to a response action or to management of a hazardous substance, pollutant, or contaminant, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the United States shall be subject to any such sanction.

(E) ENFORCEMENT.—

(i) ABATEMENT ACTIONS.—The Administrator may issue an order under section 106 to any department, agency, or instrumentality of the executive, legislative, or judicial branch of the United States. The Administrator shall initiate an administrative enforcement action against such a department, agency, or instrumentality in the same manner and under the same circumstances as an action would be initiated against any other person.

(ii) CONSULTATION.—No administrative order issued to a department, agency, or instrumentality of the United States shall become final until the department, agency, or instrumentality has had the opportunity to confer with the Administrator.

(iii) USE OF PENALTIES AND FINES.—Unless a State law in effect on the date of enactment of this clause, or a State constitution, requires the funds to be used in a different manner, all funds collected by a State from the Federal Government as a penalty for violation of a provision of law referred to in subparagraph (B) shall be used by the State only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.

(F) CONTRIBUTION.—A department, agency, or instrumentality of the United States shall have the right to contribution under section 113 if the department, agency, or instrumentality resolves its liability under this Act.

(2) APPLICATION OF REQUIREMENTS TO FEDERAL FACILITIES.—All guidelines, rules, regulations, and criteria which are applicable to preliminary assessments carried out under this Act for facilities at which hazardous substances are located, applicable to evaluations of such facilities under the National Contingency Plan, applicable to inclusion on the National Priorities List, or applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities. No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this Act.

(3) EXCEPTIONS.—This subsection shall not apply to the extent otherwise provided in this section with respect to applicable time periods. This subsection shall also not apply to any requirements relating to bonding, insurance, or financial respon-

sibility. Nothing in this Act shall be construed to require a State to comply with section 104(c)(3) in the case of a facility which is owned or operated by any department, agency, or instrumentality of the United States.

[(4) STATE LAWS.—State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States or facilities that are the subject of a deferral under subsection (h)(3)(C) when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.]

(b) NOTICE.—Each department, agency, and instrumentality of the United States shall add to the inventory of Federal agency hazardous waste facilities required to be submitted under section 3016 of the Solid Waste Disposal Act (in addition to the information required under section 3016(a)(3) of such Act) information on contamination from each facility owned or operated by the department, agency, or instrumentality if such contamination affects contiguous or adjacent property owned by the department, agency, or instrumentality or by any other person, including a description of the monitoring data obtained.

(c) FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET.—The Administrator shall establish a special Federal Agency Hazardous Waste Compliance Docket (hereinafter in this section referred to as the “docket”) which shall contain each of the following:

(1) All information submitted under section 3016 of the Solid Waste Disposal Act and subsection (b) of this section regarding any Federal facility and notice of each subsequent action taken under this Act with respect to the facility.

(2) Information submitted by each department, agency, or instrumentality of the United States under section 3005 or 3010 of such Act.

(3) Information submitted by the department, agency, or instrumentality under section 103 of this Act.

The docket shall be available for public inspection at reasonable times. Six months after establishment of the docket and every 6 months thereafter, the Administrator shall publish in the Federal Register a list of the Federal facilities which have been included in the docket during the immediately preceding 6-month period. Such publication shall also indicate where in the appropriate regional office of the Environmental Protection Agency additional information may be obtained with respect to any facility on the docket. The Administrator shall establish a program to provide information to the public with respect to facilities which are included in the docket under this subsection.

(d) ASSESSMENT AND EVALUATION.—

(1) IN GENERAL.—The Administrator shall take steps to assure that a preliminary assessment is conducted for each facil-

ity on the docket. Following such preliminary assessment, the Administrator shall, where appropriate—

(A) evaluate such facilities in accordance with the criteria established in accordance with section 105 under the National Contingency Plan for determining priorities among releases; and

(B) include such facilities on the National Priorities List maintained under such plan if the facility meets such criteria.

(2) APPLICATION OF CRITERIA.—

(A) IN GENERAL.—Subject to subparagraph (B), the criteria referred to in paragraph (1) shall be applied in the same manner as the criteria are applied to facilities that are owned or operated by persons other than the United States.

(B) RESPONSE UNDER OTHER LAW.—It shall be an appropriate factor to be taken into consideration for the purposes of section 105(a)(8)(A) that the head of the department, agency, or instrumentality that owns or operates a facility has arranged with the Administrator or appropriate State authorities to respond appropriately, under authority of a law other than this Act, to a release or threatened release of a hazardous substance.

(3) COMPLETION.—Evaluation and listing under this subsection shall be completed in accordance with a reasonable schedule established by the Administrator.

(e) REQUIRED ACTION BY DEPARTMENT.—

(1) RIFS.—Not later than 6 months after the inclusion of any facility on the National Priorities List, the department, agency, or instrumentality which owns or operates such facility shall, in consultation with the Administrator and appropriate State authorities, commence a remedial investigation and feasibility study for such facility. In the case of any facility which is listed on such list before the date of the enactment of this section, the department, agency, or instrumentality which owns or operates such facility shall, in consultation with the Administrator and appropriate State authorities, commence such an investigation and study for such facility within one year after such date of enactment. The Administrator and appropriate State authorities shall publish a timetable and deadlines for expeditious completion of such investigation and study.

(2) COMMENCEMENT OF REMEDIAL ACTION; INTERAGENCY AGREEMENT.—The Administrator shall review the results of each investigation and study conducted as provided in paragraph (1). Within 180 days thereafter, the head of the department, agency, or instrumentality concerned shall enter into an interagency agreement with the Administrator for the expeditious completion by such department, agency, or instrumentality of all necessary remedial action at such facility. Substantial continuous physical onsite remedial action shall be commenced at each facility not later than 15 months after completion of the investigation and study. All such interagency agreements, including review of alternative remedial action plans and selec-

tion of remedial action, shall comply with the public participation requirements of section 117.

(3) COMPLETION OF REMEDIAL ACTIONS.—Remedial actions at facilities subject to interagency agreements under this section shall be completed as expeditiously as practicable. Each agency shall include in its annual budget submissions to the Congress a review of alternative agency funding which could be used to provide for the costs of remedial action. The budget submission shall also include a statement of the hazard posed by the facility to human health, welfare, and the environment and identify the specific consequences of failure to begin and complete remedial action.

(4) CONTENTS OF AGREEMENT.—Each interagency agreement under this subsection shall include, but shall not be limited to, each of the following:

(A) A review of alternative remedial actions and selection of a remedial action by the head of the relevant department, agency, or instrumentality and the Administrator or, if unable to reach agreement on selection of a remedial action, selection by the Administrator.

(B) A schedule for the completion of each such remedial action.

(C) Arrangements for long-term operation and maintenance of the facility.

(5) ANNUAL REPORT.—Each department, agency, or instrumentality responsible for compliance with this section shall furnish an annual report to the Congress concerning its progress in implementing the requirements of this section. Such reports shall include, but shall not be limited to, each of the following items:

(A) A report on the progress in reaching interagency agreements under this section.

(B) The specific cost estimates and budgetary proposals involved in each interagency agreement.

(C) A brief summary of the public comments regarding each proposed interagency agreement.

(D) A description of the instances in which no agreement was reached.

(E) A report on progress in conducting investigations and studies under paragraph (1).

(F) A report on progress in conducting remedial actions.

(G) A report on progress in conducting remedial action at facilities which are not listed on the National Priorities List.

With respect to instances in which no agreement was reached within the required time period, the department, agency, or instrumentality filing the report under this paragraph shall include in such report an explanation of the reasons why no agreement was reached. The annual report required by this paragraph shall also contain a detailed description on a State-by-State basis of the status of each facility subject to this section, including a description of the hazard presented by each facility, plans and schedules for initiating and completing re-

sponse action, enforcement status (where appropriate), and an explanation of any postponements or failure to complete response action. Such reports shall also be submitted to the affected States.

(6) **SETTLEMENTS WITH OTHER PARTIES.**—If the Administrator, in consultation with the head of the relevant department, agency, or instrumentality of the United States, determines that remedial investigations and feasibility studies or remedial action will be done properly at the Federal facility by another potentially responsible party within the deadlines provided in paragraphs (1), (2), and (3) of this subsection, the Administrator may enter into an agreement with such party under section 122 (relating to settlements). Following approval by the Attorney General of any such agreement relating to a remedial action, the agreement shall be entered in the appropriate United States district court as a consent decree under section 106 of this Act.

(7) **STATE REQUIREMENTS.**—*Notwithstanding any other provision of this Act, an interagency agreement under this section shall not impair or diminish the authority of a State, political subdivision of a State, or any other person or the jurisdiction of any court to enforce compliance with requirements of State or Federal law, unless those requirements, without objection after notice to the State before or on the date on which the response action is selected, have been—*

- (A) *specifically addressed in the agreement; or*
- (B) *specifically waived.*

(f) **STATE AND LOCAL PARTICIPATION.**—The Administrator and each department, agency, or instrumentality responsible for compliance with this section shall afford to relevant State and local officials the opportunity to participate in the planning and selection of the remedial action, including but not limited to the review of all applicable data as it becomes available and the development of studies, reports, and action plans. In the case of State officials, the opportunity to participate shall be provided in accordance with section 121.

[(g) **TRANSFER OF AUTHORITIES.**—Except for authorities which are delegated by the Administrator to an officer or employee of the Environmental Protection Agency, no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise, to any other officer or employee of the United States or to any other person.]

(g) **TRANSFER OF AUTHORITIES.**—

(1) **DEFINITIONS.**—*In this section:*

(A) **INTERAGENCY AGREEMENT.**—*The term “interagency agreement” means an interagency agreement under this section.*

(B) **TRANSFER AGREEMENT.**—*The term “transfer agreement” means a transfer agreement under paragraph (3).*

(C) **TRANSFeree STATE.**—*The term “transferee State” means a State to which authorities have been transferred under a transfer agreement.*

(2) **STATE APPLICATION FOR TRANSFER OF FEDERAL AUTHORITIES.**—*Subject to paragraph (3), a State may apply to the*

Administrator to exercise the authorities identified pursuant to section 130(d)(2)(A) at any facility located in the State that is—

- (A) owned or operated by any department, agency, or instrumentality of the United States (including the executive, legislative, and judicial branches of government); and
- (B) listed on the National Priorities List.

(3) TRANSFER OF AUTHORITIES.—

(A) DETERMINATIONS.—The Administrator shall enter into a transfer agreement to transfer to a State the authorities described in paragraph (2) with respect to a facility described in paragraph (2) under the same conditions as authority may be delegated to a State with respect to a non-Federal listed facility under section 130(d).

(B) CONTENTS OF TRANSFER AGREEMENT.—In the case of a transfer agreement covering a facility with respect to which there is no interagency agreement that specifies a dispute resolution process, the transfer agreement shall require that within 120 days after the effective date of the transfer agreement, the State shall agree with the head of the Federal department, agency, or instrumentality that owns or operates the facility on a process for resolution of any disputes between the State and the Federal department, agency, or instrumentality regarding the selection of a remedial action for the facility.

(C) CONDITIONS ON STATE EXERCISE OF AUTHORITIES.—Subsections (e) and (f) of section 130 (other than section 130(f)(5)) shall apply to any facility subject to a transfer agreement under subparagraph (A).

(D) COST RECOVERY.—The Administrator retains the authority to take action under section 107 to recover response costs from a potentially responsible party for any Federal listed facility for which responsibility is transferred to a State.

(4) EFFECT ON INTERAGENCY AGREEMENTS.—Nothing in this subsection shall require, authorize, or permit the modification or revision of an interagency agreement covering a facility with respect to which authorities have been transferred to a State under a transfer agreement (except for the substitution of the transferee State for the Administrator in the terms of the interagency agreement, including terms stating obligations intended to preserve the confidentiality of information) without the written consent of the Governor of the State and the head of the department, agency, or instrumentality.

(5) SELECTED REMEDIAL ACTION.—The remedial action selected for a facility under section 121 by a transferee State shall constitute the only remedial action required to be conducted at the facility, and the transferee State shall be precluded from enforcing any other remedial action requirement under Federal or State law, except for any corrective action under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) that was initiated prior to the date of enactment of this subsection.

(6) DISPUTE RESOLUTION AND ENFORCEMENT.—

(A) DISPUTE RESOLUTION.—

(i) **FACILITIES COVERED BY BOTH A TRANSFER AGREEMENT AND AN INTERAGENCY AGREEMENT.**—*In the case of a facility with respect to which there is both a transfer agreement and an interagency agreement, if the State does not concur in the remedial action proposed for selection by the Federal department, agency, or instrumentality, the Federal department, agency, or instrumentality and the State shall engage in the dispute resolution process provided for in the interagency agreement, except that the final level for resolution of the dispute shall be the head of the Federal department, agency, or instrumentality and the Governor of the State.*

(ii) **FACILITIES COVERED BY A TRANSFER AGREEMENT BUT NOT AN INTERAGENCY AGREEMENT.**—*In the case of a facility with respect to which there is a transfer agreement but no interagency agreement, if the State does not concur in the remedial action proposed for selection by the Federal department, agency, or instrumentality, the Federal department, agency, or instrumentality and the State shall engage in dispute resolution as provided in paragraph (3)(B) under which the final level for resolution of the dispute shall be the head of the Federal department, agency, or instrumentality and the Governor of the State.*

(iii) **FAILURE TO RESOLVE.**—*If no agreement is reached between the head of the Federal department, agency, or instrumentality and the Governor in a dispute resolution process under clause (i) or (ii), the Governor of the State shall make the final determination regarding selection of a remedial action. To compel implementation of the State's selected remedy, the State must bring a civil action in United States district court.*

(B) ENFORCEMENT.—

(i) **AUTHORITY; JURISDICTION.**—*An interagency agreement with respect to which there is a transfer agreement or an order issued by a transferee State shall be enforceable by a transferee State or by the Federal department, agency, or instrumentality that is a party to the interagency agreement only in the United States district court for the district in which the facility is located.*

(ii) **TIMING.**—*In the case of a facility with respect to a remedy is eligible for review by a remedy review board under section 134(e), an action for enforcement under this paragraph may not be brought until the remedy review board submits its recommendation to the Administrator.*

(iii) **REMEDIES.**—*The district court shall—*

(I) enforce compliance with any provision, standard, regulation, condition, requirement, order, or final determination that has become effective under the interagency agreement;

(II) impose any appropriate civil penalty provided for any violation of an interagency agreement, not to exceed \$25,000 per day;

(III) compel implementation of the selected remedial action; and

(IV) review a challenge by the Federal department, agency, or instrumentality to the remedial action selected by the State under this section, in accordance with section 113(j).

(h) PROPERTY TRANSFERRED BY FEDERAL AGENCIES.—

(1) NOTICE.—After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality shall include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

(2) FORM OF NOTICE; REGULATIONS.—Notice under this subsection shall be provided in such form and manner as may be provided in regulations promulgated by the Administrator. As promptly as practicable after the enactment of this subsection but not later than 18 months after the date of such enactment, and after consultation with the Administrator of the General Services Administration, the Administrator shall promulgate regulations regarding the notice required to be provided under this subsection.

(3) CONTENTS OF CERTAIN DEEDS.—

(A) IN GENERAL.—After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, in the case of any real property owned by the United States on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, each deed entered into for the transfer of such property by the United States to any other person or entity shall contain—

(i) to the extent such information is available on the basis of a complete search of agency files—

(I) a notice of the type and quantity of such hazardous substances,

(II) notice of the time at which such storage, release, or disposal took place, and

(III) a description of the remedial action taken, if any;

(ii) a covenant warranting that—

(I) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property

has been taken before the date of such transfer, and

(II) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States; and

(iii) a clause granting the United States access to the property in any case in which remedial action or corrective action is found to be necessary after the date of such transfer.

(B) COVENANT REQUIREMENTS.—For purposes of subparagraphs (A)(ii)(I) and (C)(iii), all remedial action described in such subparagraph has been taken if the construction and installation of an approved remedial design has been completed, and the remedy has been demonstrated to the Administrator to be operating properly and successfully. The carrying out of long-term pumping and treating, or operation and maintenance, after the remedy has been demonstrated to the Administrator to be operating properly and successfully does not preclude the transfer of the property. The requirements of subparagraph (A)(ii) shall not apply in any case in which the person or entity to whom the real property is transferred is a potentially responsible party with respect to such property. The requirements of subparagraph (A)(ii) shall not apply in any case in which the transfer of the property occurs or has occurred by means of a lease, without regard to whether the lessee has agreed to purchase the property or whether the duration of the lease is longer than 55 years. In the case of a lease entered into after September 30, 1995, with respect to real property located at an installation approved for closure or realignment under a base closure law, the agency leasing the property, in consultation with the Administrator, shall determine before leasing the property that the property is suitable for lease, that the uses contemplated for the lease are consistent with protection of human health and the environment, and that there are adequate assurances that the United States will take all remedial action referred to in subparagraph (A)(ii) that has not been taken on the date of the lease.

(C) DEFERRAL.—

(i) IN GENERAL.—The Administrator, with the concurrence of the Governor of the State in which the facility is located (in the case of real property at a Federal facility that is listed on the National Priorities List), or the Governor of the State in which the facility is located (in the case of real property at a Federal facility not listed on the National Priorities List) may defer the requirement of subparagraph (A)(ii)(I) with respect to the property if the Administrator or the Governor, as the case may be, determines that the property is suitable for transfer, based on a finding that—

(I) the property is suitable for transfer for the use intended by the transferee, and the intended

use is consistent with protection of human health and the environment;

(II) the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the assurances set forth in clause (ii);

(III) the Federal agency requesting deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for transfer; and

(IV) the deferral and the transfer of the property will not substantially delay any necessary response action at the property.

(ii) RESPONSE ACTION ASSURANCES.—With regard to a release or threatened release of a hazardous substance for which a Federal agency is potentially responsible under this section, the deed or other agreement proposed to govern the transfer shall contain assurances that—

(I) provide for any necessary restrictions on the use of the property to ensure the protection of human health and the environment;

(II) provide that there will be restrictions on use necessary to ensure that required remedial investigations, response action, and oversight activities will not be disrupted;

(III) provide that all necessary response action will be taken and identify the schedules for investigation and completion of all necessary response action as approved by the appropriate regulatory agency; and

(IV) provide that the Federal agency responsible for the property subject to transfer will submit a budget request to the Director of the Office of Management and Budget that adequately addresses schedules for investigation and completion of all necessary response action, subject to congressional authorizations and appropriations.

(iii) WARRANTY.—When all response action necessary to protect human health and the environment with respect to any substance remaining on the property on the date of transfer has been taken, the United States shall execute and deliver to the transferee an appropriate document containing a warranty that all such response action has been taken, and the making of the warranty shall be considered to satisfy the requirement of subparagraph (A)(ii)(I).

(iv) FEDERAL RESPONSIBILITY.—A deferral under this subparagraph shall not increase, diminish, or affect in any manner any rights or obligations of a Fed-

eral agency (including any rights or obligations under sections 106, 107, and 120 existing prior to transfer) with respect to a property transferred under this subparagraph.

(4) IDENTIFICATION OF UNCONTAMINATED PROPERTY.—(A) In the case of real property to which this paragraph applies (as set forth in subparagraph (E)), the head of the department, agency, or instrumentality of the United States with jurisdiction over the property shall identify the real property on which no hazardous substances and no petroleum products or their derivatives were known to have been released or disposed of. Such identification shall be based on an investigation of the real property to determine or discover the obviousness of the presence or likely presence of a release or threatened release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, on the real property. The identification shall consist, at a minimum, of a review of each of the following sources of information concerning the current and previous uses of the real property:

(i) A detailed search of Federal Government records pertaining to the property.

(ii) Recorded chain of title documents regarding the real property.

(iii) Aerial photographs that may reflect prior uses of the real property and that are reasonably obtainable through State or local government agencies.

(iv) A visual inspection of the real property and any buildings, structures, equipment, pipe, pipeline, or other improvements on the real property, and a visual inspection of properties immediately adjacent to the real property.

(v) A physical inspection of property adjacent to the real property, to the extent permitted by owners or operators of such property.

(vi) Reasonably obtainable Federal, State, and local government records of each adjacent facility where there has been a release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, and which is likely to cause or contribute to a release or threatened release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, on the real property.

(vii) Interviews with current or former employees involved in operations on the real property.

Such identification shall also be based on sampling, if appropriate under the circumstances. The results of the identification shall be provided immediately to the Administrator and State and local government officials and made available to the public.

(B) The identification required under subparagraph (A) is not complete until concurrence in the results of the identification is obtained, in the case of real property that is part of a facility on the National Priorities List, from the Administrator, or, in the case of real property that is not part of a facility on the National Priorities List, from the appropriate State official.

In the case of a concurrence which is required from a State official, the concurrence is deemed to be obtained if, within 90 days after receiving a request for the concurrence, the State official has not acted (by either concurring or declining to concur) on the request for concurrence.

(C)(i) Except as provided in clauses (ii), (iii), and (iv), the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made at least 6 months before the termination of operations on the real property.

(ii) In the case of real property described in subparagraph (E)(i)(II) on which operations have been closed or realigned or scheduled for closure or realignment pursuant to a base closure law described in subparagraph (E)(ii)(I) or (E)(ii)(II) by the date of the enactment of the Community Environmental Response Facilitation Act, the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after such date of enactment.

(iii) In the case of real property described in subparagraph (E)(i)(II) on which operations are closed or realigned or become scheduled for closure or realignment pursuant to the base closure law described in subparagraph (E)(ii)(II) after the date of the enactment of the Community Environmental Response Facilitation Act, the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after the date by which a joint resolution disapproving the closure or realignment of the real property under section 2904(b) of such base closure law must be enacted, and such a joint resolution has not been enacted.

(iv) In the case of real property described in subparagraphs (E)(i)(II) on which operations are closed or realigned pursuant to a base closure law described in subparagraph (E)(ii)(III) or (E)(ii)(IV), the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after the date on which the real property is selected for closure or realignment pursuant to such a base closure law.

(D) In the case of the sale or other transfer of any parcel of real property identified under subparagraph (A), the deed entered into for the sale or transfer of such property by the United States to any other person or entity shall contain—

(i) a covenant warranting that any response action or corrective action found to be necessary after the date of such sale or transfer shall be conducted by the United States; and

(ii) a clause granting the United States access to the property in any case in which a response action or corrective action is found to be necessary after such date at such property, or such access is necessary to carry out a response action or corrective action on adjoining property.

(E)(i) This paragraph applies to—

(I) real property owned by the United States and on which the United States plans to terminate Federal Government operations, other than real property described in subclause (II); and

(II) real property that is or has been used as a military installation and on which the United States plans to close or realign military operations pursuant to a base closure law.

(ii) For purposes of this paragraph, the term “base closure law” includes the following:

(I) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(II) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

(III) Section 2687 of title 10, United States Code.

(IV) Any provision of law authorizing the closure or realignment of a military installation enacted on or after the date of enactment of the Community Environmental Response Facilitation Act.

(F) Nothing in this paragraph shall affect, preclude, or otherwise impair the termination of Federal Government operations on real property owned by the United States.

(5) NOTIFICATION OF STATES REGARDING CERTAIN LEASES.—In the case of real property owned by the United States, on which any hazardous substance or any petroleum product or its derivatives (including aviation fuel and motor oil) was stored for one year or more, known to have been released, or disposed of, and on which the United States plans to terminate Federal Government operations, the head of the department, agency, or instrumentality of the United States with jurisdiction over the property shall notify the State in which the property is located of any lease entered into by the United States that will encumber the property beyond the date of termination of operations on the property. Such notification shall be made before entering into the lease and shall include the length of the lease, the name of person to whom the property is leased, and a description of the uses that will be allowed under the lease of the property and buildings and other structures on the property.

(i) OBLIGATIONS UNDER SOLID WASTE DISPOSAL ACT.—Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act (including corrective action requirements).

(j) NATIONAL SECURITY.—

(1) SITE SPECIFIC PRESIDENTIAL ORDERS.—The President may issue such orders regarding response actions at any specified site or facility of the Department of Energy or the Department of Defense as may be necessary to protect the national security interests of the United States at that site or facility. Such orders may include, where necessary to protect such interests, an exemption from any requirement contained in this title or under title III of the Superfund Amendments and Reauthorization Act of 1986 with respect to the site or facility concerned. The President shall notify the Congress within 30 days of the issuance of an order under this paragraph provid-

ing for any such exemption. Such notification shall include a statement of the reasons for the granting of the exemption. An exemption under this paragraph shall be for a specified period which may not exceed one year. Additional exemptions may be granted, each upon the President's issuance of a new order under this paragraph for the site or facility concerned. Each such additional exemption shall be for a specified period which may not exceed one year. It is the intention of the Congress that whenever an exemption is issued under this paragraph the response action shall proceed as expeditiously as practicable. The Congress shall be notified periodically of the progress of any response action with respect to which an exemption has been issued under this paragraph. No exemption shall be granted under this paragraph due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation.

(2) CLASSIFIED INFORMATION.—Notwithstanding any other provision of law, all requirements of the Atomic Energy Act and all Executive orders concerning the handling of restricted data and national security information, including “need to know” requirements, shall be applicable to any grant of access to classified information under the provisions of this Act or under title III of the Superfund Amendments and Reauthorization Act of 1986.

(k) PRESENTATION OF MATERIALS.—*The President shall ensure that information prepared for or distributed to the public under this section shall be provided or summarized in a manner that may be easily understood by the community, considering any unique cultural needs of the community.*

(l) NO IMPEDIMENT TO RESPONSE ACTIONS.—*Nothing in this section shall impede or delay the ability of the Environmental Protection Agency to conduct a response action necessary to protect human health and the environment.*

[42 U.S.C. 9620]

[SEC. 121. CLEANUP STANDARDS.⁶²

[(a) SELECTION OF REMEDIAL ACTION.—The President shall select appropriate remedial actions determined to be necessary to be carried out under section 104 or secured under section 106 which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective response. In evaluating the cost-effectiveness of proposed alter-

⁶² [Section 121(b) of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499) provides:

[(b) EFFECTIVE DATE.—With respect to section 121 of CERCLA, as added by this section—

[(1) The requirements of section 121 of CERCLA shall not apply to any remedial action for which the Record of Decision (hereinafter in this section referred to as the “ROD”) was signed, or the consent decree was lodged, before date of enactment [October 17, 1986].

[(2) If the ROD was signed, or the consent decree lodged, within the 30-day period immediately following enactment of the Act, the Administrator shall certify in writing that the portion of the remedial action covered by the ROD or consent decree complies to the maximum extent practicable with section 121 of CERCLA.

[(Any ROD signed before enactment of this Act and reopened after enactment of this Act to modify or supplement the selection of remedy shall be subject to the requirements of section 121 of CERCLA.

native remedial actions, the President shall take into account the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required.

[(b) GENERAL RULES.—(1) Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment. The offsite transport and disposal of hazardous substances or contaminated materials without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available. The President shall conduct an assessment of permanent solutions and alternative treatment technologies or resource recovery technologies that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of the hazardous substance, pollutant, or contaminant. In making such assessment, the President shall specifically address the long-term effectiveness of various alternatives. In assessing alternative remedial actions, the President shall, at a minimum, take into account:

[(A) the long-term uncertainties associated with land disposal;

[(B) the goals, objectives, and requirements of the Solid Waste Disposal Act;

[(C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents;

[(D) short- and long-term potential for adverse health effects from human exposure;

[(E) long-term maintenance costs;

[(F) the potential for future remedial action costs if the alternative remedial action in question were to fail; and

[(G) the potential threat to human health and the environment associated with excavation, transportation, and redispersion, or containment.

[The President shall 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. If the President selects a remedial action not appropriate for a preference under this subsection, the President shall publish an explanation as to why a remedial action involving such reductions was not selected.

[(2) The President may select an alternative remedial action meeting the objectives of this subsection whether or not such action has been achieved in practice at any other facility or site that has similar characteristics. In making such a selection, the President may take into account the degree of support for such remedial action by parties interested in such site.]

SEC. 121. SELECTION AND IMPLEMENTATION OF REMEDIAL ACTIONS.

(a) GENERAL RULES.—

(1) SELECTION OF COST-EFFECTIVE REMEDIAL ACTION THAT PROTECTS HUMAN HEALTH AND THE ENVIRONMENT.—

(A) IN GENERAL.—*The President shall select a cost-effective remedial action that achieves the mandate to protect human health and the environment as stated in subparagraph (B) and attains or complies with applicable Federal and State laws in accordance with subparagraph (C).*

(B) ATTAINMENT OF MANDATE TO PROTECT HUMAN HEALTH AND THE ENVIRONMENT.—

(i) PROTECTION OF HUMAN HEALTH.—*Notwithstanding any other provision of this Act, a remedial action shall protect human health (including the health of children and other highly exposed or highly susceptible subpopulations). A remedial action shall be considered to protect human health if, considering the expected exposures associated with the current or reasonably anticipated future use of the land and water resources and on the basis of a facility-specific risk evaluation in accordance with section 131, the remedial action—*

(I) achieves a residual risk from exposure to nonthreshold carcinogenic hazardous substances, pollutants, or contaminants such that cumulative lifetime additional cancer risk from exposure to hazardous substances, pollutants, or contaminants from releases at the facility range from 10^{-4} to 10^{-6} for the affected population;

(II) achieves a residual risk from exposure to threshold carcinogenic and noncarcinogenic hazardous substances, pollutants, or contaminants at the facility, that does not exceed a hazard index of 1; and

(III) prevents or eliminates any actual human ingestion of drinking water containing any hazardous substance from the release at levels—

(aa) in excess of the maximum contaminant level established under the Safe Drinking Water Act (42 U.S.C. 300f et seq.); or

(bb) if no such maximum contaminant level has been established for the hazardous substance, at levels that meet the goals for protection of human health under clause (i).

(ii) PROTECTION OF THE ENVIRONMENT.—

(I) IN GENERAL.—*A remedial action for a facility shall be considered to be protective of the environment if, considering the current or reasonably anticipated use of any land and water resources, the remedial action protects plants and animals from significant impacts resulting from releases of hazardous substances at the facility.*

(II) PROTECTIVENESS DETERMINATION.—*The determination under subclause (I) of what is protective of plants and animals shall not be based on the impact to an individual plant or animal in the*

absence of an impact at the population, community, or ecosystem level, unless the plant or animal is listed as a threatened or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(C) COMPLIANCE WITH FEDERAL AND STATE LAWS.—

(i) APPLICABLE REQUIREMENTS.—

(I) IN GENERAL.—*Subject to clause (iii), a remedial action shall require, at the completion of the remedial action, a level or standard of control for each hazardous substance, pollutant, and contaminant that at least attains the substantive requirements of all promulgated standards, requirements, criteria, and limitations, under—*

(aa) *each Federal environmental law, that are legally applicable to the conduct or operation of the remedial action or to the level of cleanup for hazardous substances, pollutants, or contaminants addressed by the remedial action;*

(bb) *any State environmental or facility siting law, that are more stringent than any Federal standard, requirement, criterion, or limitation and are legally applicable to the conduct or operation of the remedial action or to the level of cleanup for hazardous substances, pollutants, or contaminants addressed by the remedial action, and that the State demonstrates are of general applicability, publishes and identifies to the President in a timely manner as being applicable to the remedial action, and has consistently applied to other remedial actions in the State; and*

(cc) *any more stringent standard, requirement, criterion, or limitation relating to an environmental or facility siting law promulgated by the State after the date of enactment of the Superfund Cleanup Acceleration Act of 1998 that the State demonstrates are of general applicability, publishes and identifies to the President in a timely manner as being applicable to the remedial action, and has consistently applied to other remedial actions in the State.*

(II) CONTAMINATED MEDIA.—*Compliance with substantive provisions of section 3004 of the Solid Waste Disposal Act (42 U.S.C. 6924) shall not be required with respect to return, replacement, or disposal of contaminated media (including residuals of contaminated media and other solid wastes generated onsite in the conduct of a remedial action) into the same media in or very near then-existing areas of contamination onsite at a facility.*

(ii) *APPLICABILITY OF REQUIREMENTS TO RESPONSE ACTIONS CONDUCTED ONSITE.*—No procedural or administrative requirement of any Federal, State, or local law (including any requirement for a permit) shall apply to a response action that is conducted onsite at a facility if the response action is selected and carried out in compliance with this section.

(iii) *WAIVER PROVISIONS.*—

(I) *IN GENERAL.*—The President may select a remedial action at a facility that meets the requirements of subparagraph (B) that does not attain a level or standard of control that is at least equivalent to an applicable requirement described in clause (i)(I) if the President makes any of the following findings:

(aa) *PART OF REMEDIAL ACTION.*—The selected remedial action is only part of a total remedial action that will attain the applicable requirements of clause (i)(I) when the total remedial action is completed.

(bb) *GREATER RISK.*—Attainment of the requirements of clause (i)(I) will result in greater risk to human health or the environment than alternative options.

(cc) *TECHNICAL IMPRACTICABILITY.*—Attainment of the requirements of clause (i)(I) is technically impracticable.

(dd) *EQUIVALENT TO STANDARD OF PERFORMANCE.*—The selected remedial action will attain a standard of performance that is equivalent to that required under clause (i)(I) through use of another method or approach.

(ee) *INCONSISTENT APPLICATION.*—With respect to a State requirement made applicable under clause (i)(I), the State has not consistently applied (or demonstrated the intention to apply consistently) the requirement in similar circumstances to other remedial actions in the State.

(ff) *BALANCE.*—In the case of a remedial action to be funded predominantly under section 104 or 137 using amounts from the Fund, a selection of a remedial action that attains that level or standard of control described in clause (i)(I) will not provide a balance between the need for protection of public health and welfare and the environment at the facility, and the need to make amounts from the Fund available to respond to other facilities that may present a threat to public health or welfare or the environment, taking into consideration the relative immediacy of the threats presented by the various facilities.

(II) PUBLICATION.—The President shall publish any findings made under subclause (I), including an explanation and appropriate documentation and an explanation of how the selected remedial action meets the requirements of section 121.

(D) NO STANDARD.—If no applicable Federal or State standard has been established for a specific hazardous substance, pollutant, or contaminant, a remedial action shall attain a standard that the President determines to be protective of human health and the environment as stated in subsection (a)(1)(B).

(2) METHODOLOGY FOR SELECTION OF A REMEDIAL ACTION.—The President shall select a remedial action from among a range of alternative remedial actions that satisfy the requirements of paragraph (1) by balancing the criteria stated in paragraph (3). The President's selection of a remedial action under this section shall take into account the remedy selection rules stated in subsection (b).

(3) REMEDY SELECTION CRITERIA.—In selecting a remedial action from among alternatives that satisfy the requirements of subsection (a)(1) and take into account the rules stated in subsection (b), the President shall balance the following factors, ensuring that no single factor predominates over the others:

(A) The effectiveness of the remedy in ensuring the protection of human health (including the health of children and other highly exposed or highly susceptible subpopulations) and the environment.

(B) The reliability of the remedial action in achieving the protectiveness standards over the long term.

(C) Any short-term risk to the affected community, those engaged in the remedial action effort, and to the environment posed by the implementation of the remedial action.

(D) The acceptability of the remedial action to the affected community.

(E) The implementability of the remedial action.

(F) The reasonableness of the cost.

(4) COORDINATION.—In evaluating and selecting remedial actions, the President shall take into account the potential for injury to a natural resource resulting from such actions.

(b) REMEDY SELECTION RULES.—

(1) REASONABLY ANTICIPATED FUTURE USE OF LAND AND WATER RESOURCES.—

(A) IN GENERAL.—In selecting a response action for a facility, the President shall take into account the reasonably anticipated future use of land and water resources potentially affected by the release or threat of release of a hazardous substance, pollutant, or contaminant from the facility.

(B) USE OF LAND RESOURCES.—

(i) CONSIDERATION OF VIEWS.—In developing assumptions regarding reasonably anticipated future land uses to be used in developing and evaluating re-

medial alternatives, the President shall consider the views of—

(I) local government officials; and

(II) members of the affected community, particularly persons who are immediately proximate to or may be directly affected by the release or threatened release of a hazardous substance, pollutant, or contaminant from the facility.

(i) **FACTORS TO BE CONSIDERED.**—In developing assumptions regarding reasonably anticipated future land use to be used in developing and evaluating remedial alternatives, the President shall consider, in addition to views of persons described in clause (i), factors including the following:

(I) The current land use zoning and future land use plans of the local government with land use regulatory authority.

(II)(aa) The recent land use history of the facility and properties in the vicinity of the facility.

(bb) The current land uses of the facility and properties in the vicinity of the facility.

(cc) Recent development patterns in the area where the facility is located.

(dd) Population projections for the area where the facility is located.

(III) Federal and State land use designations, including—

(aa) Federal facility and national park designations;

(bb) State ground water or surface water recharge area designations established under a State's comprehensive protection plan for ground water or surface water; and

(cc) recreational and conservation area designations.

(IV) The potential for beneficial use.

(V) The proximity of the contamination to residences, natural resources, or areas of unique historic or cultural significance.

(VI) The plans of the owner or operator of the facility.

(C) **USE OF WATER RESOURCES.**—In developing assumptions regarding what future ground water and surface water uses may be reasonably anticipated, the President shall—

(i) consider and accord substantial deference to the classifications and designations set forth in a State comprehensive ground water protection program that has been endorsed by the Administrator; and

(ii) consider other designations or plans adopted by the governmental unit that regulates surface or ground water use planning in the vicinity of the facility, including a State's designation of uses under the

underground injection control program or a State classification guideline.

(D) *ADMINISTRATIVE RECORDS.*—All information on which the President bases the development of assumptions under this paragraph shall be included in the administrative record established under section 113(k).

(2) *GROUND WATER.*—

(A) *IN GENERAL.*—

(i) *SELECTION OF REMEDIAL ACTION.*—The President shall select a remedial action for contaminated ground water in accordance with subsection (a), as modified by the requirements of this paragraph.

(ii) *PHASING.*—The use of phasing shall be considered in a remedial action for ground water in order to allow collection of sufficient data to evaluate the effect of any other remedial action taken at the site and to determine the appropriate scope of the remedial action.

(iii) *FACTORS TO BE TAKEN INTO ACCOUNT.*—A decision regarding a remedial action for contaminated ground water shall take into account—

(I) *the current or reasonably anticipated future use of the ground water and the timing of that use;*

(II) *any attenuation or biodegradation that would occur if no remedial action were taken; and*

(III) *the effect of any other completed or planned response action.*

(B) *UNCONTAMINATED GROUND WATER.*—Subject to subparagraph (E), a remedial action shall seek to protect uncontaminated ground water that is suitable for use as drinking water for such beneficial use unless it is technically impracticable to do so.

(C) *CONTAMINATED GROUND WATER.*—

(i) *IN GENERAL.*—In the case of contaminated ground water for which the current or reasonably anticipated future use of the resource is as drinking water, unless the President determines that restoration of some portion of the contaminated ground water to a condition suitable for the use is technically impracticable, the President shall restore the ground water to a condition suitable for beneficial use.

(ii) *EVALUATION OF TECHNICAL PRACTICABILITY.*—In evaluating the technical practicability of restoration and the time frame in which restoration can be achieved, the President may distinguish among 2 or more zones of ground water contamination at a facility and may select a remedial action that includes different actions, points of compliance, and time frames tailored to the circumstances of each such zone.

(iii) *INTEGRATION OF ACTIONS.*—Actions taken in any zone shall be integrated with actions taken, points of compliance, and time frames selected in other zones.

(iv) *REMEDIAL ACTION STANDARDS.*—A remedial action for contaminated ground water the current or reasonably anticipated future use of which is drinking

water shall, unless technically impracticable, attain in the contaminated ground water plume, extending to the boundary of any hazardous substance, pollutant, or contaminant that will be managed in place as part of the remedial action, 1 of the following standards (provided that the standard is no more stringent than the naturally occurring background levels of the contaminants in the surrounding area):

(I) Maximum contaminant levels established under the Safe Drinking Water Act (42 U.S.C. 300f et seq.), unless a standard under subclause (II) would be more stringent.

(II) State drinking water standards or State water quality standards for water designated for drinking water use.

(III) If no standard under subclause (I) or (II) is applicable, a level selected in accordance with subsection (a)(1)(D) and section 131 that is protective of human health and the environment.

(v) CONTAMINANTS MANAGED IN PLACE.—Restoration to beneficial use and the standards under clause (iv) are not required to be attained in an area in which any hazardous substance, pollutant, or contaminant is managed in place.

(vi) NOT A POTENTIAL SOURCE OF DRINKING WATER.—In the case of contaminated ground water or surface water that is not suitable for beneficial use as drinking water (as determined under subparagraph (F)), a remedial action shall, unless it is technically impracticable for it to do so, attain a standard that is protective for the current or reasonably anticipated future uses of the water and any surface water to which the contaminated water discharges.

(vii) RESTORATION TECHNICALLY IMPRACTICABLE.—

(I) IN GENERAL.—A remedial action for contaminated ground water having current or reasonably anticipated future use as a drinking water source for which attainment of the levels described in clause (iv) is technically impracticable shall be selected in accordance with this clause.

(II) NO INGESTION.—A remedial action shall include, as appropriate, provision of an alternate water supply, point-of-entry, or point-of-use treatment or other measures to ensure that there will be no ingestion of or exposure of humans to drinking water at levels exceeding the requirements of subparagraph (C)(iv).

(III) PREVENTION OF IMPAIRMENT OF DESIGNATED SURFACE WATER USE.—A remedial action shall, unless it is technically impracticable for it to do so, prevent impairment of any designated surface water use established under section 303 of the Federal Water Pollution Control Act (42 U.S.C. 1313) or comparable State law caused by a haz-

ardous substance, pollutant, or contaminant in any surface water into which contaminated ground water is known or expected to enter.

(IV) *PROVISION FOR LONG-TERM MONITORING.*—A remedial action shall provide for long-term monitoring, as appropriate (including any information needed for the purposes of review under subsection (c)).

(V) *RESPONSIBILITY OF PARTIES.*—If the President selects point-of-entry or point-of-use treatment, an alternative source of water supply, or another method of treating contaminated water (including treatment before distribution), the party or parties otherwise responsible for remediation shall be responsible for providing drinking water meeting the requirements of clause (iv), including all directly associated incremental costs for operation and maintenance and for delivery of drinking water for current and reasonably anticipated future uses until such time as the level of contamination is reliably and consistently at or below the levels specified under clause (iv).

(D) *MONITORED NATURAL ATTENUATION.*—

(i) *IN GENERAL.*—Monitored natural attenuation may be used as an element of a remedial action for contaminated ground water.

(ii) *FACTORS TO BE TAKEN INTO ACCOUNT.*—In using monitored natural attenuation as part of a ground water action, the President or preparer of the remedial action plan shall take into account the factors listed in subparagraph (A) (iii).

(E) *ALTERNATE CONCENTRATION LIMITS FOR CONTAMINATED GROUND WATER.*—For the purposes of this section, a process for establishing alternate concentration limits to those otherwise applicable for hazardous substances, pollutants, or contaminants under subparagraph (C)(iv) may not be used to establish standards under this paragraph if the process assumes a point of human exposure beyond the boundary of the facility, as defined at the conclusion of the remedial investigation and feasibility study, except that where—

(i) there are known and projected points of entry of ground water into surface water; and

(ii) on the basis of measurements or projections, there is and will be no impairment of the designated use established under section 303 of the Federal Water Pollution Control Act (42 U.S.C. 1313) from ground water in such surface water at the point of entry or at any point where there is reason to believe accumulation of constituents may occur downstream; and

(iii) the remedial action includes enforceable measures that will preclude human exposure to the contaminated ground water at any point between the facility

boundary and all known and projected points of entry of such ground water into surface water;
the assumed point of human exposure may be at such known and projected points of entry.

(F) *GROUND WATER NOT SUITABLE FOR BENEFICIAL USE AS DRINKING WATER.*—Notwithstanding any other evaluation or determination regarding the suitability of ground water for drinking water use, ground water that is not suitable for use as drinking water because of—

- (i) naturally occurring conditions;
- (ii) contamination resulting from broad-scale human activity unrelated to a specific facility or release that restoration of drinking water quality is technically impracticable; or
- (iii) physical incapability of yielding a quantity of 150 gallons per day of water to a well or spring (unless the well or spring is currently being used as a source of drinking water);

shall not be considered as suitable for beneficial use as drinking water.

(3) *PREFERENCE FOR TREATMENT.*—

(A) *IN GENERAL.*—For any discrete area containing a hazardous substance, pollutant, or contaminant that—

- (i) cannot be reliably contained; and
- (ii) presents a substantial risk to human health and the environment because of—
 - (I) the high toxicity of the hazardous substance, pollutant, or contaminant;
 - (II) the high mobility of the hazardous substance, pollutant, or contaminant; and
 - (III) a reasonable probability of actual exposure based upon an evaluation of site-specific factors;

the remedy selection process described in subsection (a) shall include a preference for a remedial action that includes treatment that reduces the risk posed by the nature and probability of exposure to the hazardous substance, pollutant, or contaminant over remedial actions that do not include such treatment.

(B) *FINAL CONTAINMENT.*—With respect to a discrete area described in subparagraph (A), the President may select a final containment remedy at a landfill or mining site or similar facility if—

- (i)(I) the discrete area is small relative to the overall volume of waste or contamination being addressed;
- (II) the discrete area is not readily identifiable and accessible; and
- (III) without the presence of the discrete area, containment would have been selected as the appropriate remedy under this subsection for the larger body of waste or larger area of contamination in which the discrete area is located; or
- (ii) the volume and size of the discrete area is extraordinary compared to other facilities listed on the

National Priorities List, and, because of the volume, size, and other characteristics of the discrete area, it is highly unlikely that any treatment technology will be developed that could be implemented at a reasonable cost.

(4) INSTITUTIONAL AND ENGINEERING CONTROLS.—

(A) DEFINITION OF INSTITUTIONAL CONTROL.—*In this paragraph, the term “institutional control” means a restriction on the permissible use of land, ground water, or surface water, included as part of the basis of decision in a final record of decision or any other enforceable decision document for a facility on the National Priorities List, to comply with the requirements of section 121(a) to protect human health and the environment, including—*

(i) a zoning restriction or future land use plan of the local government with land use regulatory authority;

(ii) a contaminated ground water management zone or permit program of the government unit that regulates ground water;

(iii) site acquisition under paragraph (1) or (2) of section 104(j) by the Administrator or the State to control access to the facility;

(iv) an easement or deed restriction precluding or limiting specific uses of the facility; and

(v) a notice, advisory, or alert to warn of a public health threat from contaminated ground water or from eating fish from contaminated surface water.

(B) USES.—*The Administrator may not select a remedial action that allows a hazardous substance, pollutant, or contaminant to remain at a facility above a level that would be protective for unrestricted use unless institutional and engineering controls are incorporated into the remedial action to ensure protection of human health and the environment during and after completion of the remedial action.*

(C) REQUIREMENTS FOR INSTITUTIONAL CONTROLS.—*In a case in which the Administrator selects a response action that relies in whole or in part on restrictions on land use or other resources or activities, the Administrator shall ensure that institutional controls—*

(i) are adequate to protect human health and the environment;

(ii) ensure the long-term reliability of the response action; and

(iii) will be appropriately implemented, monitored, and enforced.

(D) RECORD OF DECISION.—*Each record of decision with respect to a facility shall clearly identify any institutional controls that restrict uses of land or other resources or activities at the facility.*

(E) REGISTRY.—*The Administrator shall maintain a registry of institutional controls that—*

(i) place restrictions on the use of land, water, or other resources; and

(ii) are included as part of the basis of decision in a final record of decision or any other enforceable decision document with respect to a facility on the National Priorities List.

(5) TECHNICAL IMPRACTICABILITY.—

(A) MINIMIZATION OF RISK.—If the President, after reviewing the remedy selection methodology stated in subsection (a)(2), finds that complying with or attaining a standard required by subparagraph (C) or (D) of subsection (a)(1), or, if applicable, by a rule stated in subsection (b), is technically impracticable, the President shall evaluate remedial measures and select a technically practicable remedial action that—

(i) protects human health (as defined in subsection (a)(1)(B)(i)); and

(ii) will most closely achieve the goals stated in paragraph (1) through cost-effective means.

(B) BASIS FOR FINDING.—A finding of technical impracticability may be made on the basis of projections, modeling, or other analysis on a site-specific basis.

(C) PROMPT DETERMINATION.—The President shall make a determination of technical impracticability as soon as the President determines that sufficient information is available to make the determination.

(D) PROCESS.—

(i) DETERMINATION OF NECESSITY OF COMPLIANCE WITH STANDARD OR REQUIREMENT.—The President shall evaluate and determine if it is not appropriate for a remedial action to attain or comply with a required standard under subparagraphs (C) and (D) of subsection (a)(1), or, where applicable, with a requirement stated in a rule in subsection (b).

(ii) WAIVER ON THE BASIS OF TECHNICAL IMPRACTICABILITY.—A finding that it is technically impracticable to attain or comply with an applicable Federal or State law under subsection (a)(1)(C)(i)(I) shall constitute a waiver under subsection (a)(1)(C)(iii).

(iii) INITIATION OF REVIEW.—The President may initiate a review to determine whether a finding of technical impracticability is appropriate on the Administrator's own initiative or on the request of a person that is conducting a remedial action, if the request is supported by appropriate documentation.

(E) NOTICE OF FINDING.—If the President makes a finding of technical impracticability, the President shall publish the finding, accompanied by—

(i) an explanation of the finding, with appropriate justification; and

(ii) an explanation of how the selected remedial action meets the requirements of subsection (a)(1)(B).

(c) REVIEW.—If the President selects a remedial action that results in any hazardous substances, pollutants, or contaminants re-

maintaining at the site, the President shall review such remedial action no less often than each 5 years after the initiation of such remedial action, *including public health recommendations and decisions resulting from activities under section 104(i)*, to assure that human health and the environment are being protected by the remedial action being implemented. In addition, if upon such review it is the judgment of the President that action is appropriate at such site in accordance with section 104 or 106, the President shall take or require such action. The President shall report to the Congress a list of facilities for which such review is required, the results of all such reviews, and any actions taken as a result of such reviews.

[(d) DEGREE OF CLEANUP.—(1) Remedial actions selected under this section or otherwise required or agreed to by the President under this Act shall attain a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant.

[(2)(A) With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if—

[(i) any standard, requirement, criteria, or limitation under any Federal environmental law, including, but not limited to, the Toxic Substances Control Act, the Safe Drinking Water Act, the Clean Air Act, the Clean Water Act, the Marine Protection, Research and Sanctuaries Act, or the Solid Waste Disposal Act; or

[(ii) any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or limitation, including each such State standard, requirement, criteria, or limitation contained in a program approved, authorized or delegated by the Administrator under a statute cited in subparagraph (A), and that has been identified to the President by the State in a timely manner,

is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, the remedial action selected under section 104 or secured under section 106 shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation. Such remedial action shall require a level or standard of control which at least attains Maximum Contaminant Level Goals established under the Safe Drinking Water Act and water quality criteria established under section 304 or 303 of the Clean Water Act, where such goals or criteria are relevant and appropriate under the circumstances of the release or threatened release.

[(B)(i) In determining whether or not any water quality criteria under the Clean Water Act is relevant and appropriate under

the circumstances of the release or threatened release, the President shall consider the designated or potential use of the surface or groundwater, the environmental media affected, the purposes for which such criteria were developed, and the latest information available.

[(ii) For the purposes of this section, a process for establishing alternate concentration limits to those otherwise applicable for hazardous constituents in groundwater under subparagraph (A) may not be used to establish applicable standards under this paragraph if the process assumes a point of human exposure beyond the boundary of the facility, as defined at the conclusion of the remedial investigation and feasibility study, except where—

[(I) there are known and projected points of entry of such groundwater into surface water; and

[(II) on the basis of measurements or projections, there is or will be no statistically significant increase of such constituents from such groundwater in such surface water at the point of entry or at any point where there is reason to believe accumulation of constituents may occur 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

then the assumed point of human exposure may be at such known and projected points of entry.

[(C)(i) Clause (ii) of this subparagraph shall be applicable only in cases where, due to the President's selection, in compliance with subsection (b)(1), of a proposed remedial action which does not permanently and significantly reduce the volume, toxicity, or mobility of hazardous substances, pollutants, or contaminants, the proposed disposition of waste generated by or associated with the remedial action selected by the President is land disposal in a State referred to in clause (ii).

[(ii) Except as provided in clauses (iii) and (iv), a State standard, requirement, criteria, or limitation (including any State siting standard or requirement) which could effectively result in the statewide prohibition of land disposal of hazardous substances, pollutants, or contaminants shall not apply.

[(iii) Any State standard, requirement, criteria, or limitation referred to in clause (ii) shall apply where each of the following conditions is met:

[(I) The State standard, requirement, criteria, or limitation is of general applicability and was adopted by formal means.

[(II) The State standard, requirement, criteria, or limitation was adopted on the basis of hydrologic, geologic, or other relevant considerations and 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.

[(III) The State arranges for, and assures payment of the incremental costs of utilizing, a facility for disposition of the hazardous substances, pollutants, or contaminants concerned.

[(iv) Where the remedial action selected by the President does not conform to a State standard and the State has initiated a law suit against the Environmental Protection Agency prior to May 1, 1986, to seek to have the remedial action conform to such standard, the President shall conform the remedial action to the State standard. The State shall assure the availability of an offsite facility for such remedial action.

[(3) In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant offsite, such hazardous substance or pollutant or contaminant shall only be transferred to a facility which is operating in compliance with section 3004 and 3005 of the Solid Waste Disposal Act (or, where applicable, in compliance with the Toxic Substances Control Act or other applicable Federal law) and all applicable State requirements. Such substance or pollutant or contaminant may be transferred to a land disposal facility only if the President determines that both of the following requirements are met:

[(A) The unit to which the hazardous substance or pollutant or contaminant is transferred is not releasing any hazardous waste, or constituent thereof, into the groundwater or surface water or soil.

[(B) All such releases from other units at the facility are being controlled by a corrective action program approved by the Administrator under subtitle C of the Solid Waste Disposal Act.

[(The President shall notify the owner or operator of such facility of determinations under this paragraph.

[(4) The President may select a remedial action meeting the requirements of paragraph (1) that does not attain a level or standard of control at least equivalent to a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation as required by paragraph (2) (including subparagraph (B) thereof), if the President finds that—

[(A) the remedial action selected is only part of a total remedial action that will attain such level or standard of control when completed;

[(B) compliance with such requirement at that facility will result in greater risk to human health and the environment than alternative options;

[(C) compliance with such requirements is technically impracticable from an engineering perspective;

[(D) the remedial action selected will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, criteria, or limitation, through use of another method or approach;

[(E) with respect to a State standard, requirement, criteria, or limitation, the State has not consistently applied (or demonstrated the intention to consistently apply) the standard, requirement, criteria, or limitation in similar circumstances at other remedial actions within the State; or

[(F) in the case of a remedial action to be undertaken solely under section 104 using the Fund, selection of a remedial action that attains such level or standard of control 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 amounts from the Fund to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the relative immediacy of such threats.

【The President shall publish such findings, together with an explanation and appropriate documentation.】

【(e)】 *(d)* PERMITS AND ENFORCEMENT.—(1) No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

(2) A State may enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under this Act in the United States district court for the district in which the facility is located. Any consent decree shall require the parties to attempt expeditiously to resolve disagreements concerning implementation of the remedial action informally with the appropriate Federal and State agencies. Where the parties agree, the consent decree may provide for administrative enforcement. Each consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed \$25,000 per day, which may be enforced by either the President or the State. Such stipulated penalties shall not be construed to impair or affect the authority of the court to order compliance with the specific terms of any such decree.

【(f)】 *(e)* STATE INVOLVEMENT.—(1) The President shall promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State. The regulations, at a minimum, shall include each of the following:

(A) State involvement in decisions whether to perform a preliminary assessment and site inspection.

(B) Allocation of responsibility for hazard ranking system scoring.

(C) State concurrence in deleting sites from the National Priorities List.

(D) State participation in the long-term planning process for all remedial sites within the State.

(E) A reasonable opportunity for States to review and comment on each of the following:

(i) The remedial investigation and feasibility study and all data and technical documents leading to its issuance.

(ii) The planned remedial action identified in the remedial investigation and feasibility study.

(iii) The engineering design following selection of the final remedial action.

(iv) Other technical data and reports relating to implementation of the remedy.

(v) Any proposed finding or decision by the President to exercise the authority of subsection (d)(4).

(F) Notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State and an opportunity to participate in such

negotiations and, subject to paragraph (2), be a party to any settlement.

(G) Notice to the State and an opportunity to comment on the President's proposed plan for remedial action as well as on alternative plans under consideration. The President's proposed decision regarding the selection of remedial action shall be accompanied by a response to the comments submitted by the State, including an explanation regarding any decision under subsection (d)(4) on compliance with promulgated State standards. A copy of such response shall also be provided to the State.

(H) Prompt notice and explanation of each proposed action to the State in which the facility is located.

Prior to the promulgation of such regulations, the President shall provide notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State, and such State may participate in such negotiations and, subject to paragraph (2), any settlements.

(2)(A) This paragraph shall apply to remedial actions secured under section 106. At least 30 days prior to the entering of any consent decree, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4), the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, the State may become a signatory to the consent decree.

(B) If the State does not concur in such selection, and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action under section 106 before entry of the consent decree, to seek to have the remedial action so conform. Such intervention shall be a matter of right. The remedial action shall conform to such standard, requirement, criteria, or limitation if the State establishes, on the administrative record, that the finding of the President was not supported by substantial evidence. If the court determines that the remedial action shall conform to such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State may become a signatory to the decree. If the court determines that the remedial action need not conform to such standard, requirement, criteria, or limitation, and the State pays or assures the payment of the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State shall become a signatory to the decree.

(C) The President may conclude settlement negotiations with potentially responsible parties without State concurrence.

(3)(A) This paragraph shall apply to remedial actions at facilities owned or operated by a department, agency, or instrumentality of the United States. At least 30 days prior to the publication of the President's final remedial action plan, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4), the President shall

provide an opportunity for the State to concur or not concur in such selection. If the State concurs, or does not act within 30 days, the remedial action may proceed.

(B) If the State does not concur in such selection as provided in subparagraph (A), and desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State may maintain an action as follows:

(i) If the President has notified the State of selection of such a remedial action, the State may bring an action within 30 days of such notification for the sole purpose of determining whether the finding of the President is supported by substantial evidence. Such action shall be brought in the United States district court for the district in which the facility is located.

(ii) If the State establishes, on the administrative record, that the President's finding is not supported by substantial evidence, the remedial action shall be modified to conform to such standard, requirement, criteria, or limitation.

(iii) If the State fails to establish that the President's finding was not supported by substantial evidence and if the State pays, within 60 days of judgment, the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be selected to meet such standard, requirement, criteria, or limitation. If the State fails to pay within 60 days, the remedial action selected by the President shall proceed through completion.

(C) Nothing in this section precludes, and the court shall not enjoin, the Federal agency from taking any remedial action unrelated to or not inconsistent with such standard, requirement, criteria, or limitation.

[42 U.S.C. 9621]

SEC. 122. SETTLEMENTS.

(a) **AUTHORITY TO ENTER INTO AGREEMENTS.**—The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 104(b)) if the President determines that such action will be done properly by such person. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation. If the President decides not to use the procedures in this section, the President shall notify in writing potentially responsible parties at the facility of such decision and the reasons why use of the procedures is inappropriate. A decision of the President to use or not to use the procedures in this section is not subject to judicial review.

(b) **AGREEMENTS WITH POTENTIALLY RESPONSIBLE PARTIES.**—

(1) **MIXED FUNDING.**—An agreement under this section may provide that the President will reimburse the parties to the agreement from the Fund, with interest, for certain costs of actions under the agreement that the parties have agreed to

perform but which the President has agreed to finance. In any case in which the President provides such reimbursement, the President shall make all reasonable efforts to recover the amount of such reimbursement under section 107 or under other relevant authorities.

(2) REVIEWABILITY.—The President's decisions regarding the availability of fund financing under this subsection shall not be subject to judicial review under subsection (d).

(3) RETENTION OF FUNDS.—If, as part of any agreement, the President will be carrying out any action and the parties will be paying amounts to the President, the President may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement.

(4) FUTURE OBLIGATION OF FUND.—In the case of a completed remedial action pursuant to an agreement described in paragraph (1), the Fund shall be subject to an obligation for subsequent remedial actions at the same facility but only to the extent that such subsequent actions are necessary by reason of the failure of the original remedial action. Such obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the Fund for the original remedial action. The Fund's obligation for such future remedial action may be met through Fund expenditures or through payment, following settlement or enforcement action, by parties who were not signatories to the original agreement.

(c) EFFECT OF AGREEMENT.—

(1) LIABILITY.—Whenever the President has entered into an agreement under this section, the liability to the United States under this Act of each party to the agreement, including any future liability to the United States, arising from the release or threatened release that is the subject of the agreement shall be limited as provided in the agreement pursuant to a covenant not to sue in accordance with subsection (f). A covenant not to sue may provide that future liability to the United States of a settling potentially responsible party under the agreement may be limited to the same proportion as that established in the original settlement agreement. Nothing in this section shall limit or otherwise affect the authority of any court to review in the consent decree process under subsection (d) any covenant not to sue contained in an agreement under this section. In determining the extent to which the liability of parties to an agreement shall 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.

(2) ACTIONS AGAINST OTHER PERSONS.—If an agreement has been entered into under this section, the President may take any action under section 106 against any person who is not a party to the agreement, once the period for submitting a proposal under subsection (e)(2)(B) has expired. Nothing in this section shall be construed to affect either of the following:

(A) The liability of any person under section 106 or 107 with respect to any costs or damages which are not included in the agreement.

(B) The authority of the President to maintain an action under this Act against any person who is not a party to the agreement.

(d) ENFORCEMENT.—

(1) CLEANUP AGREEMENTS.—

(A) CONSENT DECREE.—Whenever the President enters into an agreement under this section with any potentially responsible party with respect to remedial action under section 106, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in subsection (g), the agreement shall be entered in the appropriate United States district court as a consent decree. The President need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in connection with any such agreement or consent decree.

(B) EFFECT.—The entry of any consent decree under this subsection shall not be construed to be an acknowledgment by the parties that the release or threatened release concerned constitutes an imminent and substantial endangerment to the public health or welfare or the environment. Except as otherwise provided in the Federal Rules of Evidence, the participation by any party in the process under this section shall not be considered an admission of liability for any purpose, and the fact of such participation shall not be admissible in any judicial or administrative proceeding, including a subsequent proceeding under this section.

(C) STRUCTURE.—The President may fashion a consent decree so that the entering of such decree and compliance with such decree or with any determination or agreement made pursuant to this section shall not be considered an admission of liability for any purpose.

(2) PUBLIC PARTICIPATION.—

(A) FILING OF PROPOSED JUDGMENT.—At least 30 days before a final judgment is entered under paragraph (1), the proposed judgment shall be filed with the court.

(B) OPPORTUNITY FOR COMMENT.—The Attorney General shall provide an opportunity to persons who are not named as parties to the action to comment on the proposed judgment before its entry by the court as a final judgment. The Attorney General shall consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment. The Attorney General may withdraw or withhold its consent to the proposed judgment if the comments, views, and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

(3) 104(b) AGREEMENTS.—Whenever the President enters into an agreement under this section with any potentially responsible party with respect to action under section 104(b), the President shall issue an order or enter into a decree setting

forth the obligations of such party. The United States district court for the district in which the release or threatened release occurs may enforce such order or decree.

(e) SPECIAL NOTICE PROCEDURES.—

(1) NOTICE.—Whenever the President determines that a period of negotiation under this subsection would facilitate an agreement with potentially responsible parties for taking response action (including any action described in section 104(b)) and would expedite remedial action, the President shall so notify all such parties and shall provide them with information concerning each of the following:

(A) The names and addresses of potentially responsible parties (including owners and operators and other persons referred to in section 107(a)), to the extent such information is available.

(B) To the extent such information is available, the volume and nature of substances contributed by each potentially responsible party identified at the facility.

(C) A ranking by volume of the substances at the facility, to the extent such information is available.

The President shall make the information referred to in this paragraph available in advance of notice under this paragraph upon the request of a potentially responsible party in accordance with procedures provided by the President. The provisions of subsection (e) of section 104 regarding protection of confidential information apply to information provided under this paragraph. Disclosure of information generated by the President under this section to persons other than the Congress, or any duly authorized Committee thereof, is subject to other privileges or protections provided by law, including (but not limited to) those applicable to attorney work product. Nothing contained in this paragraph or in other provisions of this Act shall be construed, interpreted, or applied to diminish the required disclosure of information under other provisions of this or other Federal or State laws.

(D) For each potentially responsible party, the evidence that indicates that each element of liability contained in section 107(a)(1) (A), (B), (C), and (D), as applicable, is present.

(2) NEGOTIATION.—

(A) MORATORIUM.—Except as provided in this subsection, the President may not commence action under section 104(a) or take any action under section 106 for 120 days after providing notice and information under this subsection with respect to such action. Except as provided in this subsection, the President may not commence a remedial investigation and feasibility study under section 104(b) for 90 days after providing notice and information under this subsection with respect to such action. The President may commence any additional studies or investigations authorized under section 104(b), including remedial design, during the negotiation period.

(B) PROPOSALS.—Persons receiving notice and information under paragraph (1) of this subsection with respect to

action under section 106 shall have 60 days from the date of receipt of such notice to make a proposal to the President for undertaking or financing the action under section 106. Persons receiving notice and information under paragraph (1) of this subsection with respect to action under section 104(b) shall have 60 days from the date of receipt of such notice to make a proposal to the President for undertaking or financing the action under section 104(b).

(C) ADDITIONAL PARTIES.—If an additional potentially responsible party is identified during the negotiation period or after an agreement has been entered into under this subsection concerning a release or threatened release, the President may bring the additional party into the negotiation or enter into a separate agreement with such party.

(3) PRELIMINARY ALLOCATION OF RESPONSIBILITY.—

(A) IN GENERAL.—The President shall develop guidelines for preparing nonbinding preliminary allocations of responsibility. In developing these guidelines the President may include such factors as the President considers relevant, such as: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors. 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.

(B) COLLECTION OF INFORMATION.—To collect information necessary or appropriate for performing the allocation under subparagraph (A) or for otherwise implementing this section, the President may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the President deems necessary. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In the event of contumacy or failure or refusal of any person to obey any such subpoena, any district court of the United States in which venue is proper shall have jurisdiction to order any such person to comply with such subpoena. Any failure to obey such an order of the court is punishable by the court as a contempt thereof.

(C) EFFECT.—The nonbinding preliminary allocation of responsibility shall not be admissible as evidence in any proceeding, and no court shall have jurisdiction to review the nonbinding preliminary allocation of responsibility. The nonbinding preliminary allocation of responsibility shall not constitute an apportionment or other statement on the divisibility of harm or causation.

(D) COSTS.—The costs incurred by the President in producing the nonbinding preliminary allocation of responsibility shall be reimbursed by the potentially responsible

parties whose offer is accepted by the President. Where an offer under this section is not accepted, such costs shall be considered costs of response.

(E) DECISION TO REJECT OFFER.—Where the President, in his discretion, has provided a nonbinding preliminary allocation of responsibility and the potentially responsible parties have made a substantial offer providing for response to the President which he rejects, the reasons for the rejection shall be provided in a written explanation. The President's decision to reject such an offer shall not be subject to judicial review.

(4) FAILURE TO PROPOSE.—If the President determines that a good faith proposal for undertaking or financing action under section 106 has not been submitted within 60 days of the provision of notice pursuant to this subsection, the President may thereafter commence action under section 104(a) or take an action against any person under section 106 of this Act. If the President determines that a good faith proposal for undertaking or financing action under section 104(b) has not been submitted within 60 days after the provision of notice pursuant to this subsection, the President may thereafter commence action under section 104(b).

(5) SIGNIFICANT THREATS.—Nothing in this subsection shall limit the President's authority to undertake response or enforcement action regarding a significant threat to public health or the environment within the negotiation period established by this subsection.

(6) INCONSISTENT RESPONSE ACTION.—When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this Act, has initiated a remedial investigation and feasibility study for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

(f) COVENANT NOT TO SUE.—

(1) DISCRETIONARY COVENANTS.—The President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this Act, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action, whether that action is onsite or offsite, if each of the following conditions is met:

(A) The covenant not to sue is in the public interest.

(B) The covenant not to sue would expedite response action consistent with the National Contingency Plan under section 105 of this Act.

(C) The person is in full compliance with a consent decree under section 106 (including a consent decree entered into in accordance with this section) for response to the release or threatened release concerned.

(D) The response action has been approved by the President.

(2) SPECIAL COVENANTS NOT TO SUE.—In the case of any person to whom the President is authorized under paragraph

(1) of this subsection to provide a covenant not to sue, for the portion of remedial action—

(A) which involves the transport and secure disposition offsite of hazardous substances in a facility meeting the requirements of sections 3004 (c), (d), (e), (f), (g), (m), (o), (p), (u), and (v) and 3005(c) of the Solid Waste Disposal Act, where the President has rejected a proposed remedial action that is consistent with the National Contingency Plan that does not include such offsite disposition and has thereafter required offsite disposition; or

(B) which involves the treatment of hazardous substances so as to destroy, eliminate, or permanently immobilize the hazardous constituents of such substances, such that, in the judgment of the President, the substances no longer present any current or currently foreseeable future significant risk to public health, welfare or the environment, no byproduct of the treatment or destruction process presents any significant hazard to public health, welfare or the environment, and all byproducts are themselves treated, destroyed, or contained in a manner which assures that such byproducts do not present any current or currently foreseeable future significant risk to public health, welfare or the environment,

the President shall provide such person with a covenant not to sue with respect to future liability to the United States under this Act for a future release or threatened release of hazardous substances from such facility, and a person provided such covenant not to sue shall not be liable to the United States under section 106 or 107 with respect to such release or threatened release at a future time.

(3) REQUIREMENT THAT REMEDIAL ACTION BE COMPLETED.—A covenant not to sue concerning future liability to the United States shall not take effect until the President certifies that remedial action has been completed in accordance with the requirements of this Act at the facility that is the subject of such covenant.

(4) FACTORS.—In assessing the appropriateness of a covenant not to sue under paragraph (1) and any condition to be included in a covenant not to sue under paragraph (1) or (2), the President shall consider whether the covenant or condition is in the public interest on the basis of such factors as the following:

(A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.

(B) The nature of the risks remaining at the facility.

(C) The extent to which performance standards are included in the order or decree.

(D) The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.

(E) The extent to which the technology used in the response action is demonstrated to be effective.

(F) Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.

(G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

(5) SATISFACTORY PERFORMANCE.—Any covenant not to sue under this subsection shall be subject to the satisfactory performance by such party of its obligations under the agreement concerned.

(6) ADDITIONAL CONDITION FOR FUTURE LIABILITY.—(A) Except for the portion of the remedial action which is subject to a covenant not to sue under paragraph (2) or under subsection (g) (relating to de minimis settlements), a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant that allows the President to sue such person concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies under paragraph (3) that remedial action has been completed at the facility concerned.

(B) In extraordinary circumstances, the President may determine, after assessment of relevant factors such as those referred to in paragraph (4) and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors, not to include the exception referred to in subparagraph (A) if other terms, conditions, or requirements of the agreement containing the covenant not to sue are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility.

(C) The President is authorized to include any provisions allowing future enforcement action under section 106 or 107 that in the discretion of the President are necessary and appropriate to assure protection of public health, welfare, and the environment.

[(g) DE MINIMIS SETTLEMENTS] (g) *EXPEDITED FINAL SETTLEMENT*.—

[(1) EXPEDITED FINAL SETTLEMENT.—Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 106 or 107 if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

[(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

[(i) The amount of the hazardous substances contributed by that party to the facility.

[(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

(1) PARTIES ELIGIBLE.—

(A) IN GENERAL.—*As expeditiously as practicable, the President shall—*

(i) notify each potentially responsible party that meets 1 or more of the conditions stated in subparagraphs (B), (C), and (D) of the party's eligibility for a settlement; and

(ii) offer to reach a final administrative or judicial settlement with the party.

(B) DE MINIMIS CONTRIBUTION.—*The condition stated in this subparagraph is that the liability is for response costs based on subparagraph (C) or (D) of section 107(a)(1) and the party's contribution of a hazardous substance at a facility is de minimis. For the purposes of this subparagraph, a potentially responsible party's contribution shall be considered to be de minimis only if the President determines that both of the following criteria are met:*

(i) The amount of material containing a hazardous substance contributed by the potentially responsible party to the facility is minimal relative to the total amount of material containing hazardous substances at the facility. The amount of a potentially responsible party's contribution shall be presumed to be minimal if the amount is 1 percent or less of the total amount of material containing a hazardous substance at the facility, unless the Administrator promptly identifies a greater threshold based on site-specific factors.

(ii) The material containing a hazardous substance contributed by the potentially responsible party does not present toxic or other hazardous effects that are significantly greater than the toxic or other hazardous effects of other material containing a hazardous substance at the facility.

[(B)] (C) [The potentially responsible party]

(C) OWNERS OF REAL PROPERTY.—

(i) IN GENERAL.—The condition stated in this subparagraph is that the potentially responsible party—

[(i)] (I) *is the owner of the real property on or in which the facility is located;*

[(ii)] (II) *did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and*

[(iii)] (III) *did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.*

[(This subparagraph (B)] (i) APPLICABILITY.—*Clause (i) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.*

(2) COVENANT NOT TO SUE.—*The President may provide a covenant not to sue with respect to the facility concerned to*

any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest as determined under subsection (f).

(3) EXPEDITED AGREEMENT.—The President shall reach any such settlement or grant any such covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.

(4) CONSENT DECREE OR ADMINISTRATIVE ORDER.—A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. In the case of any facility where the total response costs exceed \$500,000 (excluding interest), if the settlement is embodied as an administrative order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Administrator have agreed to extend the time. The district court for the district in which the release or threatened release occurs may enforce any such administrative order.

(5) EFFECT OF AGREEMENT.—A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(6) SETTLEMENT OFFERS.—

(A) *IN GENERAL.*—As soon as practicable after receipt of sufficient information, the Administrator shall submit a written settlement offer (stated in dollars) to each person that the Administrator determines, based on information available to the Administrator at the time at which the determination is made, to be eligible for a settlement under paragraph (1).

(B) *INFORMATION.*—At the time at which the Administrator submits an offer under paragraph (1), the Administrator shall, at the request of the recipient of the offer, make available to the recipient any information available under section 552 of title 5, United States Code, on which the Administrator bases the settlement offer, and if the settlement offer is based in whole or in part on information not available under that section, so inform the recipient.

(7) LITIGATION MORATORIUM.—

(A) *IN GENERAL.*—No person eligible for an expedited settlement under paragraph (1) shall be named as a defendant in any action under this Act or any other Federal or State law for recovery of response costs incurred after the date of enactment of this paragraph (including an action for contribution) during the period beginning on the date on which the person receives from the President written notice of the person's potential liability and notice that the

person is a party that may qualify for an expedited settlement, and ending on the earlier of—

(i) the date that is 90 days after the date on which the President tenders a written settlement offer to the person; or

(ii) the date that is 1 year after the date specified in subparagraph (A).

(B) *TOLLING OF PERIOD OF LIMITATION.*—The period of limitation under section 113(g) applicable to a claim against a person described in subparagraph (A) for response costs (including an action for contribution or natural resource damages) shall be tolled during the period described in subparagraph (A).

(8) *NOTICE OF SETTLEMENT.*—After a settlement under this subsection becomes final with any person with respect to a facility, the President shall promptly notify potentially responsible parties at the facility that have not resolved their liability to the United States of the settlement.

[(6)] (9) *SETTLEMENTS WITH OTHER POTENTIALLY RESPONSIBLE PARTIES.*—Nothing in this subsection shall be construed to affect the authority of the President to reach settlements with other potentially responsible parties under this Act.

(D) *REDUCTION IN SETTLEMENT AMOUNT BASED ON LIMITED ABILITY TO PAY.*—

(i) *IN GENERAL.*—The condition stated in this subparagraph is that—

(I) the potentially responsible party is—

(aa) a natural person;

(bb) a small business; or

(cc) a municipality;

(II) the potentially responsible party demonstrates to the President an inability to pay or has only a limited ability to pay response costs, as determined by the Administrator under a regulation promulgated by the Administrator, after public notice and opportunity for comment and after consultation with the Administrator of the Small Business Administration and the Secretary of Housing and Urban Development; and

(III) in the case of a potentially responsible party that is a small business, the potentially responsible party does not qualify for the small business exemption under section 107(s) because of the application of section 107(s)(2)(A).

(ii) *SMALL BUSINESSES.*—

(I) *DEFINITION OF SMALL BUSINESS.*—In this subparagraph, the term “small business” means a business entity that—

(aa) during the taxable year preceding the date of transmittal of notification that the business is a potentially responsible party, had full- and part-time employees whose combined time was equivalent to 50 or fewer full-time

employees or for that taxable year reported \$3,000,000 or less in gross revenue; and

(bb) the person is not affiliated through any familial or corporate relationship with any person that is or was a party potentially responsible for response costs at the facility.

(II) *CONSIDERATIONS.*—At the request of a small business, the President shall take into consideration the ability of the small business to pay response costs and still maintain its basic business operations, including consideration of the overall financial condition of the small business and demonstrable constraints on the ability of the small business to raise revenues.

(III) *INFORMATION.*—A small business requesting settlement under this paragraph shall promptly provide the President with all relevant information needed to determine the ability of the small business to pay response costs.

(IV) *DETERMINATION.*—A small business shall demonstrate the amount of its ability to pay response costs, and the President shall perform any analysis that the President determines may assist in demonstrating the impact of a settlement on the ability of the small business to maintain its basic operations. The President, in the discretion of the President, may perform such analysis for any other party or request such other party to perform the analysis.

(V) *ALTERNATIVE PAYMENT METHODS.*—If the President determines that a small business is unable to pay its total settlement amount immediately, the President shall consider such alternative payment methods as may be necessary or appropriate.

(iii) *MUNICIPALITIES.*—

(I) *CONSIDERATIONS.*—The President shall consider the inability or limited ability to pay of a municipality to the extent that the municipality provides necessary information with respect to—

(aa) the general obligation bond rating and information about the most recent bond issue for which the rating was prepared;

(bb) the amount of total available funds (other than dedicated funds or State assistance payments for remediation of inactive hazardous waste sites);

(cc) the amount of total operating revenues (other than obligated or encumbered revenues);

(dd) the amount of total expenses;

(ee) the amounts of total debt and debt service;

(ff) per capita income and cost of living;

(gg) real property values;

- (hh) unemployment information; and
- (ii) population information.

(II) *EVALUATION OF IMPACT.*—A municipality may also submit for consideration by the President an evaluation of the potential impact of the settlement on the provision of municipal services and the feasibility of making delayed payments or payments over time.

(III) *RISK OF DEFAULT OR VIOLATION.*—A municipality may establish an inability to pay for purposes of this subparagraph through an affirmative showing that payment of its liability under this Act would—

(aa) create a substantial demonstrable risk that the municipality would default on debt obligations existing as of the time of the showing, be forced into bankruptcy, be forced to dissolve, or be forced to make budgetary cut-backs that would substantially reduce the level of protection of public health and safety; or

(bb) necessitate a violation of legal requirements or limitations of general applicability concerning the assumption and maintenance of fiscal municipal obligations.

(IV) *OTHER FACTORS RELEVANT TO SETTLEMENTS WITH MUNICIPALITIES.*—In determining an appropriate settlement amount with a municipality under this subparagraph, the President may consider other relevant factors, including the fair market value of any in-kind services that the municipality may provide to support the response action at the facility.

(iv) *OTHER POTENTIALLY RESPONSIBLE PARTIES.*—This subparagraph does not affect the President's authority to evaluate the ability to pay of a potentially responsible party other than a natural person, small business, or municipality or to enter into a settlement with such other party based on that party's ability to pay.

(F) *ADDITIONAL CONDITIONS FOR EXPEDITED SETTLEMENTS.*—

(i) *WAIVER OF CLAIMS.*—The President shall require, as a condition of settlement under this paragraph, that a potentially responsible party waive the claims (including a claim for contribution under section 113) that the party may have against other potentially responsible parties for all response costs addressed in the settlement.

(ii) *EXCEPTION.*—The President may decline to offer a settlement to a potentially responsible party under this paragraph if the President determines that the potentially responsible party has failed to substantially comply with the requirement stated in subsection (y) with respect to the facility.

(iii) *RESPONSIBILITY TO PROVIDE INFORMATION.*—A potentially responsible party that enters into a settlement under this paragraph shall not be relieved of the responsibility to provide any information requested by the President in accordance with subsection (e)(3)(B) or section 104(e).

(iv) *BASIS OF DETERMINATION.*—If the President determines that a potentially responsible party is not eligible for settlement under this paragraph, the President shall state the reasons for the determination in writing to any potentially responsible party that requests a settlement under this paragraph.

(v) *NO JUDICIAL REVIEW.*—A determination by the President under this paragraph shall not be subject to judicial review.

(h) *COST RECOVERY SETTLEMENT AUTHORITY.*—

(1) *AUTHORITY TO SETTLE.*—The head of any department or agency with authority to undertake a response action under this Act pursuant to the national contingency plan may consider, compromise, and settle a claim under section 107 for costs incurred by the United States Government if the claim has not been referred to the Department of Justice for further action. In the case of any facility where the total response costs exceed \$500,000 (excluding interest), any claim referred to in the preceding sentence may be compromised and settled only with the prior written approval of the Attorney General.

(2) *USE OF ARBITRATION.*—Arbitration in accordance with regulations promulgated under this subsection may be used as a method of settling claims of the United States where the total response costs for the facility concerned do not exceed \$500,000 (excluding interest). After consultation with the Attorney General, the department or agency head may establish and publish regulations for the use of arbitration or settlement under this subsection.

(3) *RECOVERY OF CLAIMS.*—If any person fails to pay a claim that has been settled under this subsection, the department or agency head shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount of such claim, plus costs, attorneys' fees, and interest from the date of the settlement. In such an action, the terms of the settlement shall not be subject to review.

(4) *CLAIMS FOR CONTRIBUTION.*—A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement shall not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(i) *SETTLEMENT PROCEDURES.*—

(1) *PUBLICATION IN FEDERAL REGISTER.*—At least 30 days before any settlement (including any settlement arrived at through arbitration) may become final under subsection (h), or under subsection (g) in the case of a settlement embodied in an administrative order, the head of the department or agency

which has jurisdiction over the proposed settlement shall publish in the Federal Register notice of the proposed settlement. The notice shall identify the facility concerned and the parties to the proposed settlement.

(2) COMMENT PERIOD.—For a 30-day period beginning on the date of publication of notice under paragraph (1) of a proposed settlement, the head of the department or agency which has jurisdiction over the proposed settlement shall provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement.

(3) CONSIDERATION OF COMMENTS.—The head of the department or agency shall consider any comments filed under paragraph (2) in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.

(j) NATURAL RESOURCES.—

(1) NOTIFICATION OF TRUSTEE.—Where a release or threatened release of any hazardous substance that is the subject of negotiations under this section may have resulted in damages to natural resources under the trusteeship of the United States, the President shall notify the Federal natural resource trustee of the negotiations and shall encourage the participation of such trustee in the negotiations.

(2) COVENANT NOT TO SUE.—An agreement under this section may contain a covenant not to sue under section 107(a)(4)(C) for damages to natural resources under the trusteeship of the United States resulting from the release or threatened release of hazardous substances that is the subject of the agreement, but only if the Federal natural resource trustee has agreed in writing to such covenant. The Federal natural resource trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.

(k) SECTION NOT APPLICABLE TO VESSELS.—The provisions of this section shall not apply to releases from a vessel.

(l) CIVIL PENALTIES.—A potentially responsible party which is a party to an administrative order or consent decree entered pursuant to an agreement under this section or section 120 (relating to Federal facilities) or which is a party to an agreement under section 120 and which fails or refuses to comply with any term or condition of the order, decree or agreement shall be subject to a civil penalty in accordance with section 109.

(m) APPLICABILITY OF GENERAL PRINCIPLES OF LAW.—In the case of consent decrees and other settlements under this section (including covenants not to sue), no provision of this Act shall be construed to preclude or otherwise affect the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements.

(n) *RELATIONSHIP TO LIABILITY UNDER OTHER LAW.*—Nothing in this section affects the obligation of any person to comply with any other Federal, State, or local law (including requirements under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.)).

[42 U.S.C. 9622]

SEC. 123. REIMBURSEMENT TO LOCAL GOVERNMENTS.

(a) *APPLICATION.*—Any general purpose unit of local government for a political subdivision which is affected by a release or threatened release at any facility may apply to the President for reimbursement under this section.

(b) *REIMBURSEMENT.*—

(1) *TEMPORARY EMERGENCY MEASURES.*—The President is authorized to reimburse local community authorities for expenses incurred (before or after the enactment of the Superfund Amendments and Reauthorization Act of 1986) in carrying out temporary emergency measures necessary to prevent or mitigate injury to human health or the environment associated with the release or threatened release of any hazardous substance or pollutant or contaminant. Such measures may include, where appropriate, security fencing to limit access, response to fires and explosions, and other measures which require immediate response at the local level.

(2) *LOCAL FUNDS NOT SUPPLANTED.*—Reimbursement under this section shall not supplant local funds normally provided for response.

(c) *AMOUNT.*—The amount of any reimbursement to any local authority under subsection (b)(1) may not exceed \$25,000 for a single response. The reimbursement under this section with respect to a single facility shall be limited to the units of local government having jurisdiction over the political subdivision in which the facility is located.

(d) *PROCEDURE.*—Reimbursements authorized pursuant to this section shall be in accordance with rules promulgated by the Administrator within one year after the enactment of the Superfund Amendments and Reauthorization Act of 1986.

[42 U.S.C. 9623]

SEC. 124. METHANE RECOVERY.

(a) *IN GENERAL.*—In the case of a facility at which equipment for the recovery or processing (including recirculation of condensate) of methane has been installed, for purposes of this Act:

(1) The owner or operator of such equipment shall not be considered an “owner or operator”, as defined in section 101(20), with respect to such facility.

(2) The owner or operator of such equipment shall not be considered to have arranged for disposal or treatment of any hazardous substance at such facility pursuant to section 107 of this Act.

(3) The owner or operator of such equipment shall not be subject to any action under section 106 with respect to such facility.

(b) *EXCEPTIONS.*—Subsection (a) does not apply with respect to a release or threatened release of a hazardous substance from a fa-

cility described in subsection (a) if either of the following circumstances exist:

(1) The release or threatened release was primarily caused by activities of the owner or operator of the equipment described in subsection (a).

(2) The owner or operator of such equipment would be covered by paragraph (1), (2), (3), or (4) of subsection (a) of section 107 with respect to such release or threatened release if he were not the owner or operator of such equipment.

In the case of any release or threatened release referred to in paragraph (1), the owner or operator of the equipment described in subsection (a) shall be liable under this Act only for costs or damages primarily caused by the activities of such owner or operator.

[42 U.S.C. 9624]

SEC. 125. SECTION 3001(b)(3)(A)(i) WASTE.

(a) REVISION OF HAZARD RANKING SYSTEM.—This section shall apply only to facilities which are not included or proposed for inclusion on the National Priorities List and which contain substantial volumes of waste described in section 3001(b)(3)(A)(i) of the Solid Waste Disposal Act. As expeditiously as practicable, the President shall revise the hazard ranking system in effect under the National Contingency Plan with respect to such facilities in a manner which assures appropriate consideration of each of the following site-specific characteristics of such facilities:

(1) The quantity, toxicity, and concentrations of hazardous constituents which are present in such waste and a comparison thereof with other wastes.

(2) The extent of, and potential for, release of such hazardous constituents into the environment.

(3) The degree of risk to human health and the environment posed by such constituents.

(b) INCLUSION PROHIBITED.—Until the hazard ranking system is revised as required by this section, the President may not include on the National Priorities List any facility which contains substantial volumes of waste described in section 3001(b)(3)(A)(i) of the Solid Waste Disposal Act on the basis of an evaluation made principally on the volume of such waste and not on the concentrations of the hazardous constituents of such waste. Nothing in this section shall be construed to affect the President's authority to include any such facility on the National Priorities List based on the presence of other substances at such facility or to exercise any other authority of this Act with respect to such other substances.

[42 U.S.C. 9625]

SEC. 126. INDIAN TRIBES.

(a) TREATMENT GENERALLY.—The governing body of an Indian tribe shall be afforded substantially the same treatment as a State with respect to the provisions of section 103(a) (regarding notification of releases), section 104(c)(2) (regarding consultation on remedial actions), section 104(e) (regarding access to information), section 104(i) (regarding health authorities) [and section 105], *section 105* (regarding roles and responsibilities under the national contingency plan and submittal of priorities for remedial action, but not

including the provision regarding the inclusion of at least one facility per State on the National Priorities List), *and section 130 (with respect to a facility that is located on Indian lands).*

(b) **COMMUNITY RELOCATION.**—Should the President determine that proper remedial action is the permanent relocation of tribal members away from a contaminated site because it is cost-effective and necessary to protect their health and welfare, such finding must be concurred in by the affected tribal government before relocation shall occur. The President, in cooperation with the Secretary of the Interior, shall also assure that all benefits of the relocation program are provided to the affected tribe and that alternative land of equivalent value is available and satisfactory to the tribe. Any lands acquired for relocation of tribal members shall be held in trust by the United States for the benefit of the tribe.

(c) **STUDY.**—The President shall conduct a survey, in consultation with the Indian tribes, to determine the extent of hazardous waste sites on Indian lands. Such survey shall be included within a report which shall make recommendations on the program needs of tribes under this Act, with particular emphasis on how tribal participation in the administration of such programs can be maximized. Such report shall be submitted to Congress along with the President's budget request for fiscal year 1988.

(d) **LIMITATION.**—Notwithstanding any other provision of this Act, no action under this Act by an Indian tribe shall be barred until the later of the following:

(1) The applicable period of limitations has expired.

(2) 2 years after the United States, in its capacity as trustee for the tribe, gives written notice to the governing body of the tribe that it will not present a claim or commence an action on behalf of the tribe or fails to present a claim or commence an action within the time limitations specified in this Act.

SEC. 127. BROWNFIELDS.

(a) **DEFINITIONS.**—*In this section:*

(1) **BROWNFIELD FACILITY.**—

(A) **IN GENERAL.**—*The term "brownfield facility" means real property, the expansion or redevelopment of which is complicated by the presence or potential presence of a hazardous substance.*

(B) **EXCLUSIONS.**—*The term "brownfield facility" does not include—*

(i) *any portion of real property that, as of the date of submission of an application for assistance under this section, is the subject of an ongoing removal under title I;*

(ii) *any portion of real property that has been listed on the National Priorities List or is proposed for listing as of the date of the submission of an application for assistance under this section;*

(iii) *any portion of real property with respect to which cleanup work is proceeding in substantial compliance with the requirements of an administrative order on consent, or judicial consent decree that has been entered into, or a permit issued by, the United*

States or a duly authorized State under this Act, the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. 300f et seq.);

(iv) a land disposal unit with respect to which—

(I) a closure notification under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) has been submitted; and

(II) closure requirements have been specified in a closure plan or permit;

(v) a facility that is owned or operated by a department, agency, or instrumentality of the United States; or

(vi) a portion of a facility, for which portion, assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of the Internal Revenue Code of 1986.

(C) FACILITIES OTHER THAN BROWNFIELD FACILITIES.—

That a facility may not be a brownfield facility within the meaning of subparagraph (A) has no effect on the eligibility of the facility for assistance under any provision of Federal law other than this section.

(2) ELIGIBLE ENTITY.—

(A) IN GENERAL.—The term “eligible entity” means—

(i) a general purpose unit of local government;

(ii) a land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of local government;

(iii) a government entity created by a State legislature;

(iv) a regional council or group of general purpose units of local government;

(v) a redevelopment agency that is chartered or otherwise sanctioned by a State;

(vi) a State; and

(vii) an Indian Tribe.

(B) EXCLUSION.—The term “eligible entity” does not include any entity that is not in substantial compliance with the requirements of an administrative order on consent, judicial consent decree that has been entered into, or a permit issued by, the United States or a duly authorized State under this Act, the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. 300f et seq.) with respect to any portion of real property that is the subject of the administrative order on consent, judicial consent decree, or permit.

(3) *FACILITY SUBJECT TO STATE CLEANUP.*—The term “facility subject to State cleanup” means a facility that—

(A) is not listed or proposed for listing on the National Priorities List; and

(i) has been archived from the Comprehensive Environmental Response, Compensation, and Liability Information System;

(ii) was included on the Comprehensive Environmental Response, Compensation, and Liability Information System before the date of enactment of this section and is not listed or proposed for listing on the National Priorities List within 2 years after the date of enactment of this section; or

(iii) is included on the Comprehensive Environmental Response, Compensation, and Liability Information System after the date of enactment of this section, if at least 2 years have elapsed since the earlier of—

(I) inclusion of the facility on the Comprehensive Environmental Response, Compensation, and Liability Information System; or

(II) issuance at the facility of an order under section 106(a).

(b) *BROWNFIELD GRANT PROGRAM.*—

(1) *ESTABLISHMENT OF PROGRAM.*—The Administrator shall establish a program to provide grants for the site characterization and assessment of brownfield facilities and performance of response actions at brownfield facilities.

(2) *ASSISTANCE FOR SITE CHARACTERIZATION AND ASSESSMENT AND RESPONSE ACTIONS.*—

(A) *IN GENERAL.*—On approval of an application made by an eligible entity, the Administrator may make grants out of the Fund to the eligible entity to be used for the site characterization and assessment of and response actions at 1 or more brownfield facilities or to capitalize a revolving loan fund.

(B) *SITE CHARACTERIZATION AND ASSESSMENT.*—A site characterization and assessment carried out with the use of a grant under subparagraph (A)—

(i) shall be performed in accordance with section 101(35)(B); and

(ii) may include a process to identify and inventory potential brownfield facilities.

(3) *MAXIMUM GRANT AMOUNT.*—

(A) *IN GENERAL.*—A grant under subparagraph (A) shall not exceed, with respect to any individual brownfield facility covered by the grant, \$350,000 in total.

(B) *WAIVER.*—The Administrator may waive the \$350,000 limitation under subparagraph (A) based on the anticipated level of contamination, size, or status of ownership of the facility.

(4) *GENERAL PROVISIONS.*—

(A) *PROHIBITION.*—

(i) *IN GENERAL.*—No part of a grant under this section may be used for payment of penalties, fines, or administrative costs.

(ii) *EXCLUSIONS.*—For the purposes of clause (i), the term “administrative cost” does not include the cost of—

(I) investigation and identification of the extent of contamination;

(II) design and performance of a response action; or

(III) monitoring of natural resources.

(B) *AUDITS.*—The Inspector General of the Environmental Protection Agency shall conduct such reviews or audits of loans under subsection (c) or grants under this subsection as the Inspector General considers necessary to carry out the objectives of this section. Audits shall be conducted in accordance with the auditing procedures of the General Accounting Office, including chapter 75 of title 31, United States Code.

(C) *LEVERAGING.*—An eligible entity that receives a grant under this section may use the funds for part of a project at a brownfield facility for which funding is received from other sources, but the grant shall be used only for the purposes described in subsection (b)(2) or (c)(2).

(c) *STATE LOAN FUNDS.*—

(1) *GRANTS TO STATES TO ESTABLISH STATE LOAN FUNDS.*—

(A) *IN GENERAL.*—The Administrator shall offer to enter into agreements with eligible States to make capitalization grants, including letters of credit, to the States to further objectives of this Act, promote the efficient use of fund resources, and for other purposes as are specified in this Act. The Administrator may enter into an agreement with a city, county, or regional association of governments, provided that the area covered by the agreement has a population greater than 1 million persons, in a State that has elected not to enter into an agreement with the Administrator. Eligible entities in a State, city, county or region covered by an agreement shall be eligible to receive assistance from the State loan fund in lieu of assistance from the Administrator under subsection (b).

(B) *ESTABLISHMENT OF FUND.*—To be eligible to receive a capitalization grant under this subsection, a State, city, county or regional association of governments shall establish a brownfields revolving loan fund (referred to in this subsection as a “State loan fund”) and comply with the other requirements of this subsection. Each grant to a State, city, county or regional association of governments under this subsection shall be deposited in the State loan fund.

(C) *EXTENDED PERIOD.*—The grant to a State loan fund shall be available to the State loan fund for obligation during the fiscal year for which the funds are authorized and during the following fiscal year.

(D) ALLOTMENT FORMULA.—Except as otherwise provided in this subsection, funds made available to carry out this subsection shall be allotted to State loan funds that are established by agreements pursuant to this section in accordance with a formula developed by the Administrator through a regulatory negotiation and reflecting the number of potential brownfields facilities in areas covered by agreements and the level of effort made by each State, city, county or regional association of governments to return brownfields to beneficial uses. The formula shall reserve sufficient funds to provide assistance to eligible entities in areas not covered by agreements. The Administrator shall update the formula not less often than biennially.

(E) REALLOTMENT.—The grants not obligated by the last day of the period for which the grants are available shall be reallocated according to the formula established under subparagraph (D).

(2) USE OF FUNDS.—Amounts deposited in a State loan fund, including loan repayments and interest earned on such amounts, shall be used only for providing loans or loan guarantees, or as a source of reserve and security for leveraged loans, the proceeds of which are deposited in a State loan fund established under paragraph (1), or other financial assistance authorized under this subsection to eligible entities. Funds from capitalization grants shall not be used for the acquisition of real property or interests therein. Nothing in this subsection shall be interpreted to preclude the use of other funds deposited in a State loan fund to acquire real property or to preclude an eligible entity from acquiring real property.

(3) INTENDED USE PLANS.—

(A) IN GENERAL.—After providing for public review and comment, each State, city, county or regional association of governments that has entered into a capitalization agreement pursuant to this subsection shall annually prepare a plan that identifies the intended uses of the amounts available to the State loan fund.

(B) CONTENTS.—An intended use plan shall include—

(i) a list of the projects to be assisted in the first fiscal year that begins after the date of the plan, including a description of the projects and the expected terms of financial assistance;

(ii) the criteria and methods established for the distribution of funds; and

(iii) a description of the financial status of the State loan fund and the short-term and long-term goals of the State loan fund.

(4) FUND MANAGEMENT.—Each State loan fund under this subsection shall be established, maintained, and credited with repayments and interest. The fund corpus shall be available in perpetuity for providing financial assistance under this subsection. To the extent amounts in the fund are not required for current obligation or expenditure, such amounts shall be invested in interest bearing obligations.

(5) ADDITIONAL ASSISTANCE.—

(A) *SUBSIDY.*—Notwithstanding any other provision of this subsection, a State loan fund may—

(i) provide additional subsidization (including forgiveness of principal) to an eligible entity; and

(ii) provide assistance to the State for the purpose of conducting response actions at facilities the ownership of which or control over which was acquired by a law enforcement agency through seizure or otherwise in connection with law enforcement activity.

(B) *TOTAL AMOUNT OF SUBSIDIES.*—For each fiscal year, the total amount of subsidies made from the corpus or capitalization grant of a State loan fund pursuant to subparagraph (A) may not exceed 30 percent of the amount of the capitalization grant received by the State loan fund for that year.

(6) *NON-FEDERAL CONTRIBUTION.*—

(A) *IN GENERAL.*—Each agreement under paragraph (1) shall require that the State, city, county or regional association of governments deposit in the State loan fund from non-Federal moneys an amount equal to at least 20 percent of the total amount of the capitalization grant to be made to the State loan fund on or before the date on which the grant payment is made to the State loan fund.

(B) *SOURCE.*—Resources used to satisfy the requirement of subparagraph (A) may be drawn from any non-Federal source.

(C) *IN-KIND CONTRIBUTIONS.*—A contribution of labor, materials, or services may be used to satisfy the requirement of subparagraph (A).

(7) *TYPES OF ASSISTANCE.*—Except as otherwise limited by State law, the amounts deposited into a State loan fund under this subsection may be used only—

(A) to make loans, on the condition that—

(i) the interest rate for each loan is less than or equal to the market interest rate, including an interest free loan;

(ii) principal and interest payments on each loan will commence not later than 1 year after completion of the project for which the loan was made, and each loan will be fully amortized not later than 10 years after the completion of the project; and

(iii) the State loan fund will be credited with all payments of principal and interest on each loan;

(B) to guarantee, or purchase insurance for, a local obligation (all of the proceeds of which finance a project eligible for assistance under this subsection) if the guarantee or purchase would improve credit market access or reduce the interest rate applicable to the obligation;

(C) as a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the State, city, county or regional association of governments if the proceeds of the sale of the bonds will be deposited into the State loan fund; and

(D) to earn interest on the amounts deposited into the State loan fund.

(8) *COST OF ADMINISTERING FUND.*—The cost of administering the State loan fund shall be borne from funds provided by the State, city, county or regional association of governments entering into the agreement and shall be in addition to the matching amounts required by paragraph (6).

(9) *GUIDANCE AND REGULATIONS.*—The Administrator shall publish guidance and promulgate regulations as may be necessary to carry out this subsection, including—

(A) provisions to ensure that each State loan fund commits and expends funds allotted to the State loan fund under this subsection as efficiently as possible in accordance with this Act and applicable State laws;

(B) guidance to prevent waste, fraud, and abuse; and

(C) provisions to ensure that the State loan funds, and eligible entities receiving assistance under this subsection, use accounting, audit, and fiscal procedures that conform to generally accepted accounting standards.

(10) *STATE REPORT.*—Each State, city, county, or regional association of governments administering a loan fund and assistance program under this subsection shall publish and submit to the Administrator a report every 2 years on its activities under this subsection, including the findings of the most recent audit of the fund. The Administrator shall periodically audit all State loan funds established by, and all other amounts allotted to, the State loan funds pursuant to this subsection in accordance with procedures established by the Comptroller General.

(11) *EVALUATION.*—The Administrator shall conduct an evaluation of the effectiveness of the State loan funds through fiscal year 2003. The evaluation shall be submitted to the Congress at the same time as the President submits to the Congress, pursuant to section 1108 of title 31, United States Code, an appropriations request for fiscal year 2005 relating to the budget of the Environmental Protection Agency.

(d) *GRANT APPLICATIONS.*—

(1) *SUBMISSION.*—

(A) *IN GENERAL.*—Any eligible entity may submit an application to the Administrator, through a regional office of the Environmental Protection Agency and in such form as the Administrator may require, for a grant under this section for 1 or more brownfield facilities.

(B) *COORDINATION.*—The Administrator in developing such application requirements is instructed to coordinate with other Federal agencies and departments, such that eligible entities under this section are made aware of other available Federal resources.

(C) *GUIDANCE.*—The Administrator shall publish guidance to assist eligible entities in obtaining grants under this section.

(2) *APPROVAL.*—

(A) *INITIAL GRANT.*—On or about March 30 and September 30 of the first fiscal year following the date of en-

actment of this section, the Administrator shall make grants under this section to eligible entities that submit applications before those dates and that the Administrator determines have the highest rankings under ranking criteria established under paragraph (3).

(B) *SUBSEQUENT GRANTS.*—*Beginning with the second fiscal year following the date of enactment of this section, the Administrator shall make an annual evaluation of each application received during the prior fiscal year and make grants under this section to eligible entities that submit applications during the prior year and that the Administrator determines have the highest rankings under the ranking criteria established under paragraph (3).*

(3) *RANKING CRITERIA.*—*The Administrator shall establish a system for ranking grant applications that includes the following criteria:*

(A) *The extent to which a grant will stimulate the availability of other funds for environmental remediation and subsequent redevelopment of the area in which the brownfield facilities are located.*

(B) *The potential of the development plan for the area in which the brownfield facilities are located to stimulate economic development of the area on completion of the cleanup, such as the following:*

(i) *The relative increase in the estimated fair market value of the area as a result of any necessary response action.*

(ii) *The demonstration by applicants of the intent and ability to create new or expand existing business, employment, recreation, or conservation opportunities on completion of any necessary response action.*

(iii) *If commercial redevelopment is planned, the estimated additional full-time employment opportunities and tax revenues expected to be generated by economic redevelopment in the area in which a brownfield facility is located.*

(iv) *The estimated extent to which a grant would facilitate the identification of or facilitate a reduction of health and environmental risks.*

(v) *The financial involvement of the State and local government in any response action planned for a brownfield facility and the extent to which the response action and the proposed redevelopment is consistent with any applicable State or local community economic development plan.*

(vi) *The extent to which the site characterization and assessment or response action and subsequent development of a brownfield facility involves the active participation and support of the local community.*

(vii) *Such other factors as the Administrator considers appropriate to carry out the purposes of this section.*

(C) *The extent to which a grant will enable the creation of or addition to parks, greenways, or other recreational property.*

(D) *The extent to which a grant will meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a brownfield facility is located because of the small population or low income of the community.*

SEC. 128. QUALIFYING STATE VOLUNTARY RESPONSE PROGRAMS.

(a) *ASSISTANCE TO STATES.*—*The Administrator shall provide technical and other assistance to States to establish and expand qualifying State voluntary response programs that include the elements listed in subsection (b).*

(b) *ELEMENTS.*—*The elements of a qualifying State voluntary response program are the following:*

(1) *Opportunities for technical assistance for voluntary response actions.*

(2) *Adequate opportunities for public participation, including prior notice and opportunity for comment in appropriate circumstances, in selecting response actions.*

(3) *Streamlined procedures to ensure expeditious voluntary response actions.*

(4) *Oversight and enforcement authorities or other mechanisms that are adequate to ensure that—*

(A) *voluntary response actions will protect human health and the environment and be conducted in accordance with applicable Federal and State law; and*

(B) *if the person conducting the voluntary response action fails to complete the necessary response activities, including operation and maintenance or long-term monitoring activities, the necessary response activities are completed.*

(5) *Mechanisms for approval of a voluntary response action plan, or a requirement for certification or similar documentation from the State or parties authorized and licensed by State law to the person conducting the voluntary response action indicating that the response is complete.*

SEC. 129. ENFORCEMENT IN CASES OF A RELEASE SUBJECT TO A STATE PLAN.

(a) *ENFORCEMENT.*—

(1) *IN GENERAL.*—*Except as provided in paragraph (2), in the case of a release or threatened release of a hazardous substance at a facility subject to State cleanup (as defined in section 127(a)), neither the President nor any other person may use any authority under this Act to take an enforcement action against any person regarding any matter that is within the scope of a response action that is being conducted or has been completed under State law.*

(2) *EXCEPTIONS.*—*The President may bring enforcement action under this Act with respect to a facility described in paragraph (1) if—*

(A) *the State requests that the President provide assistance in the performance of a response action and that the enforcement bar in paragraph (1) be lifted;*

(B) *at a facility at which response activities are ongoing the Administrator—*

(i) *makes a written determination that the State is unwilling or unable to take appropriate action, after the Administrator has provided the Governor or other chief executive of the State notice and an opportunity to cure; and*

(ii) *the Administrator determines that the release or threat of release constitutes a public health or environmental emergency under section 104(a)(4);*

(C) *the Administrator determines that contamination has migrated across a State line, resulting in the need for further response action to protect human health or the environment; or*

(D) *in the case of a facility at which all response actions have been completed, the Administrator—*

(i) *makes a written determination that the State is unwilling or unable to take appropriate action, after the Administrator has provided the Governor or other chief executive of the State notice and an opportunity to cure; and*

(ii) *makes a written determination that the facility presents a substantial risk that requires further remediation to protect human health or the environment, as evidenced by—*

(I) *newly discovered information regarding contamination at the facility;*

(II) *the discovery that fraud was committed in demonstrating attainment of standards at the facility; or*

(III) *a failure of the remedy under the State remedial action plan or a change in land use giving rise to a clear threat of exposure.*

(3) *EPA NOTIFICATION.*—

(A) *IN GENERAL.*—*In the case of a facility at which there is a release or threatened release of a hazardous substance, pollutant, or contaminant and for which the Administrator intends to undertake an administrative or enforcement action, the Administrator, prior to taking the administrative or enforcement action, shall notify the State of the action the Administrator intends to take and wait for an acknowledgment from the State pursuant to subparagraph (B).*

(B) *STATE RESPONSE.*—*Not later than 48 hours after receiving a notice from the Administrator under subparagraph (A), the State shall notify the Administrator if the facility is currently or has been subject to a State remedial action plan.*

(C) *PUBLIC HEALTH OR ENVIRONMENTAL EMERGENCY.*—If the Administrator finds that a release or threatened release constitutes a public health or environmental emergency under section 104(a)(4), the Administrator may take appropriate action immediately after giving notification under subparagraph (A) without waiting for State acknowledgment.

(b) *FACILITIES NOT SUBJECT TO STATE CLEANUP.*—In the case of a release or threatened release of a hazardous substance at a facility not subject to State cleanup (as defined in section 127(a)), the President shall provide notice to the State not later than 48 hours after issuing an order under section 106(a) addressing the release or threatened release.

(c) *COST OR DAMAGE RECOVERY ACTIONS.*—Subsection (a) shall not apply to an action brought by any person (including an Indian Tribe) for the recovery of costs or damages under this Act incurred before the date of enactment of this section.

(d) *SAVINGS PROVISION.*—

(1) *EXISTING AGREEMENTS.*—A memorandum of agreement, memorandum of understanding, or similar agreement between the President and a State or Indian Tribe defining Federal and State or tribal response action responsibilities that was in effect as of the date of enactment of this section with respect to a facility to which subsection (a)(3) does not apply shall remain effective until the agreement expires in accordance with the terms of the agreement.

(2) *NEW AGREEMENTS.*—Nothing in this section precludes the President from entering into an agreement with a State or Indian Tribe regarding responsibility at a facility to which subsection (a)(3) does not apply.

SEC. 130. TRANSFER TO THE STATES OF RESPONSIBILITY AT NON-FEDERAL NATIONAL PRIORITIES LIST FACILITIES.

(a) *DEFINITIONS.*—In this section:

(1) *AUTHORIZED STATE.*—The term “authorized State” means a State that is authorized under subsection (c) to apply State cleanup program requirements, in lieu of the requirements of this Act, to the cleanup of a non-Federal listed facility.

(2) *DELEGABLE AUTHORITY.*—The term “delegable authority” means authority to perform all of the authorities included in any 1 or more of the following categories of authority:

(A) All authorities necessary to perform technical investigations, evaluations, and risk analyses.

(B) All authorities necessary to perform alternatives development and remedy selection.

(C) All authorities necessary to perform remedial design and remedial action.

(D) All authorities necessary to perform and operation maintenance.

(E) All authorities necessary to perform information collection and allocation of liability.

(3) *DELEGATED STATE.*—The term “delegated State” means a State to which delegable authority has been delegated under subsection (D).

(4) *DELEGATED AUTHORITY.*—The term “delegated authority” means a delegable authority that has been delegated to a delegated State under subsection (d).

(5) *DELEGATED FACILITY.*—The term “delegated facility” means a non-Federal listed facility with respect to which a delegable authority has been delegated to a State under subsection (d).

(6) *ENFORCEMENT AUTHORITY.*—The term “enforcement authority” means all authorities necessary to recover response costs, require potentially responsible parties to perform response actions, and otherwise compel implementation of a response action, including—

(A) issuance of an order under section 106(a);

(B) a response action cost recovery under section 107;

(C) imposition of a civil penalty or award under subsection (a)(1)(D) or (b)(4) of section 109;

(D) settlement under section 122;

(E) gathering of information under section 104(e); and

(F) any other authority identified by the Administrator under subsection (b).

(7) *NONDELEGABLE AUTHORITY.*—The term “nondelegable authority” means authority to—

(A) make grants to community advisory groups under section 117; and

(B) conduct research and development activities under any provision of this Act.

(8) *NON-FEDERAL LISTED FACILITY.*—The term “non-Federal listed facility” means a facility that—

(A) is not owned or operated by a department, agency, or instrumentality of the United States in any branch of the Government; and

(B) is listed on the National Priorities List.

(b) *METHODS FOR TRANSFER OF RESPONSIBILITY TO THE STATES.*—

(1) *IN GENERAL.*—The Administrator shall seek, to the extent consistent with the requirement to protect human health and the environment, to transfer to the States the responsibility to perform response actions at non-Federal listed facilities.

(2) *METHODS TO ACCOMPLISH TRANSFER.*—Responsibility may be transferred to a State by use of 1 or more of the following methods:

(A) Authorization under subsection (c).

(B) Delegation under subsection (d).

(3) *FACILITIES WITHIN TRIBAL JURISDICTION.*—

(A) *IN GENERAL.*—With respect to a facility that is located on Indian lands, the Administrator may grant authorization or delegation—

(i) to the Indian Tribe; or

(ii) to the State, with the consent of the Indian Tribe.

(B) *DEFINITION OF INDIAN LANDS.*—For the purposes of this subsection, the term “Indian lands” means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(c) *AUTHORIZATION.*—

(1) *IN GENERAL.*—The Administrator may grant to a State authority to apply any or all of the requirements of the State cleanup program in lieu of any or all of the requirements of this Act to the cleanup of one or more non-Federal listed facilities.

(2) *APPLICATION.*—A State seeking authorization shall submit to the Administrator an application identifying each non-Federal listed facility for which authorization is requested, including such information and documentation as the Administrator may require to enable the Administrator to determine whether and to what extent—

(A) the State has adequate legal authority, financial and personnel resources, organization, and expertise to implement, administer, and enforce a hazardous substance response program;

(B) the State cleanup program will be implemented in a manner that is protective of human health and the environment;

(C) the State has procedures to ensure public notice and, as appropriate, opportunity for comment on remedial action plans, consistent with section 117; and

(D) the State agrees to exercise its enforcement authorities to require that persons that are potentially liable under section 107(a), to the extent practicable, perform and pay for the response actions.

(3) *ACTION BY THE ADMINISTRATOR.*—

(A) *IN GENERAL.*—Not later than 180 days after receipt from a State of an application under paragraph (2) (unless the State agrees to a greater length of time), the Administrator shall—

(i) approve or disapprove the application; and

(ii) if the Administrator disapproves the application, include in the notice of disapproval an identification of each criterion under paragraph (2) that the Administrator determined was not met and an explanation of the basis for the determination.

(B) *FAILURE TO ACT.*—

(i) *IN GENERAL.*—If the Administrator does not make a determination under subparagraph (A) with respect to an application on or before the last day of the 180-day period specified in that subparagraph, any person may bring an action, without regard to the notice requirement of section 310(d)(1), to compel the Administrator to make a determination.

(ii) *RELIEF.*—In an action under clause (i)(I)—

(I) the court shall order the Administrator to approve or disapprove the application within 30 days after the date of the order; or

(II) if the Administrator or any other person interested in the application contends that action on the application should be delayed pending consideration of additional information not contained in the application itself or in comments submitted regarding the application—

(aa) remand the application to the Administrator only if the court finds good cause for the failure of the Administrator or other person to present or request the information; and

(bb) extend the period for consideration of the application to a date not later than 90 days after the date of the order.

(iii) NO PREJUDICE.—The failure of the Administrator to make a determination under subparagraph (A) shall not be considered to be a disapproval of the application.

(C) PUBLIC COMMENT.—The Administrator shall provide for public notice and an opportunity to comment on a decision to approve an application under this subsection.

(D) RESUBMISSION OF APPLICATION.—If the Administrator disapproves an application under paragraph (2), the State may resubmit the application at any time after receiving the notice of disapproval.

(E) NO ADDITIONAL TERMS OR CONDITIONS.—The Administrator shall not impose any term or condition on the approval of an application that meets the requirements stated in paragraph (2) (except a requirement that any technical deficiencies in the application be corrected).

(F) JUDICIAL REVIEW.—Approval or disapproval of an application or resubmitted application shall be considered final agency action subject to judicial review under section 113(b).

(4) EXPEDITED AUTHORIZATION.—

(A) PILOT PROGRAM.—

(i) IN GENERAL.—Notwithstanding paragraph (1), the Administrator shall provide an expedited process for the evaluation of the applications of not fewer than 6 States qualified for authorization under this section.

(ii) CRITERIA FOR APPROVAL.—Not later than 180 days after the date of enactment of this section, the Administrator shall publish criteria, in accordance with paragraph (2), for approval of an application for expedited authorization.

(iii) APPROVAL AND DISAPPROVAL.—An application submitted by a State identified under subparagraph (B) on or before the last day of the 12-month period beginning on the date of enactment of this section shall be deemed to be approved on the last day of the 180-day period beginning on the date on which the application is submitted unless, on or before that day, the Administrator publishes in the Federal Register an explanation why the State does not meet the criteria for authorization established under this section.

(iv) *REPORT TO CONGRESS.*—Not later than 3 years after the date of enactment of this section, the Administrator shall submit to Congress a report on the status of any facilities for which a State has received authorization under this subparagraph.

(B) *PERMANENT PROGRAM.*—

(i) *IN GENERAL.*—Not later than 3 years after the date of the enactment of this section, based on experience gained in the pilot program under subparagraph (A), the Administrator shall promulgate a regulation providing criteria for expedited authorization of States under this section.

(ii) *REQUIREMENTS.*—The regulation under clause (i) shall provide for notice and opportunity for public comment and a strict schedule for consideration and approval or disapproval of an application.

(d) *DELEGATION OF AUTHORITY.*—

(1) *IN GENERAL.*—Pursuant to an approved State application, the Administrator shall delegate authority to perform 1 or more delegable authorities with respect to 1 or more non-Federal listed facilities in the State.

(2) *IDENTIFICATION OF DELEGABLE AUTHORITIES.*—

(A) *IN GENERAL.*—Not later than 1 year after the date of enactment of this section, the President shall by regulation identify all of the authorities of the Administrator that shall be included in a delegation of any category of delegable authority described in subsection (a)(2).

(B) *LIMITATION.*—The Administrator shall not identify a nondelegable authority for inclusion in a delegation of any category of delegable authority.

(C) *ENFORCEMENT AUTHORITIES.*—A State seeking a delegation under this subsection—

(i) in addition to meeting the requirements of paragraph (3), shall demonstrate that the State's enforcement authorities are substantially equivalent to the enforcement authorities under this Act; and

(ii) shall use the State's enforcement authorities in carrying out delegable authorities.

(3) *APPLICATION.*—An application under paragraph (1) shall—

(A) identify each non-Federal listed facility for which delegation is requested;

(B) identify each delegable authority that is requested to be delegated for each non-Federal listed facility for which delegation is requested; and

(C) include such information and documentation as the Administrator may require to enable the Administrator to determine whether and to what extent—

(i) the State has adequate financial and personnel resources, organization, and expertise to implement, administer, and enforce a hazardous substance response program;

(ii) the State will implement the delegated authorities in a manner that is protective of human health and the environment; and

(iii) the State agrees to exercise its delegated authorities to require that persons that are potentially liable under section 107(a), to the extent practicable, perform and pay for the response actions.

(4) ACTION BY THE ADMINISTRATOR.—

(A) IN GENERAL.—Not later than 120 days after receiving an application from a State (unless the State agrees to a greater length of time for the Administrator to make a determination), the Administrator shall—

(i) issue a notice of approval of the application (including approval or disapproval regarding any or all of the facilities with respect to which a delegation of authority is requested or with respect to any or all of the authorities that are requested to be delegated); or

(ii) if the Administrator determines that the State does not meet 1 or more of the criteria under paragraph (3), issue a notice of disapproval, including an explanation of the basis for the determination.

(B) FAILURE TO ACT.—

(i) IN GENERAL.—If the Administrator does not make a determination under subparagraph (A) with respect to an application on or before the last day of the 120-day period specified in that subparagraph, any person may bring an action, without regard to the notice requirement of section 310(d)(1), to compel the Administrator to make a determination.

(ii) RELIEF.—In an action under clause (i)(I)—

(I) the court shall order the Administrator to approve or disapprove the application within 30 days after the date of the order; or

(II) if the Administrator or any other person interested in the application contends that action on the application should be delayed pending consideration of additional information not contained in the application itself or in comments submitted regarding the application—

(aa) remand the application to the Administrator only if the court finds good cause for the failure of the Administrator or other person to present or request the information; and

(bb) extend the period for consideration of the application to a date not later than 90 days after the date of the order.

(iii) NO PREJUDICE.—The failure of the Administrator to make a determination under subparagraph (A) shall not be considered to be a disapproval of the application.

(C) PUBLIC COMMENT.—The Administrator shall provide public notice and an opportunity for comment on an application under this subsection.

(D) *RESUBMISSION OF APPLICATION.*—If the Administrator disapproves an application under paragraph (1), the State may resubmit the application at any time after receiving the notice of disapproval.

(E) *NO ADDITIONAL TERMS OR CONDITIONS.*—The Administrator shall not impose any term or condition on the approval of an application that meets the requirements stated in paragraph (2) (except a requirement that any technical deficiencies in the application be corrected).

(E) *JUDICIAL REVIEW.*—Approval or disapproval of an application or resubmitted application shall be considered final agency action subject to judicial review under section 113(b).

(4) *DELEGATION AGREEMENT.*—On approval of a delegation of authority under this section, the Administrator and the delegated State shall enter into a delegation agreement that identifies each category of delegable authority that is delegated with respect to each delegated facility.

(e) *PERFORMANCE OF TRANSFERRED RESPONSIBILITIES.*—

(1) *IN GENERAL.*—A State to which responsibility is transferred under subsection (c) or (d) shall have sole authority (except as provided in subsection (f)) to perform the transferred responsibility.

(2) *COMPLIANCE WITH ACT.*—A delegated State shall implement each applicable provision of this Act (including regulations and guidance issued by the Administrator) so as to perform each delegated authority with respect to a delegated facility in the same manner as would the Administrator with respect to a facility that is not a delegated facility.

(f) *RETAINED FEDERAL AUTHORITIES.*—

(1) *WITHDRAWAL OF TRANSFER OF RESPONSIBILITY.*—

(A) *IN GENERAL.*—If at any time the Administrator finds that contrary to the terms of an approved application under subsection (c) or (d), a State to which responsibility at a non-Federal listed facility has been transferred under this section—

(i) lacks the required financial and personnel resources, organization, or expertise to administer and enforce the transferred responsibilities;

(ii) does not have adequate legal authority to perform the transferred responsibilities;

(iii) is failing to materially carry out the State's transferred responsibilities; or

(iv) is failing to operate its State cleanup program or exercise transferred responsibility in such a manner as to be protective of human health and the environment as required under section 121;

the Administrator may withdraw the transfer of responsibility after providing notice and opportunity to correct deficiencies under subparagraph (B).

(B) *NOTICE AND OPPORTUNITY TO CORRECT.*—If the Administrator proposes to withdraw a transfer of responsibility for any or all non-Federal listed facilities, the Administrator shall give the State written notice and allow the

State at least 90 days after the date of receipt of the notice to correct the deficiencies cited in the notice.

(C) *FAILURE TO CORRECT.*—If the Administrator finds that the deficiencies have not been corrected within the time specified in a notice under subparagraph (B), the Administrator may withdraw the transfer of responsibility after providing public notice and opportunity for comment.

(D) *JUDICIAL REVIEW.*—A decision of the Administrator to withdraw a transfer of responsibility shall be subject to judicial review under section 113(b).

(2) *NO EFFECT ON CERTAIN AUTHORITIES.*—Nothing in this section affects the authority of the Administrator under this Act to—

(A) perform a response action at a facility listed on the National Priorities List in a State to which a transfer of responsibility has not been made under this section or at a facility not included in a transfer of responsibility; or

(B) perform any element of a response action with respect to a non-Federal listed facility that is not included among the responsibilities transferred to a State with respect to the facility.

(3) *FEDERAL REMOVAL AUTHORITY.*—

(A) *NOTICE.*—Before performing an emergency removal action under section 104 at a non-Federal listed facility at which responsibility has been transferred to a State, the Administrator shall notify the State of the Administrator's intention to perform the removal.

(B) *STATE ACTION.*—If, within 48 hours after receiving a notification under subparagraph (A), the State notifies the Administrator that the State intends to take action to perform an emergency removal at the non-Federal listed facility, the Administrator shall not perform the emergency removal action unless the Administrator determines that the State has failed to act within a reasonable period of time to perform the emergency removal.

(C) *PUBLIC HEALTH OR ENVIRONMENTAL EMERGENCY.*—If the Administrator finds that any release or threat of release constitutes a public health or environmental emergency under section 104(a)(4) the Administrator may act immediately notwithstanding subparagraph (B).

(4) *FEDERAL ENFORCEMENT AUTHORITY.*—

(A) *IN GENERAL.*—In the case of a non-Federal listed facility at which—

(i) there has been a transfer of responsibility under this section; and

(ii) there is a release or threatened release of a hazardous substance, pollutant, or contaminant;

neither the President nor any other person may use any authority under this Act to take an administrative or judicial enforcement action or to bring a private civil action against any person regarding any matter that is within the scope of the transfer of responsibility, except as provided in subparagraph (B).

(B) *EXCEPTIONS.*—The President may bring an administrative or judicial enforcement action with respect to a non-Federal listed facility under this Act if—

(i) the State requests that the President provide assistance in the performance of a response action and that the enforcement bar in subparagraph (A) be lifted; or

(ii) after providing the Governor of the State notice and a reasonable opportunity to cure, the Administrator—

(I) makes a determination that the State is unwilling or unable to take appropriate action at a facility to respond to a release that constitutes a public health or environmental emergency; and

(II) obtains a declaratory judgment in United States district court that the State has failed to make reasonable progress in performance of a remedial action at the facility.

(C) *ACTION FOR CONTRIBUTION.*—Subparagraph (A) does not preclude an action for contribution for response costs incurred by any person.

(5) *COST RECOVERY.*—

(A) *RECOVERY BY A TRANSFEREE STATE.*—Of the amount of any response costs recovered from a responsible party by a State that is transferred responsibility at a non-federal listed facility under section 107—

(i) 25 percent of the amount of any Federal response cost recovered with respect to a facility, plus an amount equal to the amount of response costs incurred by the State with respect to the facility, may be retained by the State; and

(ii) the remainder shall be deposited in the Hazardous Substances Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1986.

(B) *RECOVERY BY THE ADMINISTRATOR.*—

(i) *IN GENERAL.*—The Administrator may take action under section 107 to recover response costs from a potentially responsible party for a non-federal listed facility for which responsibility is transferred to a State if—

(I) the State notifies the Administrator in writing that the State does not intend to pursue action for recovery of response costs under section 107 against the potentially responsible party; or

(II) the State fails to take action to recover response costs within a reasonable time in light of applicable statutes of limitation.

(ii) *NOTICE.*—If the Administrator proposes to commence an action for recovery of response costs under section 107, the Administrator shall give the State written notice and allow the State at least 90 days after receipt of the notice to commence the action.

(iii) *NO FURTHER ACTION.*—If the Administrator takes action against a potentially responsible party under section 107 relating to a release from a non-Federal listed facility after providing a State notice under clause (ii), the State may not take any other action for recovery of response costs relating to that release under this Act or any other Federal or State law.

(6) *DELISTING OF NATIONAL PRIORITY LIST FACILITIES.*—

(A) *DELISTING REQUEST.*—A State may request that the Administrator remove from the National Priorities List all or part of a facility to which responsibility has been transferred to the State under this section.

(B) *ACTION BY THE ADMINISTRATOR.*—The Administrator shall—

(i) promptly consider a request under subparagraph (A); and

(ii) remove the facility or part of the facility from the National Priorities List unless the delisting would be inconsistent with a requirement of this Act.

(C) *DENIAL OF REQUEST.*—If the Administrator decides to deny a request for delisting under subparagraph (A), the Administrator shall publish the decision in the Federal Register with an explanation of the reasons for the denial.

(D) *REPORT.*—At the end of each calendar year, the Administrator shall submit to Congress a report describing actions taken under this paragraph during the year.

(g) *FUNDING.*—

(1) *IN GENERAL.*—The Administrator shall provide grants to or enter into contracts or cooperative agreements with States to which responsibility has been transferred under this section.

(2) *NO CLAIM AGAINST FUND.*—Notwithstanding any other law, funds to be granted under this subsection shall not constitute a claim against the Fund or the United States.

(3) *INSUFFICIENT FUNDS AVAILABLE.*—If funds are unavailable in any fiscal year to satisfy all commitments made under this section by the Administrator, the Administrator shall have sole authority and discretion to establish priorities and to delay payments until funds are available.

(4) *AMOUNTS OF FUNDING.*—

(A) *IN GENERAL.*—Once every 3 years with respect to subparagraphs (B) and (C), and once each year with respect to subparagraph (D), the Administrator and the State shall determine the amount of Federal funding that will be required for the State to undertake the responsibilities under this section.

(B) *ADMINISTRATIVE COSTS.*—

(i) *IN GENERAL.*—The Administrator shall provide funding for administration of the State response program in place of the Federal program under an authorization under subsection (c) or a delegation under subsection (d), based on the number of facilities and the activities at the facilities for which the State has received delegation or authorization.

(ii) *AMOUNT OF FUNDING.*—

(I) *CALCULATION BASED ON FIXED COSTS.*—The amount of funding under clause (i) shall be based on a calculation of the fixed costs of program administration.

(II) *MINIMUM AMOUNT.*—In the case of no State shall the amount of funding be less than the funding levels necessary for Federal administration of the same activities.

(C) *PRECONSTRUCTION COSTS.*—

(i) *IN GENERAL.*—The Administrator and a State shall agree on the amount of Federal funding for all preconstruction activities for which the State has received an authorization under subsection (c) or delegation under subsection (d).

(ii) *AMOUNT OF FUNDING.*—The amount of funding under clause (i) may be based on anticipated outputs and standard pricing factors.

(D) *REMEDY CONSTRUCTION COSTS.*—The Administrator shall provide funding for remedy construction at a site for which the State has an authorization under subsection (c) or delegation under subsection (d) if—

(i) the remedial design for the facility is complete; and

(ii) the State certifies that—

(I) there are no financially viable potentially responsible parties capable of performing the response action; or

(II) enforcement measures have been attempted and the remedial action would be delayed without Federal funding.

(5) *PRIORITIZATION PROCESS.*—

(A) *IN GENERAL.*—In a process for allocating funds among facilities, the Administrator shall include all facilities that are the subject of a State response program under an authorization under subsection (c) or delegation under subsection (d).

(B) *CONSIDERATION.*—In allocating funding among facilities, the Administrator—

(i) shall not take into consideration whether a listed facility is the subject of a State response program under an authorization under subsection (c) or a delegation under subsection (d); and

(ii) shall apply the same decisionmaking criteria and factors (including the need to maintain activity at facilities at which construction has been commenced) in the same manner to all facilities.

(C) *PUBLICATION OF LIST.*—The Administrator shall publish annually a list of facilities at which response actions are proposed to be taken and the funding amounts for each such response action.

(6) *USE OF FUNDS.*—

(A) *PRE-REMEDIAL FUNDS.*—A State may use funds provided under this subsection to take any actions or perform any duties necessary to implement any authorization or del-

egation that the State has received under subsection (c) or (d).

(B) *REMEDY CONSTRUCTION FUNDS.*—A State shall use funds provided under this subsection to construct the remedy at the facility for which funding is provided.

(7) *LIMITATION ON REIMBURSEMENT FOR REMOVAL ACTIONS UNDER SECTION 104.*—Reimbursement to a State for exercising any removal authority under subsection (c) or (d) shall be limited to facilities for which removal authority is specifically delegated or authorized under those subsections, except as provided in section 123.

(8) *PERMITTED USE OF GRANT FUNDS.*—A State to which responsibility has been transferred under this section may use grant funds, in accordance with this Act and the National Contingency Plan, to take any action or perform any duty necessary to implement the authority delegated to the State under this section.

(9) *COST SHARE.*—A State receiving a grant under this subsection—

(A) shall provide an assurance that the State will pay any amount required under section 104(c)(3); and

(B) may not use grant funds to pay any amount required under section 104(c)(3).

(10) *CERTIFICATION OF USE OF FUNDS.*—

(A) *IN GENERAL.*—Not later than 1 year after the date on which a State receives funds under this subsection, and annually thereafter, the Governor of the State shall submit to the Administrator—

(i) a certification that the State has used the funds in accordance with the requirements of this Act and the National Contingency Plan; and

(ii) information describing the manner in which the State used the funds.

(B) *REVIEW OF USE OF FUNDS.*—

(i) *IN GENERAL.*—The Administrator shall review a certification submitted by the Governor under subparagraph (A) not later than 120 days after the date of its submission.

(ii) *FINDING OF USE OF FUNDS INCONSISTENT WITH THIS ACT.*—If the Administrator finds that funds were used in a manner that is inconsistent with this Act, the Administrator shall notify the Governor in writing not later than 120 days after receiving the Governor's certification.

(iii) *EXPLANATION.*—Not later than 30 days after receiving a notice under clause (ii), the Governor shall—

(I) explain why the finding of the Administrator is in error; or

(II) explain to the satisfaction of the Administrator how any misapplication or misuse of funds will be corrected.

(iv) *FAILURE TO EXPLAIN.*—If the Governor fails to make an explanation under clause (iii) to the satisfac-

tion of the Administrator, the Administrator may request reimbursement of such amount of funds as the Administrator finds was misapplied or misused.

(v) *REPAYMENT OF FUNDS.*—If the Administrator fails to obtain reimbursement from the State within a reasonable period of time, the Administrator may, after 30 days’ notice to the State, bring a civil action in United States district court to recover from the transferee State any funds that were advanced for a purpose or were used for a purpose or in a manner that is inconsistent with this Act.

(C) *REGULATIONS.*—Not later than 1 year after the date of enactment of this section, the Administrator shall promulgate a regulation describing with particularity the information that a State shall be required to provide under subparagraph (A)(ii).

(h) *COOPERATIVE AGREEMENTS.*—Nothing in this section affects the authority of the Administrator under section 104(d)(1) to enter into a cooperative agreement with a State, a political subdivision of a State, or an Indian Tribe to carry out actions under section 104.

SEC. 131. FACILITY-SPECIFIC RISK EVALUATIONS.

(a) *IN GENERAL.*—The goal of a facility-specific risk evaluation performed under this Act is to provide informative and understandable estimates that neither minimize nor exaggerate the current or potential risk posed by a facility.

(b) *RISK EVALUATION PRINCIPLES.*—

(1) *IN GENERAL.*—A facility-specific risk evaluation shall—

(A)(i) use chemical-specific and facility-specific data in preference to default assumptions whenever it is practicable to obtain such data; or

(ii) if it is not practicable to obtain such data, use a range and distribution of realistic and scientifically supportable default assumptions;

(B) ensure that the exposed population and all current and potential pathways and patterns of exposure are evaluated;

(C) consider the current or reasonably anticipated future use of the land and water resources in estimating exposure; and

(D) consider the use of institutional controls that comply with the requirements stated in section 121(b)(4).

(2) *CRITERIA FOR USE OF SCIENCE.*—Any chemical-specific and facility-specific data or default assumptions used in connection with a facility-specific risk evaluation shall be consistent with the criteria for the use of science in decisionmaking stated in subsection (e).

(3) *INSTITUTIONAL CONTROLS.*—In conducting a risk assessment to determine the need for remedial action, the President may consider only institutional controls that are in place at the facility at the time at which the risk assessment is conducted.

(c) *USES.*—A facility-specific risk evaluation shall be used to—

(1) determine the need for remedial action;

(2) evaluate the current and potential hazards, exposures, and risks at the facility;

(3) screen out potential contaminants, areas, or exposure pathways from further study at a facility;

(4) evaluate the protectiveness of alternative remedial actions proposed for a facility;

(5) demonstrate that the remedial action selected for a facility is capable of protecting human health and the environment considering the current and reasonably anticipated future use of the land and water resources; and

(6) establish protective concentration levels if no applicable requirement under section 121(a)(1)(C) exists or if an otherwise applicable requirement is not sufficiently protective of human health and the environment under section 121(a)(1)(B).

(d) **RISK COMMUNICATION PRINCIPLES.**—In carrying out this section, the President shall ensure that the presentation of information on public health effects is comprehensive, informative, and understandable. The document reporting the results of a facility-specific risk evaluation shall specify, to the extent practicable—

(1) each population addressed by any estimate of public health effects;

(2) the expected risk or central estimate of risk for the specific populations;

(3) each appropriate upper-bound or lower-bound estimate of risk;

(4) each significant uncertainty identified in the process of the assessment of public health effects and research that would assist in resolving the uncertainty; and

(5) peer-reviewed studies known to the President that support, are directly relevant to, or fail to support any estimate of public health effects and the methodology used to reconcile inconsistencies in the scientific data.

(e) **USE OF SCIENCE IN DECISIONMAKING.**—In carrying out this section, the President shall use—

(1) the best available peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and

(2) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data).

(f) **REGULATIONS.**—Not later than 18 months after the date of enactment of this section, the President shall issue a final regulation implementing this section.

SEC. 132. PRESUMPTIVE REMEDIAL ACTIONS.

(a) **IN GENERAL.**—In order to streamline the remedial action selection process, the Administrator shall establish presumptive remedial actions that—

(1) identify preferred technologies and approaches (which may include as an element institutional and engineering controls, if appropriate) for common categories of facilities; and

(2) identify, as appropriate, site categorization methodologies for those categories of facilities.

(b) **PRESUMPTIVE REMEDIAL ACTIONS.**—

(1) *IN GENERAL.*—The Administrator shall establish presumptive remedial actions that are technically practicable, cost-effective, and demonstrated methods to protect human health and the environment under this Act.

(2) *MATTERS TO BE TAKEN INTO ACCOUNT.*—In establishing a presumptive remedial action, the Administrator shall take into account the goals stated in section 121(a)(1), the factors stated in section 121(a)(3), and the rules stated in section 121(b).

(3) *PROCEDURE; JUDICIAL REVIEW.*—The identification of categories of facilities and site categorization methodologies and the establishment of presumptive remedial actions under this section shall not be subject to—

(A) the rulemaking procedure of section 553 of title 5, United States Code; or

(B) judicial review.

(c) *USE OF PRESUMPTIVE REMEDIAL ACTIONS.*—In appropriate circumstances, the Administrator may select a presumptive remedial action—

(1) from among technologies and approaches identified under subsection (a)(1); or

(2) based on only the site characterization methodologies identified under subsection (a)(2), without consideration of technologies, approaches, or methodologies that have not been identified for that category of facility in the list prepared under subsection (d).

(d) *NOTICE AND PERIODIC REVIEW.*—

(1) *INITIAL LIST.*—Not later than 1 year after the date of enactment of this section, the Administrator shall make available to the public a list of presumptive remedial actions identified under subsection (a) that are available for specific categories of facilities, and solicit information to assist the Administrator in modifying or adding to the list, as appropriate.

(2) *UPDATED LISTS.*—At least once every 3 years, the Administrator shall solicit information from the public for the purpose of updating presumptive remedial actions, as appropriate, to incorporate emerging technologies, approaches, or methodologies or designate additional categories of facilities.

SEC. 133. AMENDMENTS TO THE NATIONAL CONTINGENCY PLAN.

(a) *IN GENERAL.*—In order to reflect the amendments made by the Superfund Cleanup Acceleration Act of 1998 (including subsections (b) and (c) of section 134 and section 132), not later than 180 days after the date of enactment of this section, the President shall—

(1) revise the National Contingency Plan; and

(2) as appropriate, issue and periodically update Agency guidance.

SEC. 134. REMEDIAL ACTION PLANNING AND IMPLEMENTATION.

(a) *ACCELERATED RESPONSE GENERALLY.*—

(1) *IN GENERAL.*—To the extent practicable, and consistent with requirements in section 121, the President shall seek to expedite implementation of response actions and reduce transaction costs by implementing measures to—

(A) accelerate and increase the efficiency of the remedy selection and implementation processes;

(B) tailor the level of oversight of performance of a response action by a potentially responsible party or group of potentially responsible parties considering the circumstances of the response action; and

(C) streamline the processes for submittal, review, and approval of plans and other documents.

(b) *ACCELERATION OF INVESTIGATIVE ACTIVITIES AND RESPONSE ACTIONS.*—

(1) *PHASING OF INVESTIGATIVE AND RESPONSE ACTIVITIES.*—The President shall seek to expedite protection of human health and the environment and completion of response actions in an efficient and cost-effective manner through appropriate phasing and integration of investigative and response activities.

(2) *USE OF RESULTS OF INITIAL INVESTIGATIONS.*—The results of initial investigations of a facility shall be used, as appropriate—

(A) to focus subsequent data collection efforts in order to characterize the nature and extent of contamination at the facility in an efficient and cost-effective manner; or

(B) to develop and support multiple phases of a response action, as appropriate.

(3) *EARLY RESPONSE ACTIONS.*—

(A) *IMPLEMENTATION.*—An early response action under section 104 or 106 shall be implemented, to the extent practicable, to—

(i) prevent exposure to hazardous substances, pollutants, and contaminants; and

(ii) prevent further migration of hazardous substances, pollutants, or contaminants.

(B) *USE OF RESULTS.*—The results of an early response action shall be used to—

(i) further characterize the nature and extent of contamination at the facility; and

(ii) provide information needed to evaluate and select any additional appropriate response actions that are needed to protect human health and the environment.

(C) *COMPLIANCE WITH REQUIREMENTS.*—An early response action shall—

(i) meet the requirements of this Act (including the requirements for public participation) and

(ii) to the extent practicable, contribute to the efficient performance of any long-term remedial action with respect to the release or threatened release concerned.

(c) *PARTICIPATION IN THE RESPONSE ACTION PROCESS BY POTENTIALLY RESPONSIBLE PARTIES.*—

(1) *REQUIREMENTS.*—When the President determines under paragraph (5) that a response action will be performed properly and promptly by a potentially responsible party or group of potentially responsible parties in accordance with the requirements of this Act, the President may allow the potentially responsible party or group of potentially responsible parties to perform the response action in accordance with this section, section 106, or section 122.

(2) *PERFORMANCE OF RESPONSE ACTION.*—The President may authorize performance of a response action by a potentially responsible party or group of potentially responsible parties only if—

(A) the President determines that the potentially responsible party or group of potentially responsible parties is qualified to perform the response action; and

(B) the potentially responsible party or group of potentially responsible parties agrees to reimburse the Fund for any cost incurred by the President in overseeing and reviewing the performance of the response action by the potentially responsible party or group of potentially responsible parties, including the costs of contracting or arranging for a qualified person to assist the President in conducting the oversight and review.

(3) *OVERSIGHT OF RESPONSE ACTIONS.*—The President may tailor the level of oversight that will accompany performance of a response action by the potentially responsible party or group of potentially responsible parties based on factors including the factors set forth in paragraph (5).

(4) *RESPONSE ACTION ACTIVITIES.*—The President may authorize a potentially responsible party or group of potentially responsible parties to perform removal and remedial actions, including—

(A) remedial investigations (including risk assessments);

(B) feasibility studies;

(C) preparation of draft proposed remedial action plans;

(D) remedial designs;

(E) operation and maintenance;

(F) maintenance of institutional controls;

(G) studies that the President determines are necessary for the President to conduct review under section 135(c)(2); and

(H) any response action that the President determines is required as a result of the review under of section 135(c)(2).

(5) *OVERSIGHT FACTORS.*—In determining for the purposes of paragraph (1) whether a potentially responsible party or group of potentially responsible parties will perform a response action properly and promptly in accordance with requirements of this Act, and in determining the appropriate level of oversight required for performance by a potentially responsible party or group of potentially responsible parties of a response action, the President shall consider factors that include—

(A) the technical and financial capability of the potentially responsible party or group of potentially responsible parties;

(B) the willingness of the potentially responsible party or group of potentially responsible parties to complete performance of the response action within the period of time prescribed by the President.

(C) the assurance of the potentially responsible party or group of potentially responsible parties that it will comply with the requirements of this Act, the National Contingency Plan, and guidelines issued by the Administrator;

(D) the level of effort that the Environmental Protection Agency has expended in reviewing performance by the potentially responsible party or group of potentially responsible parties in other instances regulated by the Agency;

(E) the history of cooperation of the potentially responsible party or group of potentially responsible parties in other Agency actions;

(F) the level of concern of the local community;

(G) the degree of technical complexity or uncertainty associated with the response action to be performed; and

(H) the resources of the Environmental Protection Agency.

(d) DRAFT PROPOSED REMEDIAL ACTION PLANS.—

(1) IN GENERAL.—The Administrator shall issue guidelines identifying the contents of a draft proposed remedial action plan, which shall include, at a minimum—

(A) a brief description of the remedial alternatives that were analyzed, including the respective capital costs, operation and maintenance costs, and estimated present worth costs of the remedial alternatives;

(B) a recommended remedial action alternative; and

(C) a summary of information relied on to make the recommendation, including a brief description of site risks.

(2) ADMINISTRATIVE RECORD.—Nothing in this paragraph shall affect or impede the establishment by the President of an administrative record under section 113(k).

(e) REMEDY REVIEW BOARD.—

(1) ESTABLISHMENT.—

(A) IN GENERAL.—In order to promote cost-effective remedy selection decisions, the Administrator shall establish and appoint the members of at least 1 remedy review board consisting of a balance of technical and policy experts within the Environmental Protection Agency and other Federal and State agencies with responsibility for remediating contaminated facilities.

(B) STATE RESPONSIBILITY.—If responsibility for the conduct of a response action at a facility has been transferred to a State under section 130, technical and policy experts from State agencies with responsibility for remediating contaminated facilities shall constitute not less than $\frac{1}{3}$ of the membership of the remedy review board that reviews a draft proposed remedial action plan for the facility.

(2) PROCEDURES AND CRITERIA.—

(A) *PROCEDURES.*—Not later than 180 days after the date of enactment of this section, the Administrator shall promulgate a regulation that establishes procedures for the operation of remedy review board, including cost-based or other appropriate criteria for determining which draft proposed remedial action plans will be eligible for review by a remedy review board.

(B) *CRITERIA.*—

(i) *DIFFERING CRITERIA.*—The Administrator may develop different criteria under subparagraph (A) for different categories of facilities.

(ii) *PROPORTION OF FACILITIES ELIGIBLE FOR REVIEW.*—Application of the criteria under subparagraph (A) shall, to the extent practicable, result in the eligibility for review of not less than an annual average of $\frac{1}{3}$ of the number of draft proposed remedial action plans prepared and ready for issuance for public comment.

(3) *REVIEW.*—

(A) *TIMING.*—Subject to paragraph (4), before issuance for public comment, a draft proposed remedial action plan that meets the criteria under paragraph (2) (B) shall be submitted to the remedy review board.

(B) *NO REVIEW.*—A remedy review board shall not review a remedy that meets the criteria under paragraph (2) (B) if the Administrator determines that review by the remedy review board would result in an unacceptable delay in taking measures to achieve protection of human health or the environment.

(4) *NOTICE AND COMMENT.*—

(A) *NOTICE.*—The Administrator shall give interested parties (including representatives of the State and local community in which the facility is located) adequate notice of the submission of a draft proposed remedial action plan to the remedy review board and an opportunity to comment.

(B) *COMMENT.*—

(i) *IN GENERAL.*—Potentially responsible parties that are participating in the performance of a remedial investigation and feasibility study shall be permitted to submit comments on a draft remedial action plan to a remedy review board and be provided a reasonable opportunity to meet with the remedy review board.

(ii) *LENGTH OF SUBMISSIONS.*—Any limitation on the length of a submission established by the Administrator shall be rationally related to the level of detail contained in the draft proposed plan.

(5) *RECOMMENDATIONS.*—

(A) *IN GENERAL.*—A remedy review board shall provide recommendations to the Administrator.

(B) *CONSIDERATIONS.*—In preparing a recommendation, a remedy review board shall consider—

(i) whether the proposed remedial action meets the requirements of section 121;

(ii) the nature of the facility;

- (iii) the risks posed by the facility;
- (iv) the opinions of the affected Environmental Protection Agency regional administrator and State government regarding the proposed remedial action;
- (v) the quality and reasonableness of the cost estimates; and
- (vi) any other relevant factors that the Administrator considers appropriate.

(C) EPA CONSIDERATION OF RECOMMENDATIONS.—

(i) SUBSTANTIAL WEIGHT.—In determining whether to modify a draft proposed remedial action plan, the Administrator shall give substantial weight to the recommendations of a remedy review board.

(ii) DECISION NOT TO FOLLOW RECOMMENDATION.—A decision by the Administrator not to follow a recommendation of the remedy review board shall not, by itself, render a decision arbitrary and capricious.

(f) APPROVAL OF DRAFT PROPOSED REMEDIAL ACTION PLAN.—The President may approve a draft proposed remedial action plan prepared by a potentially responsible party or group of potentially responsible parties that the President has determined to be qualified under subsection (c). If the President approves the draft proposed remedial action plan, the President may treat the document as the President's proposed plan, and provide it to the public for comment under section 117(a).

SEC. 135. COMPLETION OF PHYSICAL CONSTRUCTION AND DELISTING.

(a) IN GENERAL.—

(1) PROPOSED NOTICE OF COMPLETION AND PROPOSED DELISTING.—Not later than 180 days after the completion by the President of physical construction necessary to implement a response action at a facility, or not later than 180 days after receipt of a notice of such completion from the implementing party, the President shall publish a notice of completion and proposed delisting of the facility from the National Priorities List in the Federal Register and in a newspaper of general circulation in the area where the facility is located.

(2) PHYSICAL CONSTRUCTION.—For the purposes of paragraph (1), physical construction necessary to implement a response action at a facility shall be considered to be complete when—

(A) construction of all systems, structures, devices, and other components necessary to implement a response action for the entire facility has been completed in accordance with the remedial design plan; or

(B) no construction, or no further construction, is expected to be undertaken.

(3) CONSTRUCTION COMPLETE BEFORE ENACTMENT.—Any facility at which physical construction necessary to implement a response action has been completed before the date of enactment of this section shall qualify for a proposed delisting under paragraph (1), if the procedures set out in paragraph (1) for seeking a proposal to delist the facility are followed.

(4) *COMMENTS.*—The public shall be provided 30 days in which to submit comments on the notice of completion and proposed delisting.

(5) *FINAL NOTICE.*—

(A) *IN GENERAL.*—Not later than 60 days after the end of the comment period, or such extended period as may be determined under subparagraph (B), the President shall—

(i) issue a final notice of completion and delisting or a notice of withdrawal of the proposed notice until the implementation of the remedial action is determined to be complete; and

(ii) publish the notice in the Federal Register and in a newspaper of general circulation in the area where the facility is located.

(B) *EXTENSION OF TIME.*—The President may extend the 60-day period for issuing and publishing a final notice under subparagraph (A) if the President determines, for good cause, that additional time is needed, and publishes an explanation of the need for more time in the Federal Register and in a newspaper of general circulation in the area where the facility is located.

(6) *EFFECT OF DELISTING.*—The delisting of a facility shall have no effect on—

(A) liability allocation requirements or cost-recovery provisions otherwise provided in this Act;

(B) any liability of a potentially responsible party or the obligation of any person to provide continued operation and maintenance;

(C) the authority of the President to make expenditures from the Fund relating to the facility; or

(D) the enforceability of any consent order or decree relating to the facility.

(b) *CERTIFICATION.*—A final notice of completion and delisting shall include a certification by the President that the facility has met all of the requirements of the remedial action plan (except requirements for continued operation and maintenance).

(c) *OPERATION AND MAINTENANCE.*—The need to perform continued operation and maintenance at a facility shall not be the sole basis for delaying delisting of the facility or issuance of the certification if performance of operation and maintenance is subject to a legally enforceable agreement, order, or decree.

SEC. 136. REMEDY REVIEW PROCESS.

(a) *DEFINITION OF REMEDY REVIEW BOARD.*—In this section, the term “remedy review board” means a remedy review board established under section 134(e).

(b) *PETITIONS FOR REMEDY UPDATE.*—

(1) *FILING.*—In the case of a facility or operable unit with respect to which a record of decision was signed before the date of enactment of this section and that meets the criteria of paragraph (3), the implementor of the record of decision, not later than 1 year after the date of enactment of this section, may submit to a remedy review board a petition to update the record of decision to incorporate in the remedial action at the facility or

operable unit an alternative technology, methodology, or approach.

(2) *PROVISION OF COPIES.*—The implementor shall provide a copy of the petition to the State, affected Indian Tribes, local governments, any applicable community action group, and the recipient of any technical assistance grant.

(3) *CRITERIA FOR ACCEPTANCE FOR REVIEW.*—

(A) *IN GENERAL.*—A remedy review board may accept for review a petition for remedy update if the implementor demonstrates that—

(i) the alternative remedial action proposed in the petition meets the requirements of section 121;

(ii) the Governor of the State in which the facility is located does not object to consideration of the petition;

(iii) the record of decision—

(I) was issued before September 27, 1996; or

(II) in the case of a record of decision involving primarily ground water extraction and treatment remedies, was issued before October 1, 1993; and

(iv)(I) the record of decision has an estimated implementation cost in excess of \$30,000,000; or

(II) the record of decision with an estimated implementation cost of between \$5,000,000 and \$30,000,000, and the alternative remedial action achieves a cost saving of at least 50 percent of the total costs of the record of decision.

(B) *WAIVER OF COST THRESHOLD.*—With the concurrence of the Administrator, a remedy review board may approve a petition that does not meet the cost threshold of subparagraph (A)(iv).

(4) *PRIORITIZATION OF PETITIONS.*—

(A) *IN GENERAL.*—A remedy review board shall prioritize its decision to accept petitions for remedy update based on the criteria of paragraph (3) and the potential cost savings of the proposed remedy update.

(B) *CONSIDERATIONS.*—When factoring cost savings into the prioritization of petitions for remedy update, a remedy review board shall consider—

(i) the gross cost saving estimated for the proposed remedy update; and

(ii) the proportion of total remedy costs that the saving would represent.

(c) *REVIEW FACTORS.*—In formulating a recommendation, a remedy review board shall consider factors that include—

(1) the continued relevance of the exposure scenarios and risk assumptions in the original remedy;

(2) the effectiveness of the original cleanup strategy in light of any new information or changed circumstances at the facility;

(3) the appropriateness and attainability of the original cleanup goals;

(4) the ability to enhance the original cleanup strategy through the application of new technologies, methodologies, or approaches;

(5) the level and degree of community, State, tribal, and potentially responsible parties involvement and consensus in selecting the original cleanup strategy;

(6) the reasonableness of the original cost estimates and whether the costs remain justifiable and cost-effective;

(7) the consistency of the original cleanup strategy with similar remedies selected by the Agency; and

(8) the effectiveness of the original cleanup strategy in meeting the cleanup goals.

(d) **RECOMMENDATIONS.**—Not later than 180 days after the acceptance of a petition for remedy update, a remedy review board shall—

(1) submit to the Administrator a written recommendation with respect to the petition; and

(2) provide responses to all comments submitted during the review process with respect to the petition.

(e) **CONSIDERATION OF RECOMMENDATIONS.**—In deciding whether to approve a proposed remedy update, the Administrator shall give substantial weight to the recommendation of a remedy review board.

(f) **REPORT TO CONGRESS.**—

(1) **IN GENERAL.**—The Administrator shall submit an annual report to Congress on the Administrator's activity in reviewing and modifying records of decision signed before the date of enactment of this section (whether or not the records of decision meet the criteria under subsection (b)(3))—

(A) to apply the amendments made to section 121 by the Superfund Cleanup Acceleration Act of 1998;

(B) to incorporate new information regarding science, technology, and site conditions; or

(C) to improve the cost-effectiveness of remedial actions.

(2) **CONTENTS.**—A report under paragraph (1) shall describe—

(A) the petitions for remedy update received;

(B) the disposition of the petitions for remedy update; and

(C) the cost savings, if any, that are estimated to result from the remedy updates.

(g) **REMEDIAL ACTION REVIEWS UNDER SECTION 121(C).**—In conducting remedial action reviews under section 121(c), the Administrator should—

(1) give priority consideration to records of decision that—

(A) were issued before October 1, 1993; and

(B) involve primarily ground water extraction and treatment remedies for dense, nonaqueous phase liquids; and

(2) based on the review factors stated in subsection (c), make a determination whether a remedy update is justified.

SEC. 137. ALLOCATION OF LIABILITY FOR CERTAIN FACILITIES.

(a) **DEFINITIONS.**—*In this section:*

(1) **ALLOCATED SHARE.**—*The term “allocated share” means the percentage of responsibility assigned to a potentially responsible party by the allocator in an allocation report under subsection (h).*

(2) **ALLOCATION PARTY.**—

(A) **IN GENERAL.**—*The term “allocation party” means a party, named on a list of parties issued by the Administrator, that will be subject to the allocation process under this section.*

(B) **EXCLUSION.**—

(i) **IN GENERAL.**—*The term “allocation party” does not include a person that is qualified for an exemption under subsection (q), (r), or (s), but such a person shall be required to respond to information requests under subsections (d) and (j).*

(ii) **DETERMINATION OF ALLOCATION SHARES.**—*Notwithstanding clause (i), an allocator shall determine the allocation share of a person that is qualified for the exemption under subsection (q) or (s) for the purpose of determining the orphan share under section 137(i).*

(3) **ALLOCATOR.**—*The term “allocator” means a neutral third party retained to conduct an allocation for a facility under this section.*

(4) **ADR NEUTRAL.**—*The term “ADR neutral” means an alternative dispute resolution neutral retained to assist the parties at a facility in resolving a dispute related to a settlement.*

(5) **MANDATORY ALLOCATION FACILITY.**—*The term “mandatory allocation facility” means—*

(A) *a non-federally owned vessel or facility listed on the National Priorities List with respect to which response costs are incurred after the date of enactment of this section and at which there are 2 or more potentially responsive persons (including 1 or more persons that are qualified for an exemption under subsection (q), (r), or (s) of section 107), if at least 1 potentially responsible person is viable and not entitled to an exemption under subsection (q), (r), or (s) of section 107 for which the potentially responsible parties demonstrate that the response costs to be incurred after the date of enactment of this Act will exceed \$1,000,000;*

(B) *a federally owned vessel or facility listed on the National Priorities List with respect to which response costs are incurred after the date of enactment of this section, and with respect to which 1 or more potentially responsible parties (other than a department, agency, or instrumentality of the United States) are liable or potentially liable if at least 1 potentially liable party is liable and not entitled to an exemption under subsection (q), (r), or (s) of section 107 for which the potentially responsible parties demonstrate that the response costs to be incurred after the date of enactment of this Act will exceed \$1,000,000; and*

(C) a codisposal landfill with respect to which costs are incurred after the date of enactment of this section.

(6) ORPHAN SHARE.—The term “orphan share” means the total of the allocated shares determined by the Administrator and the parties to a negotiation under subsection (e) or by the allocator under subsection (i).

(b) ALLOCATIONS OF RESPONSIBILITY.—

(1) MANDATORY ALLOCATIONS.—The Administrator shall conduct the allocation process under this section for each mandatory allocation facility.

(2) REQUESTED ALLOCATIONS.—For a facility (other than a mandatory allocation facility) involving 2 or more potentially responsible parties, the Administrator may conduct the allocation process under this section if the allocation is requested in writing by a potentially responsible party that has—

(A) incurred response costs with respect to a response action; or

(B) resolved any liability to the United States with respect to a response action in order to assist in allocating shares among potentially responsible parties.

(3) ORPHAN SHARE.—An allocation performed at a vessel or facility identified under paragraph (2) shall not require payment of an orphan share under subsection (i) or contribution under subsection (o).

(4) CODISPOSAL LANDFILLS.—In determining the order in which to conduct allocations at facilities identified under paragraph (1) or (2), the Administrator shall give priority to allocations at codisposal landfills.

(5) EXCLUDED FACILITIES.—A facility for which there was in effect as of the date of enactment of this section a settlement decree or order that determines the liability and allocated shares of all potentially responsible parties with respect to the response action shall not be considered to be a mandatory allocation facility for the purposes of paragraph (1).

(6) LIMITATION OF CERTAIN FACILITIES.—

(A) IN GENERAL.—In the case of a mandatory allocation facility that is the subject of a judicial or administrative consent decree or unilateral administrative order under section 106 that was issued, signed, lodged, or entered on or before February 1, 1998, in which there may be an orphan share, there shall be no mandatory allocation process under this section for the purpose of determining the amount of the orphan share unless, after the Administrator rejects a request for mandatory allocation, a neutral third party determines that the amount of the orphan share of the response costs remaining to be incurred can reasonably be expected to amount to \$500,000 or more.

(B) PRESENTATION TO NEUTRAL THIRD PARTY.—Two or more persons subject to a consent decree or unilateral administrative order described in subparagraph (A) that seek an allocation process for the purpose of determining the amount of the orphan share shall—

(i) nominate, with the approval of the Administrator, a neutral third party to make the determination under subparagraph (A); and

(ii) not later than 30 days after selection of the neutral third party, submit to the neutral third party a written presentation showing the amount of the orphan share of the response costs then remaining to be incurred.

(C) DETERMINATION.—Not later than 60 days after the receipt of the presentation under subparagraph (B), the neutral third party shall determine the reasonably expected amount of the orphan share of the response costs remaining to be incurred.

(D) CONCLUSIVENESS OF DETERMINATION.—The determination of a neutral third party under subparagraph (C) shall be conclusive on all persons and shall not be subject to review by the Administrator or any court.

(E) COST.—The cost of obtaining a determination under this paragraph shall be paid by the person or group of persons seeking an orphan share allocation.

(F) SCOPE.—If the requirement of subparagraph (A) is met, an allocation shall be performed for the sole purpose of determining the orphan share under subsection (i)(1). The allocation shall take into account any monetary or nonmonetary compromises made by the Administrator in negotiating the underlying consent decree. If the allocator under subsection (i)(1) determines that the amount of the orphan share of the response costs remaining to be incurred is less than \$500,000, there shall be no orphan shares provided.

(G) REQUESTED ALLOCATIONS.—A determination under this paragraph that a mandatory allocation process shall not be conducted shall not preclude the conduct of a requested allocation with the approval of the Administrator.

(H) EFFECT OF PARAGRAPH.—This paragraph does not limit or otherwise affect the obligation of any person to implement a response action as required by a consent decree or unilateral administrative order.

(7) SCOPE OF ALLOCATIONS.—

(A) IN GENERAL.—An allocation under this section shall apply to—

(i) response costs incurred after the date of enactment of this section, with respect to a mandatory allocation facility;

(ii) unrecovered response costs of the United States incurred before the date of enactment of this section, with respect to a mandatory allocation facility; and

(iii) response costs incurred at a facility that is the subject of a requested allocation under paragraph (2).

(B) COSTS INCURRED BEFORE DATE OF ENACTMENT.—With the agreement of the allocation parties and the United States, the allocator may also provide an allocation of response costs incurred at a facility before the date of enact-

ment of this section, but that portion of the allocation shall not qualify for reimbursement of an orphan share.

(8) *OTHER MATTERS.*—This section shall not limit or affect—

(A) the obligation of the Administrator to conduct the allocation process for a response action at a facility that has been the subject of a partial or expedited settlement;

(B) the ability of any person to resolve any liability, with respect to a facility, to any other person at any time before initiation or completion of the allocation process, subject to subsection (n)(2);

(C) the validity, enforceability, finality, or merits of any judicial or administrative order, judgment, or decree, issued prior to the date of enactment of this section with respect to liability under this Act; or

(D) the validity, enforceability, finality, or merits of any preexisting contract or agreement relating to any allocation of responsibility or any indemnity for, or sharing of, any response costs under this Act.

(c) *MORATORIUM ON LITIGATION AND ENFORCEMENT.*—

(1) *IN GENERAL.*—No person may assert a claim for recovery of a response cost or contribution toward a response cost (including a claim for insurance proceeds) incurred after the date of enactment of this section under this Act or any other Federal or State law in connection with a response action—

(A) for which an allocation is required to be performed under subsection (b)(1);

(B) for which the Administrator has initiated settlement negotiations under subsection (e); or

(C) for which the Administrator has initiated the allocation process under this section;

until the date that is 120 days after the date of issuance of a report by the allocator under subsection (h) or, if a second or subsequent report is issued under subsection (m), the date of issuance of the second or subsequent report.

(2) *PENDING ACTIONS OR CLAIMS.*—If a claim described in paragraph (1) is pending on the date of enactment of this section or on initiation of an allocation under this section, the portion of the claim pertaining to response costs that are the subject of the allocation shall be stayed until the date that is 120 days after the date of issuance of a report by the allocator under subsection (h) or, if a second or subsequent report is issued under subsection (m), the date of issuance of the second or subsequent report, unless the court determines that a stay would result in manifest injustice.

(3) *TOLLING OF PERIOD OF LIMITATION.*—

(A) *BEGINNING OF TOLLING.*—Any applicable period of limitation with respect to a claim subject to paragraph (1) shall be tolled beginning on the earlier of—

(i) the date of listing of the facility on the National Priorities List if the listing occurs after the date of enactment of this section; or

(ii) the date of commencement of settlement negotiations or initiation of the allocation process under this section.

(B) *END OF TOLLING.*—A period of limitation shall be tolled under subparagraph (A) until the later of—

(i) the date that is 180 days after the date of entry by a United States district court of a settlement under subsection (e); or

(ii) the date that is 180 days after the date of issuance of a report by the allocator under subsection (h), or of a second or subsequent report under subsection (m).

(4) *ACTIONS CONTEMPORANEOUS WITH SETTLEMENT.*—Notwithstanding this section, the Attorney General may commence a civil action against a potentially responsible party or allocation party at any time if at the same time the Attorney General files a judicial consent decree resolving the liability of the potentially responsible party or allocation party.

(d) *IDENTIFICATION OF POTENTIALLY RESPONSIBLE PARTIES.*—

(1) *IN GENERAL.*—As soon as reasonably practicable, the Administrator shall perform a comprehensive search to identify all potentially responsible parties at each mandatory allocation facility, and provide appropriate opportunity for participation by potentially responsible parties. The search shall be initiated not later than 60 days after commencement of the remedial investigation or selection of a removal action, whichever occurs first.

(2) *NOMINATION OF ADDITIONAL PARTIES.*—

(A) *SUBMISSION OF NAMES.*—The Administrator shall allow each potentially responsible party identified by the Administrator under paragraph (1) a reasonable period of time in which to submit the names of additional potentially responsible parties.

(B) *STATEMENT OF BASIS.*—A potentially responsible party nominating another person as a potentially responsible party shall—

(i) include a statement setting forth the basis in law and fact why the nominated party is potentially liable under this Act; and

(ii) submit to the Administrator and a majority of the nominated person all available information that identifies the nature and extent of the nominated person's involvement at, and contribution of hazardous substances to, the facility.

(C) *SUBMISSION BY NOMINATED PERSONS.*—A person nominated as a potentially responsible party may within a reasonable time submit to the Administrator information relating to inclusion of the person as a potentially responsible party at the facility.

(3) *INCLUSION OF NOMINATED PERSONS.*—The Administrator shall include each person nominated under paragraph (2) on the list of potentially responsible parties, unless the Administrator determines that inclusion of the person as a potentially liable party is not warranted by law or not based on facts

that have reasonable evidentiary support under the circumstances.

(4) *LIST OF POTENTIALLY RESPONSIBLE PARTIES.*—On completion of the identification of potentially responsible parties and before commencing settlement negotiations under subsection (e), the Administrator shall publish a list of potentially responsible parties.

(5) *NOT FINAL AGENCY ACTION.*—The identification of potentially responsible parties by the Administrator under this subsection shall not constitute final agency action for the purposes of chapter 7 of title 5, United States Code and shall not be subject to judicial review.

(e) *SETTLEMENT NEGOTIATIONS.*—

(1) *IN GENERAL.*—Unless the Administrator determines not to use the negotiation procedures under this subsection (in which case subsection (f) shall apply), the Administrator shall provide a 90-day period of negotiation under section 122(e)(2) for each mandatory allocation facility before initiating an allocation process under subsection (f). The 90-day period may be extended by agreement of the Administrator and a majority of the parties to the negotiation.

(2) *ADR NEUTRAL.*—The Administrator may use the services of an ADR neutral to assist in negotiations if requested by the potentially responsible parties.

(3) *ORPHAN SHARE.*—If settling potentially responsible parties agree to perform the response action and agree to additional terms and conditions of settlement that are acceptable to the United States, the United States shall reimburse the settling parties, by payment or otherwise, 100 percent of the orphan share identified by the Administrator under subsection (i).

(4) *MANDATORY SETTLEMENT.*—The Administrator shall promptly adopt any settlement that—

(A) allocates at least 90 percent of the recoverable costs at a facility (including any orphan share identified by the Administrator); and

(B) contains the terms and conditions under subsection (n)(2) other than the requirement to pay a premium under subsection (n)(2)(A)(ii)(I).

(5) *NONSETTLING PARTY.*—A potentially responsible party that does not agree to a settlement under paragraph (4) is subject to post-settlement litigation under subsection (q).

(f) *ALLOCATION PROCESS.*—

(1) *IN GENERAL.*—At the request of any potentially responsible party that has not resolved its liability to the United States (other than a nonsettling party described in subsection (e)(5)), not later than 30 days after the conclusion of settlement negotiations if undertaken pursuant to subsection (e), the Administrator shall initiate an allocation process concerning a mandatory allocation facility in accordance with this subsection.

(2) *TIMING.*—A potentially responsible party described in paragraph (1) shall submit to the Administrator a written request for an allocation not later than 30 days after the earlier of—

(A) the date on which the Administrator notifies the potentially responsible parties in writing that negotiations under subsection (e) have concluded without a settlement having been reached;

(B) the date on which a settlement under subsection (e) has been lodged in United States district court; or

(C) the Administrator determines not to use the negotiation procedure under subsection (e), and provides the potentially responsible party notice of the determination.

(3) FLEXIBLE PROCESS.—

(A) IN GENERAL.—Each allocation under this section shall be performed by an allocator in a fair, efficient, and impartial manner.

(B) COST MINIMIZATION.—The allocator shall make every effort to streamline the allocation process and minimize the cost of conducting the allocation.

(C) OPPORTUNITY FOR COMMENT.—Before issuing the final allocation report, the allocator shall give each allocation party and the President an opportunity to comment on a draft allocation report.

(D) JUDICIAL REVIEW.—

(i) IN GENERAL.—A decision by the allocator shall be subject to judicial review in United States district court under subchapter II of chapter 5 of title 5, United States Code.

(ii) STANDARD OF REVIEW.—A decision by the allocator shall be upheld unless the objecting party demonstrates that the decision was arbitrary and capricious or otherwise not in accordance with law.

(4) RETENTION OF ALLOCATOR.—

(A) IN GENERAL.—An allocator shall be selected by the Administrator and the allocation parties to conduct an allocation under this section.

(B) SELECTION BY THE ADMINISTRATOR.—An allocator shall be selected by the Administrator if the allocation parties do not agree to the selection of an allocator within a reasonable time.

(C) PROCEDURE FOR EXPEDITED RETENTION.—

(i) IN GENERAL.—The Administrator shall establish, by regulation or otherwise—

(I) a simplified acquisition procedure for the expedited selection and retention by contract of ADR neutrals and allocators (including, if appropriate, establishing alternative conflict of interest screening procedures and alternative sole source contracting requirements); and

(II) a procedure for the conduct of the allocation process.

(ii) MANDATORY CONTRACT SOURCE.—On selection of an ADR neutral or allocator, the Administrator shall treat the selected ADR neutral or allocator as a mandatory source for contracting purposes.

(iii) NO RESTRICTION OF ALLOCATOR'S DISCRETION.—The Administrator shall not establish by the

regulation under clause (i) or otherwise, any procedure that restricts the allocator's discretion in assigning estimated contribution shares and the orphan share under this section.

(D) *PARTICIPATION BY ADMINISTRATOR OR ATTORNEY GENERAL.*—The Administrator or the Attorney General shall participate in the allocation process on behalf of the United States and as the representative of the Fund.

(E) *SUPPORT SERVICES.*—Each contract by which the Administrator retains an allocator shall authorize the allocator to acquire reasonable support services.

(F) *INFORMATION REGARDING POTENTIALLY RESPONSIBLE PARTIES.*—The Administrator shall provide the allocator all information regarding potentially responsible parties obtained under paragraphs (1) and (2) of subsection (d).

(G) *FEDERAL POTENTIALLY RESPONSIBLE PARTIES.*—Federal departments, agencies, or instrumentalities, or their agents, that are identified as potentially responsible parties or allocation parties under this Act—

(i) shall be subject to, and be entitled to the benefits of, the settlement negotiation and allocation processes provided in this section to the same extent as any other potentially responsible party; but

(ii) shall not be entitled to post-allocation contribution under subsection (o).

(g) *EQUITABLE FACTORS FOR ALLOCATION.*—The allocator shall prepare a nonbinding allocation of percentage shares of responsibility to each allocation party and to the orphan share, in accordance with this section and without regard to any theory of joint and several liability, based on—

(1) the amount of hazardous substances contributed by each allocation party;

(2) the degree of toxicity of hazardous substances contributed by each allocation party;

(3) the mobility of hazardous substances contributed by each allocation party;

(4) the degree of involvement of each allocation party in the generation, transportation, treatment, storage, or disposal of hazardous substances;

(5) the degree of care exercised by each allocation party with respect to hazardous substances, taking into account the characteristics of the hazardous substances;

(6) the cooperation of each allocation party in contributing to any response action and in providing complete and timely information to the United States, an ADR neutral, or the allocator; and

(7) such other equitable factors as the allocator recommends, with the agreement of the allocation parties and the United States.

(h) *ALLOCATOR'S REPORT.*—

(1) *ALLOCATION REPORT.*—The allocator shall provide a written final allocation report to the Administrator, the Attorney General, and each allocation party that specifies the esti-

mated contribution share of each allocation party and of any orphan share.

(2) *OPPORTUNITY FOR COMMENT.*—Before issuing the final allocation report, the allocator shall give each allocation party and the United States a reasonable opportunity to comment on a draft allocation report.

(3) *ADMISSIBILITY OF ALLOCATION REPORT.*—

(A) *IN GENERAL.*—No draft or final allocation report shall be admissible in any court for any purpose except as provided in subparagraph (B).

(B) *ADMISSION IN SUPPORT OF SETTLEMENT.*—The final allocator’s report, subject to the rules and discretion of the court, may be admitted into evidence solely for the purpose of supporting a settlement between the United States and an allocation party.

(4) *COSTS.*—The Administrator may require potentially responsible parties that did not enter into a settlement under subsection (e) to pay the costs of the allocation process.

(5) *JUDICIAL REVIEW.*—A draft allocation report or final allocation report of an allocator and any other determination made by the Administrator or the allocator for the purposes of this subsection shall not be subject to judicial review.

(6) *ADMINISTRATIVE ORDERS.*—Neither the conduct nor the results of an allocation shall constitute sufficient cause for non-compliance with an order issued under section 106.

(i) *ORPHAN SHARES.*—

(1) *MAKEUP OF ORPHAN SHARE.*—The orphan share shall consist of—

(A) any share that the allocator determines is attributable to an allocation party that is insolvent or defunct and that is not affiliated with any financially viable allocation party; and

(B) the difference between the aggregate share that the allocator determines is attributable to an allocation party and the aggregate share actually paid by the allocation party if—

(i) the person is eligible for an expedited settlement with the United States under section 122;

(ii) the liability of the person is eliminated, limited, or reduced by subsection (o), (p), (q), (s), (t), (u), (v), (w), or (x) of section 107 or section 112(g); or

(iii) the person settled with the United States before the completion of the allocation.

(2) *UNATTRIBUTABLE SHARES.*—A share attributable to a hazardous substance that the allocator determines was disposed at the facility that cannot be attributed to any identifiable party shall be distributed among the allocation parties and the orphan share in accordance with the allocated share assigned to each.

(j) *INFORMATION-GATHERING AUTHORITY.*—

(1) *IN GENERAL.*—The ADR neutral or allocator may gather such information as is necessary to conduct a fair and impartial settlement or allocation.

(2) *TYPES OF AUTHORITY.*—In carrying out paragraph (1), the ADR neutral or allocator may—

(A) exercise the information-gathering authority of the President under section 104(e) or issue a subpoena;

(B) request that the Attorney General enforce any information request or subpoena issued by the ADR neutral or the allocator and, if the Attorney General does not respond to the request within 15 days after receipt of the request, retain counsel to enforce the information request or subpoena; and

(C) request that the Attorney General seek to impose civil penalties for any failure to submit a complete and timely answer to an information request or subpoena or for any violation of subsection (k), or criminal penalties under section 1001 of title 18, United States Code, for any false or misleading material statement made in connection with the allocation process.

(3) *NONALLOCATION PARTIES.*—The allocator may exercise the authorities under this subsection with respect to any party, regardless of whether the party participates in an allocation process under subsection (f). An exemption from, or limitation on, liability does not limit or otherwise affect any requirement under section 104(e) or 122(e).

(k) *CONFIDENTIALITY OF INFORMATION.*—

(1) *IN GENERAL.*—All persons involved in the settlement or allocation shall ensure the confidentiality at all times of all information submitted to the allocator.

(2) *CONFIDENTIALITY.*—Information submitted to the ADR neutral or allocator—

(A) shall not be—

(i) disclosed to any person except as required by court order;

(ii) subject to disclosure to any person under section 552 of title 5, United States Code; or

(iii) discoverable or admissible in any Federal, State, or local judicial or administrative proceeding (if not independently discoverable or admissible); and

(B) shall be deemed to be a dispute resolution communication for purposes of the confidentiality provisions of sections 571 through 583 of title 5, United States Code (commonly known as the “Administrative Dispute Resolution Act”), which shall apply for all activities under this section.

(3) *NO WAIVER.*—The submission to the ADR neutral or allocator of information shall not constitute a waiver of any privilege under any Federal or State law (including any regulation).

(l) *REJECTION OF ALLOCATION REPORT.*—

(1) *REJECTION.*—The Administrator and the Attorney General may jointly reject a report issued by an allocator only if the Administrator and the Attorney General jointly publish, not later than 180 days after the Administrator receives the report, a written determination that—

(A) the final allocation report does not provide a basis for a settlement that would be fair, reasonable, and consistent with the objectives of this Act; or

(B) the allocation process was directly and substantially affected by bias, procedural error, fraud, or unlawful conduct.

(2) *FINALITY*.—A report issued by an allocator may not be rejected after the date that is 180 days after the date on which the United States accepts a settlement offer based on the allocation.

(m) *SECOND AND SUBSEQUENT ALLOCATIONS*.—

(1) *IN GENERAL*.—If a report is rejected under subsection (l), the Administrator and the allocation parties shall select an allocator to perform, on an expedited basis, a new allocation based, to the extent appropriate, on the same record available to the previous allocator.

(2) *SUBSEQUENT ALLOCATOR PROCESS*.—If a second allocation report is rejected under subsection (l), subsequent allocation processes may be provided at the discretion of the Administrator.

(3) *MORATORIUM AND TOLLING*.—The moratorium and tolling provisions of subsection (l) shall be extended until the date that is 180 days after the date of issuance of any second or subsequent allocation report under paragraph (1).

(n) *SETTLEMENTS BASED ON ALLOCATIONS*.—

(1) *IN GENERAL*.—Unless an allocation report is rejected under subsection (l), any allocation party at a mandatory allocation facility (including an allocation party whose allocated share is funded partially or fully by orphan share funding under subsection (i)) shall be entitled to resolve the liability of the party to the United States for response costs subject to allocation if, not later than 90 days after the date of issuance of a report by the allocator, the party—

(A) makes a written offer to settle with the United States based on the allocated share specified by the allocator; and

(B) agrees to the other terms and conditions stated in this subsection.

(2) *PROVISIONS OF SETTLEMENTS*.—

(A) *IN GENERAL*.—A settlement based on an allocation under this section—

(i) shall provide the Administrator with authority to require that any allocation party or group of parties (other than an allocation party that satisfies the requirements of section 107(v)) perform a response action; and

(ii) shall include—

(I) a provision under which the United States shall provide, by reimbursement or otherwise, 90 percent of the estimated contribution share assigned to the orphan share, as determined by the allocator in the final allocation report, and, if applicable, the estimated contribution shares of non-settling parties;

(II) a waiver of claims against the Fund for reimbursement;

(III) a waiver of contribution rights against all persons that are potentially responsible parties for any response cost addressed in the settlement;

(IV) a covenant not to sue that is consistent with section 122(f) and, except in the case of a cash-out settlement, provisions regarding performance or adequate assurance of performance of the response action;

(V) complete protection from all claims for contribution regarding the response costs incurred after the date of enactment of this section that are addressed in the settlement;

(VI) provisions through which a settling party shall receive prompt contribution from the Fund under subsection (o) of any response cost that is the subject of the allocation in excess of the allocated share of the party, including the allocated portion of any orphan share; and

(VII) provisions through which a settling party shall waive any challenge to any settlement that the Administrator or Attorney General enters into with any other potentially responsible party at the facility.

(B) *NOT CONTINGENT.*—Contribution under subparagraph (A)(ii)(VI) shall not be contingent on recovery by the United States of any response costs from any person other than the settling party.

(o) *POST-ALLOCATION CONTRIBUTION.*—

(1) *IN GENERAL.*—An allocation party that incurs costs after the date of enactment of this section for implementation of a response action that is the subject of an allocation under this section to an extent that exceeds the percentage share of the allocation party, as determined by the allocator, shall be entitled to prompt payment of contribution for the excess amount, including any orphan share, from the Fund, unless the allocation report is rejected under subsection (l).

(2) *NOT CONTINGENT.*—The right to contribution under paragraph (1) shall not be contingent on recovery by the United States of a response cost from any other person.

(3) *TERMS AND CONDITIONS.*—

(A) *RISK PREMIUM.*—A contribution payment shall be reduced by an amount not exceeding the litigation risk premium under subsection (n)(2)(A)(ii)(I) that would apply to a settlement by the allocation party concerning the response action, based on the total allocated shares of the parties that have not reached a settlement with the United States.

(B) *TIMING.*—

(i) *IN GENERAL.*—A contribution payment shall be paid out during the course of the response action that was the subject of the allocation, using reasonable progress payments at significant milestones.

(ii) *CONSTRUCTION.*—Contribution for the construction portion of the work shall be paid out not later than 120 days after the date of completion of the construction unless construction takes longer than 1 year, in which case contribution shall be made in appropriate periodic payments.

(C) *FINANCIAL CONTROLS ON CONTRIBUTION.*—The Administrator shall require all claims for contribution under paragraph (1) to be supported by—

(i) documentation of actual costs incurred; and

(ii) sufficient information to enable the Administrator to determine whether the costs were reasonable, necessary, and consistent with the National Contingency Plan.

(D) *EQUITABLE OFFSET.*—A contribution payment shall be subject to equitable offset or recoupment by the Administrator at any time if the allocation party fails to perform the work in a proper and timely manner.

(E) *WAIVER.*—

(i) *IN GENERAL.*—An allocation party that receives contribution under this section waives the right to seek from any other person potentially liable under this Act—

(I) recovery of response costs incurred after the date of enactment of this section in connection with the response action; or

(II) contribution toward the response costs incurred after the date of enactment of this section.

(ii) *CLAIMS AGAINST INSURERS.*—Clause (i) does not preclude a claim by an allocation party against an insurer of the allocation party for the portion of response costs borne by the allocation party that is not covered by the amount of contribution received by the allocation party.

(p) *FUNDING OF ORPHAN SHARES.*—

(1) *CONTRIBUTION.*—For each settlement entered into under subsection (n) and each administrative order or settlement decree to which subsection (o) applies, the Administrator shall promptly provide contribution to the settling allocation parties as provided in those subsections.

(2) *ENTITLEMENT.*—Paragraph (1) constitutes an entitlement to any allocation party eligible to receive contribution.

(3) *AMOUNTS OWED.*—

(A) *DELAY IF FUNDS ARE UNAVAILABLE.*—If funds are unavailable in any fiscal year to provide contribution to all allocation parties under paragraph (1), the Administrator may delay payment until funds are available.

(B) *PRIORITY.*—The priority for contribution shall be based on the length of time that has passed since the settlement between the United States and the allocation parties under subsection (n).

(C) *PAYMENT FROM FUNDS MADE AVAILABLE IN SUBSEQUENT FISCAL YEARS.*—Any amount due and owing in excess of available appropriations in any fiscal year shall be

paid from amounts made available in subsequent fiscal years, along with interest on the unpaid balances at the rate equal to that of the current average market yield on outstanding marketable obligations of the United States with a maturity of 1 year.

(4) *AUDITING.*—The Administrator may require an independent auditing of any claim for contribution.

(q) *POST-SETTLEMENT LITIGATION.*—

(1) *IN GENERAL.*—Subject to subsections (m) and (n), and on the expiration of the moratorium period under subsection (c), the Administrator may commence an action under section 107 against an allocation party that has not resolved the liability of the party to the United States following allocation and may seek to recover response costs not recovered through settlements with other persons, including the costs of the allocation process under paragraph (4).

(2) *RECOVERY.*—In any action under paragraph (1), a nonsettling party shall be subject to joint and several liability for response costs not recovered through settlements with other persons, including the cost of any federally funded orphan share and share of nonsettling parties, but not including any estimated contribution shares allocated to Federal agencies, departments, or instrumentalities.

(3) *IMPLEADER.*—A defendant in an action under paragraph (1) may implead an allocation party only if the allocation party did not resolve its liability to the United States.

(4) *RESPONSE COSTS.*—

(A) *ALLOCATION PROCESS.*—The cost of implementing the allocation process or settlement process under this section, including reasonable fees and expenses of the allocator, shall be considered to be a necessary response cost.

(B) *FUNDING OF ORPHAN SHARES.*—The cost attributable to funding an orphan share under this section—

(i) shall be considered to be a necessary response cost; and

(ii) shall be recoverable under section 107 only from an allocation party that does not reach a settlement under subsection (n).

(r) *RETAINED AUTHORITY.*—Except as specifically provided in this section, this section does not affect the authority of the Administrator to—

(1) exercise the powers conferred by section 103, 104, 105, 106, or 122;

(2) commence an action against a party if there is a contemporaneous filing of a judicial consent decree resolving the liability of the party;

(3) file a proof of claim or take other action in a proceeding under title 11, United States Code;

(4) require implementation of a response action at an allocation facility during the conduct of the allocation process; or

(5) file any actions necessary to prevent dissipation of the assets of a potentially responsible party.

(s) *ILLEGAL ACTIVITIES.*—Subsections (o), (p), (q), (r), (s), (t), (u), (v), (w), and (x) of section 107 and section 112(g) shall not apply

to any person whose liability for response costs under section 107(a)(1) is otherwise based on any act, omission, or status that is determined by a court or administrative body of competent jurisdiction, within the applicable statute of limitation, to have been a violation of any Federal or State law pertaining to the treatment, storage, disposal, or handling of hazardous substances if the violation pertains to a hazardous substance, the release or threat of release of which caused the incurrence of response costs at the vessel or facility.

(t) *USE OF MEDIATION.*—

(1) *GENERAL.*—A Federal natural resource trustee, State natural resource trustee, or Indian Tribe seeking damages for injury to, destruction of, or loss of a natural resource under subsection (a) or (f) of section 107 shall initiate mediation of the claim with any potentially responsible parties by means of the mediation procedure or other alternative dispute resolution method recognized by the United States district court for the district in which the action is filed.

(2) *TIME.*—Mediation shall be initiated not later than 120 days after commencement of an action of damages.

SEC. 138. LEAD IN SOIL.

(a) *IN GENERAL.*—Not later than 30 days after the date of enactment of this section, the Administrator shall enter into a contract with the Health Effects Institute (referred to in this section as the “Institute”) to establish and administer an independent scientific review panel (referred to in this section as the “review panel”) composed of university-based scientists and statisticians and the principal investigators of the studies conducted under section 111(a)(6) to review existing science (and any new science made available before completion of any review) on the relationship between lead in residential soil and blood lead levels.

(b) *MATTERS TO BE ADDRESSED.*—The review under subsection (a) shall include—

(1) an assessment of whether, and if so to what extent, blood lead levels are affected by removing lead-containing soil at varying levels;

(2) an assessment of whether blood lead levels are affected by variation in the type of lead compound, soil type, and other site-specific factors; and

(3) a review of the methodologies for modeling the impact of soil lead levels on blood lead levels.

(c) *PROCEDURE.*—

(1) *TIME FOR COMPLETION.*—The review panel shall complete the review under subsection (a) not later than 180 days after contracting with the Administrator.

(2) *PEER REVIEW AND PUBLIC COMMENT.*—The review shall include an opportunity for peer review and public comment and participation.

(3) *REPORT.*—The review panel shall report its findings to Congress and the Administrator not later than 30 days after completing the review.

(d) *RULEMAKING.*—

(1) *PROPOSED REGULATION.*—Not later than 180 days after the date on which the report under subsection (c)(3) is submitted, the Administrator shall issue for public comment a proposed regulation governing the performance of risk assessments and selecting remedies at facilities where lead in soil is a contaminant of concern.

(2) *FINAL REGULATION.*—Not later than 180 days after the proposed regulation is issued, the Administrator shall promulgate a final regulation governing the performance of risk assessments and selecting remedies at facilities where lead in soil is a contaminant of concern.

(3) *BASIS.*—The proposed regulation and final regulation shall be based on, and shall be consistent with, the findings of the report under subsection (c)(3).

(4) *CONTENTS.*—

(A) *IN GENERAL.*—The regulation shall address, at a minimum—

(i) the role of biomonitoring data in assessing risk assessments and the use of site-specific data in risk assessments; and

(ii) the reconciliation of data, which shall include a process for the President, in making estimates or projections of risks based on models, methodologies, rules, or guidance concerning the exposure, uptake, bioavailability, and biokinetics of lead in soil, to reconcile—

(I) the estimates or projections; with

(II) any empirical data concerning lead in blood from research, studies, or samples and any other relevant research.

(B) *DEFINITION OF RECONCILE.*—For the purposes of this paragraph, the term “reconcile” means to—

(i) compare all relevant information on a technical basis; and

(ii) if there is any difference between empirical data and projections based on any model, methodology, rule, or guidance—

(I) explain the difference in writing; and

(II) make a judgment based on the weight of the scientific evidence.

[42 U.S.C. 9626]

TITLE II—HAZARDOUS SUBSTANCE RESPONSE REVENUE ACT OF 1980

SEC. 201. SHORT TITLE; AMENDMENT OF 1954 CODE.

(a) *SHORT TITLE.*—This title may be cited as the “Hazardous Substance Response Revenue Act of 1980”.

(b) *AMENDMENT OF 1954 CODE.*—Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1954.

Subtitle A—Imposition of Taxes on Petroleum and Certain Chemicals⁶³

* * * * *

Subtitle B—Establishment of Hazardous Substance Response Trust Fund

[Repealed by section 517 of SARA of 1986 (P.L. 99-499)]

Subtitle C—Post-Closure Tax and Trust Fund

[Repealed by section 514 of SARA of 1986 (P.L. 99-499)]

TITLE III—MISCELLANEOUS PROVISIONS

REPORTS AND STUDIES

SEC. 301. (a)(1) The President shall submit to the Congress, within four years after enactment of this Act, a comprehensive report on experience with the implementation of this Act, including, but not limited to—

(A) the extent to which the Act and Fund are effective in enabling Government to respond to and mitigate the effects of releases of hazardous substances;

(B) a summary of past receipts and disbursements from the Fund;

(C) a projection of any future funding needs remaining after the expiration of authority to collect taxes, and of the threat to public health, welfare, and the environment posed by the projected releases which create any such needs;

(D) the record and experience of the Fund in recovering Fund disbursements from liable parties;

(E) the record of State participation in the system of response, liability, and compensation established by this Act;

(F) the impact of the taxes imposed by title II of this Act on the Nation's balance of trade with other countries;

(G) an assessment of the feasibility and desirability of a schedule of taxes which would take into account one or more of the following: the likelihood of a release of a hazardous substance, the degree of hazard and risk of harm to public health, welfare, and the environment resulting from any such release, incentives to proper handling, recycling, incineration, and neutralization of hazardous wastes, and disincentives to improper or illegal handling or disposal of hazardous materials, administrative and reporting burdens on Government and industry, and the extent to which the tax burden falls on the substances and parties which create the problems addressed by this Act.

⁶³ Subtitle A inserted a new chapter 38 (relating to environmental taxes) in the Internal Revenue Code, consisting of a subchapter A (tax on petroleum) and subchapter B (tax on certain chemicals). However, since the enactment of CERCLA, chapter 38 has been amended extensively, most notably by title V of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499) and by section 8032 of the Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509). See the Internal Revenue Code of 1986 for the current text of chapter 38.

In preparing the report, the President shall consult with appropriate Federal, State, and local agencies, affected industries and claimants, and such other interested parties as he may find useful. Based upon the analyses and consultation required by this subsection, the President shall also include in the report any recommendations for legislative changes he may deem necessary for the better effectuation of the purposes of this Act, including but not limited to recommendations concerning authorization levels, taxes, State participation, liability and liability limits, and financial responsibility provisions for the Response Trust Fund and the Post-closure Liability Trust Fund;

(H) an exemption from or an increase in the substances or the amount of taxes imposed by section 4661 of the Internal Revenue Code of 1954 for copper, lead, and zinc oxide, and for feedstocks when used in the manufacture and production of fertilizers, based upon the expenditure experience of the Response Trust Fund;

(I) the economic impact of taxing coal-derived substances and recycled metals.

(2) The Administrator of the Environmental Protection Agency (in consultation with the Secretary of the Treasury) shall submit to the Congress (i) within four years after enactment of this Act, a report identifying additional wastes designated by rule as hazardous after the effective date of this Act and pursuant to section 3001 of the Solid Waste Disposal Act and recommendations on appropriate tax rates for such wastes for the Post-closure Liability Trust Fund. The report shall, in addition, recommend a tax rate, considering the quantity and potential danger to human health and the environment posed by the disposal of any wastes which the Administrator, pursuant to subsection 3001(b)(2)(B) and subsection 3001(b)(3)(A) of the Solid Waste Disposal Act of 1980, has determined should be subject to regulation under subtitle C of such Act, (ii) within three years after enactment of this Act, a report on the necessity for and the adequacy of the revenue raised, in relation to estimated future requirements, of the Post-closure Liability Trust Fund.

(b) The President shall conduct a study to determine (1) whether adequate private insurance protection is available on reasonable terms and conditions to the owners and operators of vessels and facilities subject to liability under section 107 of this Act, and (2) whether the market for such insurance is sufficiently competitive to assure purchasers of features such as a reasonable range of deductibles, coinsurance provisions, and exclusions. The President shall submit the results of his study, together with his recommendations, within 2 years of the date of enactment of this Act, and shall submit an interim report on his study within one year of the date of enactment of this Act.

[(c)(1) The President, acting through Federal officials designated by the National Contingency Plan published under section 105 of this Act, shall study and, not later than two years after the enactment of this Act, shall 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 for the purposes of this Act and section 311(f) (4) and (5) of the Federal

Water Pollution Control Act. Notwithstanding the failure of the President to promulgate the regulations required under this subsection on the required date, the President shall promulgate such regulations not later than 6 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986.

[(2) Such regulations shall specify (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short- and long-term injury, destruction, or loss. Such regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

[(3) Such regulations shall be reviewed and revised as appropriate every two years.]

(c) *REGULATIONS FOR INJURY AND RESTORATION ASSESSMENTS.*—

(1) *GENERAL.*—*Not later than 2 years after the date of enactment of the Superfund Cleanup Acceleration Act of 1998, the President, acting through Federal officials designated by the National Contingency Plan under section 107(f)(2), shall issue an amended regulation for the assessment of injury to natural resources and costs of restoration of natural resources (including costs of assessment) for the purposes of this Act.*

(2) *CONTENTS.*—*The amended regulation shall—*

(A) *specify protocols for conducting assessments based on scientifically valid principles in individual cases to determine the injury, destruction, or loss of natural resources;*

(B) *identify the best available procedures to determine the costs of restoration and ensure that assessment costs are reasonable;*

(C) *take into consideration the ability of a natural resource to recover naturally and the availability of replacement or alternative resources;*

(D) *provide for the designation of a lead administrative trustee for each facility at which an injury to natural resources has occurred within 180 days after the date of the first notice to the responsible parties that an assessment of injury and restoration alternatives will be made;*

(E) *require that injury assessment, restoration planning and quantification of restoration costs be based on facility-specific information to the extent that such information is available; and*

(F) *set forth procedures under which—*

(i) *all pending and potential trustees identify, as soon as practicable after the date on which an assessment begins, the injured natural resources within their respective trust responsibilities, and the authority under which such responsibilities are established;*

(ii) *assessment of injury and restoration alternatives will be coordinated to the greatest extent prac-*

licable between the lead administrative trustee and any present or potential Federal, State or Tribal trustees; and

(iii) time periods for payment of damages in accordance with section 107(f)(1)(F) shall be determined.

(3) *PERIOD IN WHICH ACTION MAY BE BROUGHT.—Promulgation of the amended regulation under this subsection shall not extend the period in which an action must have been brought pursuant to section 113(g)(1)(B) as in effect before the date of enactment of the Superfund Cleanup Acceleration Act of 1998.*

(d) The Administrator of the Environmental Protection Agency shall, in consultation with other Federal agencies and appropriate representatives of State and local governments and nongovernmental agencies, conduct a study and report to the Congress within two years of the date of enactment of this Act on the issues, alternatives, and policy considerations involved in the selection of locations for hazardous waste treatment, storage, and disposal facilities. This study shall include—

(A) an assessment of current and projected treatment, storage, and disposal capacity needs and shortfalls for hazardous waste by management category on a State-by-State basis;

(B) an evaluation of the appropriateness of a regional approach to siting and designing hazardous waste management facilities and the identification of hazardous waste management regions, interstate or intrastate, or both, with similar hazardous waste management needs;

(C) solicitation and analysis of proposals for the construction and operation of hazardous waste management facilities by nongovernmental entities, except that no proposal solicited under terms of this subsection shall be analyzed if it involves cost to the United States Government or fails to comply with the requirements of subtitle C of the Solid Waste Disposal Act and other applicable provisions of law;

(D) recommendations on the appropriate balance between public and private sector involvement in the siting, design, and operation of new hazardous waste management facilities;

(E) documentation of the major reasons for public opposition to new hazardous waste management facilities; and

(F) an evaluation of the various options for overcoming obstacles to siting new facilities, including needed legislation for implementing the most suitable option or options.

(e)(1) In order to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment, there shall be submitted to the Congress a study within twelve months of enactment of this Act.

(2) This study shall be conducted with the assistance of the American Bar Association, the American Law Institute, the Association of American Trial Lawyers, and the National Association of State Attorneys General with the President of each entity selecting three members from each organization to conduct the study. The study chairman and one reporter shall be elected from among the twelve members of the study group.

(3) As part of their review of the adequacy of existing common law and statutory remedies, the study group shall evaluate the following:

(A) the nature, adequacy, and availability of existing remedies under present law in compensating for harm to man from the release of hazardous substances;

(B) the nature of barriers to recovery (particularly with respect to burdens of going forward and of proof and relevancy) and the role such barriers play in the legal system;

(C) the scope of the evidentiary burdens placed on the plaintiff in proving harm from the release of hazardous substances, particularly in light of the scientific uncertainty over causation with respect to—

(i) carcinogens, mutagens, and teratogens, and

(ii) the human health effects of exposure to low doses of hazardous substances over long periods of time;

(D) the nature and adequacy of existing remedies under present law in providing compensation for damages to natural resources from the release of hazardous substances;

(E) the scope of liability under existing law and the consequences, particularly with respect to obtaining insurance, of any changes in such liability;

(F) barriers to recovery posed by existing statutes of limitations.

(4) The report shall be submitted to the Congress with appropriate recommendations. Such recommendations shall explicitly address—

(A) the need for revisions in existing statutory or common law, and

(B) whether such revisions should take the form of Federal statutes or the development of a model code which is recommended for adoption by the States.

(5) The Fund shall pay administrative expenses incurred for the study. No expenses shall be available to pay compensation, except expenses on a per diem basis for the one reporter, but in no case shall the total expenses of the study exceed \$300,000.

(f) The President, acting through the Administrator of the Environmental Protection Agency, the Secretary of Transportation, the Administrator of the Occupational Safety and Health Administration, and the Director of the National Institute for Occupational Safety and Health shall study and, not later than two years after the enactment of this Act, shall modify the national contingency plan to provide for the protection of the health and safety of employees involved in response actions.

(g) INSURABILITY STUDY.—

(1) STUDY BY COMPTROLLER GENERAL.—The Comptroller General of the United States, in consultation with the persons described in paragraph (2), shall undertake a study to determine the insurability, and effects on the standard of care, of the liability of each of the following:

(A) Persons who generate hazardous substances: liability for costs and damages under this Act.

(B) Persons who own or operate facilities: liability for costs and damages under this Act.

(C) Persons liable for injury to persons or property caused by the release of hazardous substances into the environment.

(2) CONSULTATION.—In conducting the study under this subsection, the Comptroller General shall consult with the following:

(A) Representatives of the Administrator.

(B) Representatives of persons described in subparagraphs (A) through (C) of the preceding paragraph.

(C) Representatives (i) of groups or organizations comprised generally of persons adversely affected by releases or threatened releases of hazardous substances and (ii) of groups organized for protecting the interests of consumers.

(D) Representatives of property and casualty insurers.

(E) Representatives of reinsurers.

(F) Persons responsible for the regulation of insurance at the State level.

(3) ITEMS EVALUATED.—The study under this section shall include, among other matters, an evaluation of the following:

(A) Current economic conditions in, and the future outlook for, the commercial market for insurance and reinsurance.

(B) Current trends in statutory and common law remedies.

(C) The impact of possible changes in traditional standards of liability, proof, evidence, and damages on existing statutory and common law remedies.

(D) The effect of the standard of liability and extent of the persons upon whom it is imposed under this Act on the protection of human health and the environment and on the availability, underwriting, and pricing of insurance coverage.

(E) Current trends, if any, in the judicial interpretation and construction of applicable insurance contracts, together with the degree to which amendments in the language of such contracts and the description of the risks assumed, could affect such trends.

(F) The frequency and severity of a representative sample of claims closed during the calendar year immediately preceding the enactment of this subsection.

(G) Impediments to the acquisition of insurance or other means of obtaining liability coverage other than those referred to in the preceding subparagraphs.

(H) The effects of the standards of liability and financial responsibility requirements imposed pursuant to this Act on the cost of, and incentives for, developing and demonstrating alternative and innovative treatment technologies, as well as waste generation minimization.

(4) SUBMISSION.—The Comptroller General shall submit a report on the results of the study to Congress with appropriate recommendations within 12 months after the enactment of this subsection.

(h) REPORT AND OVERSIGHT REQUIREMENTS.—

(1) ANNUAL REPORT BY EPA.—On January 1 of each year the Administrator of the Environmental Protection Agency shall submit an annual report to Congress of such Agency on the progress achieved in implementing this Act during the preceding fiscal year. In addition such report shall specifically include each of the following:

(A) A detailed description of each feasibility study carried out at a facility under title I of this Act.

(B) The status and estimated date of completion of each such study.

(C) Notice of each such study which will not meet a previously published schedule for completion and the new estimated date for completion.

(D) An evaluation of newly developed feasible and achievable permanent treatment technologies.

(E) Progress made in reducing the number of facilities subject to review under section 121(c).

(F) A report on the status of all remedial and enforcement actions undertaken during the prior fiscal year, including a comparison to remedial and enforcement actions undertaken in prior fiscal years.

(G) An estimate of the amount of resources, including the number of work years or personnel, which would be necessary for each department, agency, or instrumentality which is carrying out any activities of this Act to complete the implementation of all duties vested in the department, agency, or instrumentality under this Act.

(2) REVIEW BY INSPECTOR GENERAL.—Consistent with the authorities of the Inspector General Act of 1978 the Inspector General of the Environmental Protection Agency shall review any report submitted under paragraph (1) related to EPA's activities for reasonableness and accuracy and submit to Congress, as a part of such report a report on the results of such review.

(3) CONGRESSIONAL OVERSIGHT.—After receiving the reports under paragraphs (1) and (2) of this subsection in any calendar year, the appropriate authorizing committees of Congress shall conduct oversight hearings to ensure that this Act is being implemented according to the purposes of this Act and congressional intent in enacting this Act.

[42 U.S.C. 9651]

EFFECTIVE DATES, SAVINGS PROVISION

SEC. 302. (a) Unless otherwise provided, all provisions of this Act shall be effective on the date of enactment of this Act.

(b) Any regulation issued pursuant to any provisions of section 311 of the Clean Water Act which is repealed or superseded by this Act and which is in effect on the date immediately preceding the effective date of this Act shall be deemed to be a regulation issued pursuant to the authority of this Act and shall remain in full force and effect unless or until superseded by new regulations issued thereunder.

(c) Any regulation—

(1) respecting financial responsibility,

(2) issued pursuant to any provision of law repealed or superseded by this Act, and

(3) in effect on the date immediately preceding the effective date of this Act shall be deemed to be a regulation issued pursuant to the authority of this Act and shall remain in full force and effect unless or until superseded by new regulations issued thereunder.

(d) Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this Act shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

[42 U.S.C. 9652]

EXPIRATION, SUNSET PROVISION

SEC. 303. [Repealed by P.L. 99-499.]

[42 U.S.C. 9653]

CONFORMING AMENDMENTS

SEC. 304. (a) [Repealed subsection (b) of section 504 of the Federal Water Pollution Control Act].

(b) One-half of the unobligated balance remaining before the date of the enactment of this Act under subsection (k)⁶⁴ of section 311 of the Federal Water Pollution Control Act and all sums appropriated under section 504(b)⁶⁵ of the Federal Water Pollution Control Act shall be transferred to the Fund established under title II of this Act.

(c) In any case in which any provision of section 311 of the Federal Water Pollution Control Act is determined to be in conflict with any provisions of this Act, the provisions of this Act shall apply.

[42 U.S.C. 9654]

LEGISLATIVE VETO

SEC. 305. (a) Notwithstanding any other provision of law, simultaneously with promulgation or repromulgation of any rule or regulation under authority of title I of this Act, the head of the department, agency, or instrumentality promulgating such rule or regulation shall transmit a copy thereof to the Secretary of the Senate and the Clerk of the House of Representatives. Except as provided in subsection (b) of this section, the rule or regulation shall not become effective, if—

(1) within ninety calendar days of continuous session of Congress after the date of promulgation, both Houses of Congress adopt a concurrent resolution, the matter after the resolving clause of which is as follows: “That Congress dis-

⁶⁴ Subsection (k) was repealed by section 2002(b)(2) of Public Law 101-380.

⁶⁵ Section 504(b) was repealed by section 304(a) of Public Law 96-510.

approves the rule or regulation promulgated by the dealing with the matter of _____, which rule or regulation was transmitted to Congress on _____.”, the blank spaces therein being appropriately filled; or

(2) within sixty calendar days of continuous session of Congress after the date of promulgation, one House of Congress adopts such a concurrent resolution and transmits such resolution to the other House, and such resolution is not disapproved by such other House within thirty calendar days of continuous session of Congress after such transmittal.

(b) If, at the end of sixty calendar days of continuous session of Congress after the date of promulgation of a rule or regulation, no committee of either House of Congress has reported or been discharged from further consideration of a concurrent resolution disapproving the rule or regulation and neither House has adopted such a resolution, the rule or regulation may go into effect immediately. If, within such sixty calendar days, such a committee has reported or been discharged from further consideration of such a resolution, or either House has adopted such a resolution, the rule or regulation may go into effect not sooner than ninety calendar days of continuous session of Congress after such rule is prescribed unless disapproved as provided in subsection (a) of this section.

(c) For purposes of subsections (a) and (b) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of thirty, sixty, and ninety calendar days of continuous session of Congress.

(d) Congressional inaction on, or rejection of, a resolution of disapproval shall not be deemed an expression of approval of such rule or regulation.

[42 U.S.C. 9655]

TRANSPORTATION

SEC. 306. (a) Each hazardous substance which is listed or designated as provided in section 101(14) of this Act shall, within 30 days after the enactment of the Superfund Amendments and Reauthorization Act of 1986 or at the time of such listing or designation, whichever is later, be listed and regulated as a hazardous material under the Hazardous Materials Transportation Act.⁶⁶

(b) A common or contract carrier shall be liable under other law in lieu of section 107 of this Act for damages or remedial action resulting from the release of a hazardous substance during the course of transportation which commenced prior to the effective date of the listing and regulation of such substance as a hazardous material under the Hazardous Materials Transportation Act,¹ or for substances listed pursuant to subsection (a) of this section, prior to the effective date of such listing: *Provided, however,* That this subsection shall not apply where such a carrier can demonstrate

⁶⁶Should refer to chapter 51 of title 49, United States Code, pursuant to section 6(b) of Public Law 103-272 (which codified certain transportation laws into title 49, U.S.C.).

that he did not have actual knowledge of the identity or nature of the substance released.

(c) [Amended section 11901 of title 49, United States Code.]

[42 U.S.C. 9656]

ASSISTANT ADMINISTRATOR FOR SOLID WASTE

SEC. 307. (a) [Amended section 2001 of the Solid Waste Disposal Act by striking out “a Deputy Assistant” and inserting in lieu thereof “an Assistant”.]

(b) The Assistant Administrator of the Environmental Protection Agency appointed to head the Office of Solid Waste shall be in addition to the five Assistant Administrators of the Environmental Protection Agency provided for in section 1(d) of Reorganization Plan Numbered 3 of 1970 and the additional Assistant Administrator provided by the Toxic Substances Control Act, shall be appointed by the President by and with the advice and consent of the Senate, and shall be compensated at the rate provided for Level IV of the Executive Schedule pay rates under section 5315 of title 5, United States Code.

(c) The amendment made by subsection (a) shall become effective ninety days after the date of the enactment of this Act.

[42 U.S.C. 6911a]

SEPARABILITY

SEC. 308. If any provision of this Act, or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of this Act shall not be affected thereby. If an administrative settlement under section 122 has the effect of limiting any person’s right to obtain contribution from any party to such settlement, and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States, such person shall not be entitled, under other laws of the United States, to recover compensation from the United States for such taking, but in any such case, such limitation on the right to obtain contribution shall be treated as having no force and effect.

[42 U.S.C. 9657]

SEC. 309. ACTIONS UNDER STATE LAW FOR DAMAGES FROM EXPOSURE TO HAZARDOUS SUBSTANCES.

(a) STATE STATUTES OF LIMITATIONS FOR HAZARDOUS SUBSTANCE CASES.—

(1) EXCEPTION TO STATE STATUTES.—In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the feder-

ally required commencement date in lieu of the date specified in such State statute.

(2) STATE LAW GENERALLY APPLICABLE.—Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) ACTIONS UNDER SECTION 107.—Nothing in this section shall apply with respect to any cause of action brought under section 107 of this Act.

(b) DEFINITIONS.—As used in this section—

(1) TITLE I TERMS.—The terms used in this section shall have the same meaning as when used in title I of this Act.

(2) APPLICABLE LIMITATIONS PERIOD.—The term “applicable limitations period” means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) may be brought.

(3) COMMENCEMENT DATE.—The term “commencement date” means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) FEDERALLY REQUIRED COMMENCEMENT DATE.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term “federally required commencement date” means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

(B) SPECIAL RULES.—In the case of a minor or incompetent plaintiff, the term “federally required commencement date” means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

[42 U.S.C. 9658]

SEC. 310. CITIZENS SUITS.

(a) AUTHORITY TO BRING CIVIL ACTIONS.—Except as provided in subsections (d) and (e) of this section and in section 113(h) (relating to timing of judicial review), any person may commence a civil action on his own behalf—

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this Act (including any provision of an agreement under section 120, relating to Federal facilities); or

(2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this Act, including an act or duty under section 120 (relating to Federal facilities), which is not discretionary with the President or such other officer.

Paragraph (2) shall not apply to any act or duty under the provisions of section 311 (relating to research, development, and demonstration).

(b) VENUE.—

(1) ACTIONS UNDER SUBSECTION (A)(1).—Any action under subsection (a)(1) shall be brought in the district court for the district in which the alleged violation occurred.

(2) ACTIONS UNDER SUBSECTION (A)(2).—Any action brought under subsection (a)(2) may be brought in the United States District Court for the District of Columbia.

(c) RELIEF.—The district court shall have jurisdiction in actions brought under subsection (a)(1) to enforce the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 120), to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation. The district court shall have jurisdiction in actions brought under subsection (a)(2) to order the President or other officer to perform the act or duty concerned.

(d) RULES APPLICABLE TO SUBSECTION (a)(1) ACTIONS.—

(1) NOTICE.—No action may be commenced under subsection (a)(1) of this section before 60 days after the plaintiff has given notice of the violation to each of the following:

(A) The President.

(B) The State in which the alleged violation occurs.

(C) Any alleged violator of the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 120).

Notice under this paragraph shall be given in such manner as the President shall prescribe by regulation.

(2) DILIGENT PROSECUTION.—No action may be commenced under paragraph (1) of subsection (a) if the President has commenced and is diligently prosecuting an action under this Act, or under the Solid Waste Disposal Act to require compliance with the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 120).

(e) RULES APPLICABLE TO SUBSECTION (a)(2) ACTIONS.—No action may be commenced under paragraph (2) of subsection (a) before the 60th day following the date on which the plaintiff gives notice to the Administrator or other department, agency, or instrumentality that the plaintiff will commence such action. Notice under this subsection shall be given in such manner as the President shall prescribe by regulation.

(f) COSTS.—The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court deter-

mines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(g) INTERVENTION.—In any action under this section, the United States or the State, or both, if not a party may intervene as a matter of right. For other provisions regarding intervention, see section 113.

(h) OTHER RIGHTS.—This Act does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 113(h) or as otherwise provided in section 309 (relating to actions under State law).

(i) DEFINITIONS.—The terms used in this section shall have the same meanings as when used in title I.

[42 U.S.C. 9659]

SEC. 311. RESEARCH, DEVELOPMENT, AND DEMONSTRATION.

(a) HAZARDOUS SUBSTANCE RESEARCH AND TRAINING.—

(1) AUTHORITIES OF SECRETARY.—The Secretary of Health and Human Services (hereinafter in this subsection referred to as the Secretary), in consultation with the Administrator, shall establish and support a basic research and training program (through grants, cooperative agreements, and contracts) consisting of the following:

(A) Basic research (including epidemiologic and ecologic studies) which may include each of the following:

(i) Advanced techniques for the detection, assessment, and evaluation of the effects on human health of hazardous substances.

(ii) Methods to assess the risks to human health presented by hazardous substances.

(iii) Methods and technologies to detect hazardous substances in the environment and basic biological, chemical, and physical methods to reduce the amount and toxicity of hazardous substances.

(B) Training, which may include each of the following:

(i) Short courses and continuing education for State and local health and environment agency personnel and other personnel engaged in the handling of hazardous substances, in the management of facilities at which hazardous substances are located, and in the evaluation of the hazards to human health presented by such facilities.

(ii) Graduate or advanced training in environmental and occupational health and safety and in the public health and engineering aspects of hazardous waste control.

(iii) Graduate training in the geosciences, including hydrogeology, geological engineering, geophysics, geochemistry, and related fields necessary to meet professional personnel needs in the public and private sectors and to effectuate the purposes of this Act.

(2) DIRECTOR OF NIEHS.—The Director of the National Institute for Environmental Health Sciences shall cooperate fully with the relevant Federal agencies referred to in subparagraph (A) of paragraph (5) in carrying out the purposes of this section.

(3) RECIPIENTS OF GRANTS, ETC.—A grant, cooperative agreement, or contract may be made or entered into under paragraph (1) with an accredited institution of higher education. The institution may carry out the research or training under the grant, cooperative agreement, or contract through contracts, including contracts with any of the following:

(A) Generators of hazardous wastes.

(B) Persons involved in the detection, assessment, evaluation, and treatment of hazardous substances.

(C) Owners and operators of facilities at which hazardous substances are located.

(D) State and local governments.

(4) PROCEDURES.—In making grants and entering into cooperative agreements and contracts under this subsection, the Secretary shall act through the Director of the National Institute for Environmental Health Sciences. In considering the allocation of funds for training purposes, the Director shall ensure that at least one grant, cooperative agreement, or contract shall be awarded for training described in each of clauses (i), (ii), and (iii) of paragraph (1)(B). Where applicable, the Director may choose to operate training activities in cooperation with the Director of the National Institute for Occupational Safety and Health. The procedures applicable to grants and contracts under title IV of the Public Health Service Act shall be followed under this subsection.

(5) ADVISORY COUNCIL.—To assist in the implementation of this subsection and to aid in the coordination of research and demonstration and training activities funded from the Fund under this section, the Secretary shall appoint an advisory council (hereinafter in this subsection referred to as the “Advisory Council”) which shall consist of representatives of the following:

(A) The relevant Federal agencies.

(B) The chemical industry.

(C) The toxic waste management industry.

(D) Institutions of higher education.

(E) State and local health and environmental agencies.

(F) The general public.

(6) PLANNING.—Within nine months after the date of the enactment of this subsection, the Secretary, acting through the Director of the National Institute for Environmental Health Sciences, shall issue a plan for the implementation of paragraph (1). The plan shall include priorities for actions under paragraph (1) and include research and training relevant to scientific and technological issues resulting from site specific hazardous substance response experience. The Secretary shall, to the maximum extent practicable, take appropriate steps to coordinate program activities under this plan with the activities of other Federal agencies in order to avoid duplication of

effort. The plan shall be consistent with the need for the development of new technologies for meeting the goals of response actions in accordance with the provisions of this Act. The Advisory Council shall be provided an opportunity to review and comment on the plan and priorities and assist appropriate coordination among the relevant Federal agencies referred to in subparagraph (A) of paragraph (5).

(b) ALTERNATIVE OR INNOVATIVE TREATMENT TECHNOLOGY RESEARCH AND DEMONSTRATION PROGRAM.—

(1) ESTABLISHMENT.—The Administrator is authorized and directed to carry out a program of research, evaluation, testing, development, and demonstration of alternative or innovative treatment technologies (hereinafter in this subsection referred to as the “program”) which may be utilized in response actions to achieve more permanent protection of human health and welfare and the environment.

(2) ADMINISTRATION.—The program shall be administered by the Administrator, acting through an office of technology demonstration and shall be coordinated with programs carried out by the Office of Solid Waste and Emergency Response and the Office of Research and Development.

(3) CONTRACTS AND GRANTS.—In carrying out the program, the Administrator is authorized to enter into contracts and cooperative agreements with, and make grants to, persons, public entities, and nonprofit private entities which are exempt from tax under section 501(c)(3) of the Internal Revenue Code of 1954. The Administrator shall, to the maximum extent possible, enter into appropriate cost sharing arrangements under this subsection.

(4) USE OF SITES.—In carrying out the program, the Administrator may arrange for the use of sites at which a response may be undertaken under section 104 for the purposes of carrying out research, testing, evaluation, development, and demonstration projects. Each such project shall be carried out under such terms and conditions as the Administrator shall require to assure the protection of human health and the environment and to assure adequate control by the Administrator of the research, testing, evaluation, development, and demonstration activities at the site.

(5) DEMONSTRATION ASSISTANCE.—

(A) PROGRAM COMPONENTS.—The demonstration assistance program shall include the following:

(i) The publication of a solicitation and the evaluation of applications for demonstration projects utilizing alternative or innovative technologies.

(ii) The selection of sites which are suitable for the testing and evaluation of innovative technologies.

(iii) The development of detailed plans for innovative technology demonstration projects.

(iv) The supervision of such demonstration projects and the providing of quality assurance for data obtained.

(v) The evaluation of the results of alternative innovative technology demonstration projects and the

determination of whether or not the technologies used are effective and feasible.

(B) SOLICITATION.—Within 90 days after the date of the enactment of this section, and no less often than once every 12 months thereafter, the Administrator shall publish a solicitation for innovative or alternative technologies at a stage of development suitable for full-scale demonstrations at sites at which a response action may be undertaken under section 104. The purpose of any such project shall be to demonstrate the use of an alternative or innovative treatment technology with respect to hazardous substances or pollutants or contaminants which are located at the site or which are to be removed from the site. The solicitation notice shall prescribe information to be included in the application, including technical and economic data derived from the applicant's own research and development efforts, and other information sufficient to permit the Administrator to assess the technology's potential and the types of remedial action to which it may be applicable.

(C) APPLICATIONS.—Any person and any public or private nonprofit entity may submit an application to the Administrator in response to the solicitation. The application shall contain a proposed demonstration plan setting forth how and when the project is to be carried out and such other information as the Administrator may require.

(D) PROJECT SELECTION.—In selecting technologies to be demonstrated, the Administrator shall fully review the applications submitted and shall consider at least the criteria specified in paragraph (7). The Administrator shall select or refuse to select a project for demonstration under this subsection within 90 days of receiving the completed application for such project. In the case of a refusal to select the project, the Administrator shall notify the applicant within such 90-day period of the reasons for his refusal.

(E) SITE SELECTION.—The Administrator shall propose 10 sites at which a response may be undertaken under section 104 to be the location of any demonstration project under this subsection within 60 days after the close of the public comment period. After an opportunity for notice and public comment, the Administrator shall select such sites and projects. In selecting any such site, the Administrator shall take into account the applicant's technical data and preferences either for onsite operation or for utilizing the site as a source of hazardous substances or pollutants or contaminants to be treated offsite.

(F) DEMONSTRATION PLAN.—Within 60 days after the selection of the site under this paragraph to be the location of a demonstration project, the Administrator shall establish a final demonstration plan for the project, based upon the demonstration plan contained in the application for the project. Such plan shall clearly set forth how and when the demonstration project will be carried out.

(G) SUPERVISION AND TESTING.—Each demonstration project under this subsection shall be performed by the applicant, or by a person satisfactory to the applicant, under the supervision of the Administrator. The Administrator shall enter into a written agreement with each applicant granting the Administrator the responsibility and authority for testing procedures, quality control, monitoring, and other measurements necessary to determine and evaluate the results of the demonstration project. The Administrator may pay the costs of testing, monitoring, quality control, and other measurements required by the Administrator to determine and evaluate the results of the demonstration project, and the limitations established by subparagraph (J) shall not apply to such costs.

(H) PROJECT COMPLETION.—Each demonstration project under this subsection shall be completed within such time as is established in the demonstration plan.

(I) EXTENSIONS.—The Administrator may extend any deadline established under this paragraph by mutual agreement with the applicant concerned.

(J) FUNDING RESTRICTIONS.—The Administrator shall not provide any Federal assistance for any part of a full-scale field demonstration project under this subsection to any applicant unless such applicant can demonstrate that it cannot obtain appropriate private financing on reasonable terms and conditions sufficient to carry out such demonstration project without such Federal assistance. The total Federal funds for any full-scale field demonstration project under this subsection shall not exceed 50 percent of the total cost of such project estimated at the time of the award of such assistance. The Administrator shall not expend more than \$10,000,000 for assistance under the program in any fiscal year and shall not expend more than \$3,000,000 for any single project.

(6) FIELD DEMONSTRATIONS.—In carrying out the program, the Administrator shall initiate or cause to be initiated at least 10 field demonstration projects of alternative or innovative treatment technologies at sites at which a response may be undertaken under section 104, in fiscal year 1987 and each of the succeeding three fiscal years. If the Administrator determines that 10 field demonstration projects under this subsection cannot be initiated consistent with the criteria set forth in paragraph (7) in any of such fiscal years, the Administrator shall transmit to the appropriate committees of Congress a report explaining the reasons for his inability to conduct such demonstration projects.

(7) CRITERIA.—In selecting technologies to be demonstrated under this subsection, the Administrator shall, consistent with the protection of human health and the environment, consider each of the following criteria:

(A) The potential for contributing to solutions to those waste problems which pose the greatest threat to human health, which cannot be adequately controlled under

present technologies, or which otherwise pose significant management difficulties.

(B) The availability of technologies which have been sufficiently developed for field demonstration and which are likely to be cost effective and reliable.

(C) The availability and suitability of sites for demonstrating such technologies, taking into account the physical, biological, chemical, and geological characteristics of the sites, the extent and type of contamination found at the site, and the capability to conduct demonstration projects in such a manner as to assure the protection of human health and the environment.

(D) The likelihood that the data to be generated from the demonstration project at the site will be applicable to other sites.

(8) TECHNOLOGY TRANSFER.—In carrying out the program, the Administrator shall conduct a technology transfer program including the development, collection, evaluation, coordination, and dissemination of information relating to the utilization of alternative or innovative treatment technologies for response actions. The Administrator shall establish and maintain a central reference library for such information. The information maintained by the Administrator shall be made available to the public, subject to the provisions of section 552 of title 5 of the United States Code and section 1905 of title 18 of the United States Code, and to other Government agencies in a manner that will facilitate its dissemination; except, that upon a showing satisfactory to the Administrator by any person that any information or portion thereof obtained under this subsection by the Administrator directly or indirectly from such person, would, if made public, divulge—

(A) trade secrets; or

(B) other proprietary information of such person,

the Administrator shall not disclose such information and disclosure thereof shall be punishable under section 1905 of title 18 of the United States Code. This subsection is not authority to withhold information from Congress or any committee of Congress upon the request of the chairman of such committee.

(9) TRAINING.—The Administrator is authorized and directed to carry out, through the Office of Technology Demonstration, a program of training and an evaluation of training needs for each of the following:

(A) Training in the procedures for the handling and removal of hazardous substances for employees who handle hazardous substances.

(B) Training in the management of facilities at which hazardous substances are located and in the evaluation of the hazards to human health presented by such facilities for State and local health and environment agency personnel.

(10) DEFINITION.—For purposes of this subsection, the term “alternative or innovative treatment technologies” means those technologies, including proprietary or patented methods, which permanently alter the composition of hazardous waste

through chemical, biological, or physical means so as to significantly reduce the toxicity, mobility, or volume (or any combination thereof) of the hazardous waste or contaminated materials being treated. The term also includes technologies that characterize or assess the extent of contamination, the chemical and physical character of the contaminants, and the stresses imposed by the contaminants on complex ecosystems at sites.

(c) HAZARDOUS SUBSTANCE RESEARCH.—The Administrator may conduct and support, through grants, cooperative agreements, and contracts, research with respect to the detection, assessment, and evaluation of the effects on and risks to human health of hazardous substances and detection of hazardous substances in the environment. The Administrator shall coordinate such research with the Secretary of Health and Human Services, acting through the advisory council established under this section, in order to avoid duplication of effort.

(d) UNIVERSITY HAZARDOUS SUBSTANCE RESEARCH CENTERS.—

(1) GRANT PROGRAM.—The Administrator shall make grants to institutions of higher learning to establish and operate not fewer than 5 hazardous substance research centers in the United States. In carrying out the program under this subsection, the Administrator should seek to have established and operated 10 hazardous substance research centers in the United States.

(2) RESPONSIBILITIES OF CENTERS.—The responsibilities of each hazardous substance research center established under this subsection [shall include, but not be limited to, the conduct of research] *shall include*—

(A) *the conduct of research and training relating to the manufacture, use, transportation, disposal, and management of hazardous substances and publication and dissemination of the results of such research[.]; and*

(B) *the conduct of a program to provide to affected communities educational and technical assistance to and information regarding the effects or potential effects of the contamination on human health and the environment.*

(3) APPLICATIONS.—Any institution of higher learning interested in receiving a grant under this subsection shall submit to the Administrator an application in such form and containing such information as the Administrator may require by regulation.

(4) SELECTION CRITERIA.—The Administrator shall select recipients of grants under this subsection on the basis of the following criteria:

(A) The hazardous substance research center shall be located in a State which is representative of the needs of the region in which such State is located for improved hazardous waste management.

(B) The grant recipient shall be located in an area which has experienced problems with hazardous substance management.

(C) There is available to the grant recipient for carrying out this subsection demonstrated research resources.

(D) The capability of the grant recipient to provide leadership in making national and regional contributions to the solution of both long-range and immediate hazardous substance management problems.

(E) The grant recipient shall make a commitment to support ongoing hazardous substance research programs with budgeted institutional funds of at least \$100,000 per year.

(F) The grant recipient shall have an interdisciplinary staff with demonstrated expertise in hazardous substance management and research.

(G) The grant recipient shall have a demonstrated ability to disseminate results of hazardous substance research and educational programs through an interdisciplinary continuing education program.

(H) The projects which the grant recipient proposes to carry out under the grant are necessary and appropriate.

(5) MAINTENANCE OF EFFORT.—No grant may be made under this subsection in any fiscal year unless the recipient of such grant enters into such agreements with the Administrator as the Administrator may require to ensure that such recipient will maintain its aggregate expenditures from all other sources for establishing and operating a regional hazardous substance research center and related research activities at or above the average level of such expenditures in its 2 fiscal years preceding the date of the enactment of this subsection.

(6) FEDERAL SHARE.—The Federal share of a grant under this subsection shall not exceed 80 percent of the costs of establishing and operating the regional hazardous substance research center and related research activities carried out by the grant recipient.

(7) LIMITATION ON USE OF FUNDS.—No funds made available to carry out this subsection shall be used for acquisition of real property (including buildings) or construction of any building.

(8) ADMINISTRATION THROUGH THE OFFICE OF THE ADMINISTRATOR.—Administrative responsibility for carrying out this subsection shall be in the Office of the Administrator.

(9) EQUITABLE DISTRIBUTION OF FUNDS.—The Administrator shall allocate funds made available to carry out this subsection equitably among the regions of the United States.

(10) TECHNOLOGY TRANSFER ACTIVITIES.—Not less than five percent of the funds made available to carry out this subsection for any fiscal year shall be available to carry out technology transfer activities.

(e) REPORT TO CONGRESS.—**[At the time]**

(1) *IN GENERAL*.—*At the time* of the submission of the annual budget request to Congress, the Administrator shall submit to the appropriate committees of the House of Representatives and the Senate and to the advisory council established under subsection (a), a report on the progress of the research, development, and demonstration program authorized by subsection (b), including an evaluation of each demonstration project completed in the preceding fiscal year, findings with re-

spect to the efficacy of such demonstrated technologies in achieving permanent and significant reductions in risk from hazardous wastes, the costs of such demonstration projects, and the potential applicability of, and projected costs for, such technologies at other hazardous substance sites.

(2) *ADDITIONAL INFORMATION.*—A report under paragraph (1) shall include information on the use of facilities described in subsection (h)(1) for the research, development, and application of innovative technologies for remedial activity, as authorized under subsection (h).

(f) *SAVING PROVISION.*—Nothing in this section shall be construed to affect the provisions of the Solid Waste Disposal Act.

(g) *SMALL BUSINESS PARTICIPATION.*—The Administrator shall ensure, to the maximum extent practicable, an adequate opportunity for small business participation in the program established by subsection (b).

(h) *FEDERAL FACILITIES.*—

(1) *DESIGNATION.*—The President may designate a facility that is owned or operated by any department, agency, or instrumentality of the United States, and that is listed or proposed for listing on the National Priorities List, to facilitate the research, development, and application of innovative technologies for remedial action at the facility.

(2) *USE OF FACILITIES.*—

(A) *IN GENERAL.*—A facility designated under paragraph (1) shall be made available to Federal departments and agencies, State departments and agencies, and public and private instrumentalities, to carry out activities described in paragraph (1).

(B) *COORDINATION.*—The Administrator—

(i) shall coordinate the use of the facilities with the departments, agencies, and instrumentalities of the United States; and

(ii) may approve or deny the use of a particular innovative technology for remedial action at any such facility.

(3) *CONSIDERATIONS.*—

(A) *EVALUATION OF SCHEDULES AND PENALTIES.*—In considering whether to permit the application of a particular innovative technology for remedial action at a facility designated under paragraph (1), the Administrator shall evaluate the schedules and penalties applicable to the facility under any agreement or order entered into under section 120.

(B) *AMENDMENT OF AGREEMENT OR ORDER.*—If, after an evaluation under subparagraph (A), the Administrator determines that there is a need to amend any agreement or order entered into pursuant to section 120, the Administrator shall comply with all provisions of the agreement or order, respectively, relating to the amendment of the agreement or order.

SEC. 312. LOVE CANAL PROPERTY ACQUISITION.⁶⁷

(a) ACQUISITION OF PROPERTY IN EMERGENCY DECLARATION AREA.—The Administrator of the Environmental Protection Agency (hereinafter referred to as the “Administrator”) may make grants not to exceed \$2,500,000 to the State of New York (or to any duly constituted public agency or authority thereof) for purposes of acquisition of private property in the Love Canal Emergency Declaration Area. Such acquisition shall include (but shall not be limited to) all private property within the Emergency Declaration Area, including non-owner occupied residential properties, commercial, industrial, public, religious, non-profit, and vacant properties.

(b) PROCEDURES FOR ACQUISITION.—No property shall be acquired pursuant to this section unless the property owner voluntarily agrees to such acquisition. Compensation for any property acquired pursuant to this section shall be based upon the fair market value of the property as it existed prior to the emergency declaration. Valuation procedures for property acquired with funds provided under this section shall be in accordance with those set forth in the agreement entered into between the New York State Disaster Preparedness Commission and the Love Canal Revitalization Agency on October 9, 1980.

(c) STATE OWNERSHIP.—The Administrator shall not provide any funds under this section for the acquisition of any properties pursuant to this section unless a public agency or authority of the State of New York first enters into a cooperative agreement with the Administrator providing assurances deemed adequate by the Administrator that the State or an agency created under the laws of the State shall take title to the properties to be so acquired.

(d) MAINTENANCE OF PROPERTY.—The Administrator shall enter into a cooperative agreement with an appropriate public agency or authority of the State of New York under which the Administrator shall maintain or arrange for the maintenance of all properties within the Emergency Declaration Area that have been acquired by any public agency or authority of the State. Ninety (90) percent of the costs of such maintenance shall be paid by the Administrator. The remaining portion of such costs shall be paid by the State (unless a credit is available under section 104(c)). The Administrator is authorized, in his discretion, to provide technical assistance to any public agency or authority of the State of New York in order to implement the recommendations of the habitability and land-use study in order to put the land within the Emergency Declaration Area to its best use.

(e) HABITABILITY AND LAND USE STUDY.—The Administrator shall conduct or cause to be conducted a habitability and land-use study. The study shall—

(1) assess the risks associated with inhabiting of the Love Canal Emergency Declaration Area;

(2) compare the level of hazardous waste contamination in that Area to that present in other comparable communities; and

⁶⁷For additional provisions relating to this section, see section 213 of SARA of 1986 in this print.

(3) assess the potential uses of the land within the Emergency Declaration Area, including but not limited to residential, industrial, commercial and recreational, and the risks associated with such potential uses.

The Administrator shall publish the findings of such study and shall work with the State of New York to develop recommendations based upon the results of such study.

(f) FUNDING.—For purposes of section 111 and 221(c) of this Act,⁶⁸ the expenditures authorized by this section shall be treated as a cost specified in section 111(c).

(g) RESPONSE.—The provisions of this section shall not affect the implementation of other response actions within the Emergency Declaration Area that the Administrator has determined (before enactment of this section) to be necessary to protect the public health or welfare or the environment.

(h) DEFINITIONS.—For purposes of this section:

(1) EMERGENCY DECLARATION AREA.—The terms “Emergency Declaration Area” and “Love Canal Emergency Declaration Area” mean the Emergency Declaration Area as defined in section 950, paragraph (2) of the General Municipal Law of the State of New York, Chapter 259, Laws of 1980, as in effect on the date of the enactment of this section.

(2) PRIVATE PROPERTY.—As used in subsection (a), the term “private property” means all property which is not owned by a department, agency, or instrumentality of—

(A) the United States, or

(B) the State of New York (or any public agency or authority thereof).

[42 U.S.C. 9661]

TITLE IV—POLLUTION INSURANCE

SEC. 401. DEFINITIONS.

As used in this title—

(1) INSURANCE.—The term “insurance” means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk which is determined to be insurance under applicable State or Federal law.

(2) POLLUTION LIABILITY.—The term “pollution liability” means liability for injuries arising from the release of hazardous substances or pollutants or contaminants.

(3) RISK RETENTION GROUP.—The term “risk retention group” means any corporation or other limited liability association taxable as a corporation, or as an insurance company, formed under the laws of any State—

(A) whose primary activity consists of assuming and spreading all, or any portion, of the pollution liability of its group members;

(B) which is organized for the primary purpose of conducting the activity described under subparagraph (A);

⁶⁸So in original. Section 221 of CERCLA was repealed by section 517(c) of title V of SARA of 1986 (Public Law 99-499).

(C) which is chartered or licensed as an insurance company and authorized to engage in the business of insurance under the laws of any State; and

(D) which does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person.

(4) PURCHASING GROUP.—The term “purchasing group” means any group of persons which has as one of its purposes the purchase of pollution liability insurance on a group basis.

(5) STATE.—The term “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

[42 U.S.C. 9671]

SEC. 402. STATE LAWS; SCOPE OF TITLE.

(a) STATE LAWS.—Nothing in this title shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State. The definitions of pollution liability and pollution liability insurance under any State law shall not be applied for the purposes of this title, including recognition or qualification of risk retention groups or purchasing groups.

(b) SCOPE OF TITLE.—The authority to offer or to provide insurance under this title shall be limited to coverage of pollution liability risks and this title does not authorize a risk retention group or purchasing group to provide coverage of any other line of insurance.

[42 U.S.C. 9672]

SEC. 403. RISK RETENTION GROUPS.

(a) EXEMPTION.—Except as provided in this section, a risk retention group shall be exempt from the following:

(1) A State law, rule, or order which makes unlawful, or regulates, directly or indirectly, the operation of a risk retention group.

(2) A State law, rule, or order which requires or permits a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong.

(3) A State law, rule, or order which requires any insurance policy issued to a risk retention group or any member of the group to be countersigned by an insurance agent or broker residing in the State.

(4) A State law, rule, or order which otherwise discriminates against a risk retention group or any of its members.

(b) EXCEPTIONS.—

(1) STATE LAWS GENERALLY APPLICABLE.—Nothing in subsection (a) shall be construed to affect the applicability of State laws generally applicable to persons or corporations. The State in which a risk retention group is chartered may regulate the formation and operation of the group.

(2) STATE REGULATIONS NOT SUBJECT TO EXEMPTION.—Subsection (a) shall not apply to any State law which requires a risk retention group to do any of the following:

(A) Comply with the unfair claim settlement practices law of the State.

(B) Pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus line insurers, brokers, or policyholders under the laws of the State.

(C) Participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of pollution liability insurance losses and expenses incurred on policies written through such mechanism.

(D) Submit to the appropriate authority reports and other information required of licensed insurers under the laws of a State relating solely to pollution liability insurance losses and expenses.

(E) Register with and designate the State insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process.

(F) Furnish, upon request, such commissioner a copy of any financial report submitted by the risk retention group to the commissioner of the chartering or licensing jurisdiction.

(G) Submit to an examination by the State insurance commissioner in any State in which the group is doing business to determine the group's financial condition, if—

(i) the commissioner has reason to believe the risk retention group is in a financially impaired condition; and

(ii) the commissioner of the jurisdiction in which the group is chartered has not begun or has refused to initiate an examination of the group.

(H) Comply with a lawful order issued in a delinquency proceeding commenced by the State insurance commissioner if the commissioner of the jurisdiction in which the group is chartered has failed to initiate such a proceeding after notice of a finding of financial impairment under subparagraph (G).

(c) APPLICATION OF EXEMPTIONS.—The exemptions specified in subsection (a) apply to—

(1) pollution liability insurance coverage provided by a risk retention group for—

(A) such group; or

(B) any person who is a member of such group;

(2) the sale of pollution liability insurance coverage for a risk retention group; and

(3) the provision of insurance related services or management services for a risk retention group or any member of such a group.

(d) AGENTS OR BROKERS.—A State may require that a person acting, or offering to act, as an agent or broker for a risk retention group obtain a license from that State, except that a State may not

impose any qualification or requirement which discriminates against a nonresident agent or broker.

[42 U.S.C. 9673]

SEC. 404. PURCHASING GROUPS.

(a) EXEMPTION.—Except as provided in this section, a purchasing group is exempt from the following:

(1) A State law, rule, or order which prohibits the establishment of a purchasing group.

(2) A State law, rule, or order which makes it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its member, advantages, based on their loss and expense experience, not afforded to other persons with respect to rates, policy forms, coverages, or other matters.

(3) A State law, rule, or order which prohibits a purchasing group or its members from purchasing insurance on the group basis described in paragraph (2) of this subsection.

(4) A State law, rule, or order which prohibits a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time.

(5) A State law, rule, or order which requires that a purchasing group must have a minimum number of members, common ownership or affiliation, or a certain legal form.

(6) A State law, rule, or order which requires that a certain percentage of a purchasing group must obtain insurance on a group basis.

(7) A State law, rule, or order which requires that any insurance policy issued to a purchasing group or any members of the group be countersigned by an insurance agent or broker residing in that State.

(8) A State law, rule, or order which otherwise discriminate⁶⁹ against a purchasing group or any of its members.

(b) APPLICATION OF EXEMPTIONS.—The exemptions specified in subsection (a) apply to the following:

(1) Pollution liability insurance, and comprehensive general liability insurance which includes this coverage, provided to—

(A) a purchasing group; or

(B) any person who is a member of a purchasing group.

(2) The sale of any one of the following to a purchasing group or a member of the group:

(A) Pollution liability insurance and comprehensive general liability coverage.

(B) Insurance related services.

(C) Management services.

(c) AGENTS OR BROKERS.—A State may require that a person acting, or offering to act, as an agent or broker for a purchasing group obtain a license from that State, except that a State may not

⁶⁹So in law. Probably should be “discriminates”.

impose any qualification or requirement which discriminates against a nonresident agent or broker.

[42 U.S.C. 9674]

SEC. 405. APPLICABILITY OF SECURITIES LAWS.

(a) OWNERSHIP INTERESTS.—The ownership interests of members of a risk retention group shall be considered to be—

(1) exempted securities for purposes of section 5 of the Securities Act of 1933 and for purposes of section 12 of the Securities Exchange Act of 1934; and

(2) securities for purposes of the provisions of section 17 of the Securities Act of 1933 and the provisions of section 10 of the Securities Exchange Act of 1934.

(b) INVESTMENT COMPANY ACT.—A risk retention group shall not be considered to be an investment company for purposes of the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.).

(c) BLUE SKY LAW.—The ownership interests of members in a risk retention group shall not be considered securities for purposes of any State blue sky law.

[42 U.S.C. 9675]

UNITED STATES CODE

TITLE 10—ARMED FORCES

SEC. 2705. NOTICE OF ENVIRONMENTAL RESTORATION ACTIVITIES.

(a) * * *

(e) ASSISTANCE FOR CITIZEN PARTICIPATION.—

(1) Using funds made available under paragraph (3), the Secretary may make technical assistance grants under section **[[117(e)] 117(f)** of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 **[(42 U.S.C. 9617(e))]** (42 U.S.C. 9617(f)) in connection with installations containing facilities listed on the National Priorities List.

