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The Federal Superfund law, or program, has been in existence now for over thirteen years—the evolutionary by-product of two complex pieces of congressional legislation, numerous judicial opinions, and assorted regulations promulgated by the United States Environmental Protection Agency (EPA). Making "its appearance in the waning days of the 96th Congress"[1] as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[2] the forty-three-page bill "sped through Congress in a lame-duck session a few weeks after the national elections that brought Ronald Reagan to the White House"[3] and was signed into law by the defrocked President Jimmy Carter. Hardly a work of legislative craftsmanship—with " 'virtually no legislative history at all' "[4]—CERCLA has been described as a "gerry-built 'consensus' law,"[5] driven by the hysteria of the "Love Canal-factor"[6] and embedded with "ambiguities over liabilities, uncertainties over who pays, and complete absence of guidance over what was meant by cleanup in the context of hazardous waste."[7]

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[1] 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES 470 (1992).

[2] Pub. L. No. 96-510, §§ 101-308, 94 Stat. 2767-2811 (1980)(codified at 42 U.S.C. § 9601-9675 (1988).

[3] RODGERS, *supra* note 1, at 470.

[4] *Id.* (quoting Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982)).

[5] *Id.* (footnote omitted).

[6] *Id.* at 472.

[7] *Id.* at 475 (footnote omitted).

Approximately six years after CERCLA, the Superfund Amendments and Reauthorization Act of 1986 (SARA)[8] was enacted into federal law when President Reagan signed the legislation "without fanfare on Air Force One in the skies over Grand Forks, North Dakota," despite earlier strenuous objections by the White House.[9] Professor William H. Rodgers, Jr. characterizes SARA pejoratively as "conglomerate legislation,"[10] pointing out numerous procedural and substantive defects of the hazardous waste cleanup law:

> SARA is one of the longest and most intimidating of all the environmental laws. It solidifies the reputation of the field for complexity, obscurity, and mind-numbing detail. It confirms that the phenomenon of legislative amendment is rarely extractive and subtractive, but is instead additive, supplementary, and incremental, consisting of a modest spilling over into related conceptual niches.
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> In some ways, SARA is more cumbersome and obtuse than any of [the] environmental laws that came before it. It is the product not of a small-numbers bargaining game but of a large-numbers bargaining game (the six-month conference on the Senate and House bills brought together nineteen Senators and fifty-three members of the House of Representatives from eleven separate committees). The negotiations resembled those of the Law of the Sea where earlier drafts and bills assumed a momentum and stature that foreclosed those coming later from anything approaching a clean slate. Like workers assembling a Boeing airplane, experts on one feature of SARA (say, the Fund) had to be but vaguely acquainted with other features of the law (say, the settlement provisions of Section 122). As it turned out, SARA is not so much a single law but an omnibus collection of five or six separate statutes.
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> What are the consequences of these conglomerate origins and features of SARA? One is a loss of coherence, because the law was not designed by a single intelligence or the meeting of a few minds. If we had to say in a few words what SARA achieved, it would be to confirm, expand, and refine the cleanup

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[8] Pub. L. No. 99-499, §§ 1-531, 100 Stat. 1613-1782 (1986)(codified at 42 U.S.C. §§ 9601-9675 (1988)). CERCLA was reauthorized and extended for an additional three-year period by the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 104 Stat. 1388-391 (1990)(codified at 42 U.S.C. 9611 (West Supp. 1993)).

[9] RODGERS, *supra* note 1, at 483-84.

[10] *Id.* at 484.

> aims of the 1980 CERCLA. But SARA resists brief description because of its vast and multifarious origins. Another manifestation of this incoherence is potential contradiction. In the new Section 116, for example, the Congress sets rigorous goals for the commencement of remedial investigation and feasibility studies (RI/FSs) for facilities on the National Priorities List—not fewer than 275 within three years and 650 within five years. This puts a premium on Fund-financed cleanup initiated by EPA. At the same time, the settlement measures of Section 122 are constructed to encourage PRP-financed cleanup. Which will it be—more Fund-financed or PRP-financed cleanup? SARA expects more of both, and while more-more strategies are not impossible, they often prove to be more-less strategies, more or less.[11]

As the Superfund program comes under national scrutiny before the 103rd Congress, members of Congress have affixed a variety of unsavory labels, epithets, and characterizations to the law. In this regard, Congressman Al Swift, Chairman of the House of Representatives Subcommittee on Transportation and Hazardous Materials, observed:

> The Superfund program has a long and checkered history. From its enactment in 1980 in the wake of horror stories like Love Canal, through its disastrous early management during the first Reagan term, the highly controversial 1986 SARA reauthorization, and the administrative changes in the 1980's, Superfund has always been the program everyone loves to hate.[12]

In a similar vein, Michael G. Oxley—the ranking Republican member of the subcommittee—noted that the nation was "spending [a great deal of] money and no one seems to be benefiting from the program, or if they are benefitting, they do not seem to be happy, much less delighted, with Superfund."[13] Specifically, Congressman Oxley opined that:

> During the roughly dozen years since we passed CERCLA and created Superfund, we have spent a tremendous amount of money, and I am not at all sure what we received for our money.

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[11] *Id.* at 484-85 (footnotes omitted).

[12] *Superfund Program (Part 1): Hearings on Oversight of the Implementation of the Superfund Program Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 103rd Cong., 1st Sess. 1 (1993) [hereinafter *Hearings*] (opening statement of Al Swift, Chairman).

[13] *Id.* at 2-3 (opening statement of Rep. Michael G. Oxley).

> In round numbers . . . EPA has spent $10 billion on cleanup and running the Superfund program. Other Federal agencies, primarily the Department of Energy and the Department of Defense, have spent perhaps another $10 billion because of Superfund, and private industry has spent . . . perhaps another $10 billion [for a total of $30 billion].
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> . . . .
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> This program does not seem to be satisfying the very people it was set up to help. The people who live around Superfund sites don't seem to be very happy. Community groups who are trying to revitalize the urban core find Superfund more of a problem than a benefit. Cities caught up in Superfund are really mad. Superfund has become just another unfunded Federal mandate that has the real potential of bankrupting small towns. The President doesn't sound happy. He has called the program a disaster.[14]

Another member of the subcommittee referred to Superfund as "the legislative equivalent of Frankenstein [sic]. It has grown virtually beyond recognition, striking fear in the hearts of those incurring its wrath, be it a large corporation or a Girl Scout troop."[15]

How should the nation envision what will be the third-generation hazardous waste cleanup law in America? Should the Superfund reauthorization law retain the essential characteristics of SARA—only with further elaboration and fine tuning? Or, to the contrary, should SARA be scrapped and replaced with a fundamentally different kind of federal law—with different ends and different means? In Part I of this essay, I summarize the four major problems and assorted subsidiary issues that confront the U.S. hazardous waste cleanup system in the 1990s. Next, in Part II, I outline three broad categories of Superfund reform plans that have been recently proposed. Finally, in Part III, I sketch some suggested principles and priorities for Superfund reform that should be seriously considered by policymakers in shaping new federal legislation on abandoned hazardous waste sites for the 1990s.

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[14] *Id.*

[15] *Id.* at 3 (opening statement of Rep. Dan Schaefer); *see also id.* at 4 (opening statement of Rep. Fred Upton, analogizing Superfund to a "lead weight on efforts to revitalize older manufacturing areas" because investors are "afraid of what contaminants might be found on those properties at some point in the future").

I. MAJOR PROBLEMS AND ISSUES

The CERCLA-SARA paradigm of hazardous waste cleanup is troubled by four major categories of policy problems: (1) liability standards for determining responsible parties, (2) cost allocation rules for spreading liability among responsible parties, (3) hazardous waste cleanup parameters, and (4) overall strategic considerations.

A. Liability Standards: Who Should be Responsible for Hazardous Waste Cleanup?

The liability problem under Superfund has engendered vigorous debate and raises a variety of vexing issues. First, potentially responsible parties (PRPs) contend that it is fundamentally unfair to impose strict liability, rather than fault-based liability, for waste disposal practices which were reasonable at the time. In response, government officials assert that, in light of the palpable dangers presented by hazardous wastes, it is appropriate to impose accountability without fault on those who have been involved in generating or disposing of hazardous wastes, as well as those who own or operate facilities where the waste is abandoned; moreover, strict liability serves the important function of inducing a pollution-prevention ethic for present and future purveyors of hazardous waste.[16]

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[16] *See generally* THE BUSINESS ROUNDTABLE, COMPARISON OF SUPERFUND WITH PROGRAMS IN OTHER COUNTRIES (1993). "The Business Roundtable believes that the Superfund law puts U.S. industry at an international competitive disadvantage. No law or program studied inflexibly imposes the same remediation standards as Superfund. No other country broadly requires private companies to pay for the remediation of contaminated land where waste was legally disposed, unless they own or owned the land." *Id.*; Mike McGavick, *Overhaul Retroactive Liability*, ENVTL. FORUM, Sept.-Oct. 1993, at 35. Since "every economic incentive in Superfund sends the money in the wrong direction," Congress should as the major reform of Superfund "[o]verhaul retroactive liability. Increase the Superfund trust and apply money to cleanup old waste sites on a prioritized basis. The polluter pays principle can be respected by having all sectors caught up in Superfund pay into the larger fund on a broad basis." McGavick, at 35; *Businesses Willing to Pay New Taxes, Fees to Support Liability Reform, Witnesses Say*, 24 Env't. Rep. (BNA) 1313 (Nov. 12, 1993); Robert S. Sanoff, *The Unraveling of Superfund*, 8 Toxics L. Rep. (BNA) 650 (Nov. 3, 1993); Viki Reath, *Insurance Industry Floats Superfund Reform Proposal*, ENV'T. WK., Oct. 21, 1993, at 8; *Quotable* ENV'T. WK., Oct. 14, 1993, at 8. Max Baucus, D-Mont., Chairman of the Senate Env't and Public Works Comm. speaking to the Nat'l Ass'n of Counties on Oct. 7, 1993 said "[e]nvironmental liability, at times, has been unfair and deterred cleanup instead of pollution. But the underlying principle of Superfund and other environmental laws—that polluters must pay to clean up their mess—is sound . . . . Whatever the shortcoming of our laws, the underlying 'polluter pays' principle has changed

Second, and closely related to the first issue, PRPs object to imposition of liability for hazardous waste activities that antedated the 1980 passage of the radically different legal regime of CERCLA. Those in favor of retroactive liability maintain that the magnitude and scope of hazardous waste contamination throughout the country justifies the imposition of liability for pre-1980 actions.[17]

A third liability standard policy issue is whether certain types of PRPs should be exempt from prima facie liability by virtue of unique, status-based considerations. For example, should municipalities be exempt from Superfund liability because of their predominant roles as local handlers of nonhazardous residential and commercial garbage that happens to be tainted with isolated and minute quantities of hazardous substances? Or should devisees and fiduciaries under a will be exempt from Superfund liability because of their innocence and lack of control over land disposal activities that antedated their connection with the real property in question?[18]

Finally, and closely related to the immediately preceding policy question, is whether and to what extent a PRP should be able to escape Superfund liability for nonstatus, fact-specific reasons, such as wrongful acts of third parties who contributed to hazardous waste contamination, inequitable delay by government in seeking legal redress for past hazardous waste activities, or unclean hands by the government enforcers that exacerbate the cleanup problem.[19]

B. Cost Allocation Rules: How Should Liability Be Spread among Those Responsible for Hazardous Waste Cleanup?

The Superfund cost allocation problem, while similar in certain respects to the liability problem and equally controversial, im-

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our country for the better. It has deterred pollution." *Quotable*, at 8; *Treasury Department Liability Proposal Is Criticized by Congressional Leaders*, 24 Env't. Rep. (BNA) 1067 (Oct. 8, 1993) (discussing U.S. Treasury proposal that would eliminate strict liability based on status, joint and several liability, and retroactive liability prior to CERCLA's effective date of Dec. 11, 1980); George Lobsenz, *Consensus on Liability Eludes EPA's Superfund Panel*, ENV'T. WK., Oct. 7, 1993, at 1.

[17] *See supra* note 15 and accompanying text.

[18] *See generally* William A. Butler, *Congress Must Handle Municipal Solid Waste*, ENVTL. FORUM, Sept.-Oct. 1993, at 32; *Overhaul of Remedy Selection Process, Some Municipal Liability Relief Sought by EPA*, 24 Env't. Rep. (BNA) 1228 (Nov. 5, 1993).

[19] *See generally* Sanoff, *supra* note 16.

plicates a separate constellation of policy issues. First, is it appropriate to rigidly impose joint and several liability on prima-facially-liable parties sued by the government, limiting the defendants to contribution actions against other PRPs? While allowing this result has the principal advantages of shifting the costs of cleanups to industry and other "deep pocket" defendants as well as coercing some settlements short of full-fledged litigation, the key disadvantages are distributional injustice, perverse incentives for deep pocket defendants to identify and sue an assortment of de minimis and de micromis PRPs for contribution, and an overall increase in systemic transaction costs.[20]

A second cost allocation policy issue is whether the use of volumetric benchmarks of the proportion of waste contributed to a site is more appropriate as a measure of financial responsibility for hazardous waste cleanup than the relative toxicity of the specific wastes at bar. While volumetric calculations are easier and probably less costly to undertake than toxicity assessments, the toxicological profile of a waste site is quite important in determining the nature and ultimate cost of cleanup remedies. By emphasizing the volumetric share over relative toxicities, those PRPs linked with high volume/low toxicity wastes at a particular Superfund site are unfairly disadvantaged in higher cost allocation outcomes vis-a-vis those PRPs identified with high toxicity wastes.[21]

Third, when should cost allocation determinations be made? To the extent that these determinations are postponed until dueling PRPs fight it out with one another in contribution actions—as presently exists under the prevailing Superfund model—transaction costs will tend to be greater than if a method of front-end binding allocations could be made by a government official or arbitrator.

Fourth, to what extent should the system be allowed to go on encouraging settlements through assorted carrots and sticks? Use of caps or discounts for expedited settlement, mixed funding settlements, nonsettling allocation enhancements and other financial tools may be appropriate in some situations. But are there in-

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[20] *See generally* UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/T-RCED-93-73, SUPERFUND: EPA COULD DO MORE TO REDUCE RESPONSIBLE PARTIES' LEGAL EXPENSES (1993) (statement of Richard L. Hembra, Director, Environmental Protection Issues Resources, Community, and Economic Division).

[21] *See generally Allowance for Relative Toxicity, Mixed Funds Should be Embraced in Law's Reform, Panel Told*, 24 Env't. Rep. (BNA) 1314 (Nov. 12, 1993).

stances when unreflective use of settlement tools can be counterproductive and ineffective?

C. Hazardous Waste Cleanup Parameters: What Should Be Done at the Site and Who Decides?

The hazardous waste cleanup parameters problem, while conceptually distinct from the first two major Superfund problem areas discussed above, is intertwined with and related to these problems. Indeed, one cannot accurately determine cost allocation among PRPs until the specific cleanup remedies are resolved. Yet, the available pot of money—from PRPs, the Fund, or a combination thereof—may affect in subtle and not-so-subtle ways ultimate decisions on site cleanup remedies.

A variety of specific policy issues are triggered by the cleanup problem under Superfund. First, in determining technical levels of environmental cleanup, how important are background levels of contaminants? Second, and similar in nature to the first policy issue, how significant should the future land use of the hazardous waste site be? For example, should a lower level of cleanup be allowed if a Superfund site will likely be used as a future industrial site—say, a chemical production plant—than if the Superfund site were likely to be part of a residential neighborhood?[22] In light of the uncertainties of future land use and the potential off-site impacts that can result from Superfund sites—in domestic groundwater contamination, for instance—considerable uncertainty exists in applying this factor.

A third policy issue raised by the cleanup problem is as follows: What should the scientific and engineering process of selecting cleanup technologies entail? Should cleanup standards and technological remedies be considered *sui generis*—varying from site to site depending on unique geological, demographic, and risk-based parameters appropriate and relevant for the specific type of environmental media (e.g., groundwater, soil contamination) impacted? On the contrary, should the hazardous waste cleanup system seek to develop presumptive technological remedies and national cleanup standards in an effort to expedite the rate of

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[22] *See generally Different Standards for Industrial Use*, ENVTL. FORUM, Nov.-Dec. 1993, at 34-40 (discussing opposing viewpoints on use of differing cleanup standards for industrial use).

cleanups and the cost effectiveness of these cleanups?[23] To date, the Superfund model has generally attempted to "reinvent the wheel" at each national priorities list (NPL) site, leading some observers to criticize the slow pace of cleanups and the excessive transaction costs involved.

Fourth, what should be the nature of the public input into the scientific and engineering decision-making process at Superfund sites? CERCLA, as originally enacted, gave minimal attention to this issue. SARA added the concept of governmentally-financed Technical Assistance Grants (TAGs) for community groups to hire consultants to better understand the nature of hazardous waste contamination and the range of available remedies for cleaning up the contamination. But some observers insist that the current Superfund program requires reform along the following lines: (1) more resources to increase community involvement and decisionmaking about Superfund cleanup remedies, (2) EPA development of a more aggressive and effective public involvement strategy, (3) enhanced information collected by the government on "environmental justice" impacts of different Superfund sites and specific cleanup remedies attuned to eliminating racial and class prejudice in public health impacts from Superfund sites in minority and disadvantaged neighborhoods, and (4) greater EPA accountability in suggesting and choosing Superfund site cleanup remedies based on neutral principles of risk assessment rather than uninformed public opinion.[24]

D. Overall Strategic Considerations: Matters of Ends and of Means?

The strategic problem of the prevailing hazardous waste cleanup model reflected in Superfund is teleological at its core. What are the various ends that the Superfund law is supposed to

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[23] *See generally EPA Releases First Guidances on Remedies Presumed to be Effective for Similar Sites*, 8 Toxics L. Rep. (BNA) 1770 (Dec. 1, 1993); *First Guidances on Presumptive Remedies Produced by Agency for Regional Offices*, 24 Env't. Rep. (BNA) 1331 (Nov. 19, 1993).

[24] *See, e.g., Different Standards for Industrial Use, supra* note 22, at 36; *Community Groups Demand Health Services, New Site Listing Criteria, Greater Involvement*, 24 Env't. Rep. (BNA) 1318 (Nov. 12, 1993); *Surprising Coalition Calls for Radical Superfund Reform*, 4 ENV'T. HEALTH & SAFETY MGMT. (The Env't. Group, Wainscott, N.Y.), Dec. 6, 1993, at 1.

achieve? What are the means that should be utilized to achieve these ends?

The Superfund program has been roundly criticized for failing to clearly set forth the law's overriding purposes and priorities, for seeking to utilize a variety of disparate means, and for failing to prioritize among competing concerns. A sampling of specific issues—subsumed by the problem of overall strategic considerations—include the following:

- Whether Fund-led or PRP-led cleanups are more important?
- Whether separate, more stringent, state hazardous waste cleanup laws can reach a point of interfering with overarching federal purposes and interests?
- How does the Superfund law fit in with the national interest in encouraging international competitiveness and economic growth by domestic industries?
- How does Superfund interrelate with the overall American environmental agenda (e.g., water pollution, air pollution, protection of endangered species, etc.)?
- What is the relationship between national health care objectives, tort compensation policy, and Superfund?
- What is the relative priority in the Superfund program between public health protection and natural resource damages mitigation?
- At what point, if any, does the Superfund program become too costly for the nation to afford, in light of the overriding budget deficit problem?
- Should federal military bases and Energy Department facilities be treated exactly the same as privately-affiliated Superfund sites in terms of liability, cost allocation, and cleanup remedies?

II. BROAD CATEGORIES OF SUPERFUND REFORM PLANS

A variety of Superfund reform models have been proposed by various interests in recent years. These plans tend to fall within one of three broad categories, depending on what reform measures are emphasized: (1) the retroactive liability diminution/fund expansion model, (2) the more flexible, cost effective, and streamlined cost allocation and cleanup standards reform model, and

(3) the greater health services, environmental justice, and community involvement model.[25]

A. Retroactive Liability Diminution/Fund Expansion Model

Proponents of this model of reform emphasize the undesirable, pernicious, and unfair policy impacts of the current retroactive, joint and several liability scheme on various contributors or participants in hazardous waste sites that result in enormous transaction costs and manifold uncertainties. Two proposed plans that are quite similar to one another have been proffered by the insurance industry and the United States Treasury Department. In essence, this reform model would virtually eliminate liability for current owners, operators, lenders and fiduciaries who are not directly involved in activities that led to a site's placement on a Superfund list. Rather, this model assumes abandoned hazardous waste site cleanup costs to be a public good that should be financed by the public, either directly through general tax revenues or indirectly through increased product or service costs occasioned by taxes on the writing of commercial insurance policies or other taxes on businesses. Under this policy paradigm, inconsistent state cleanup laws would need to be preempted by Congress.

B. Streamlined Cost Allocation and Cleanup Standards Reform Model

Those who advocate this scheme of Superfund policy change emphasize the irrationality of the current approach for determining the appropriate extent of cleanup at Superfund sites. Rather than requiring the unrealistic standard that every Superfund site be remediated to a background or residential level, based on a site-specific assessment of environmental problems, proponents of this policy model would allow more lax cleanup standards for sites that appear likely to be used for industrial purposes as opposed to sites adjacent to residential neighborhoods. Supporters encourage use of presumptive remedies and national cleanup standards for recurring situations. Such a model utilizes incentives for acceler-

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[25] *See generally supra* notes 16-24 and accompanying text. *See also* DANIEL MAZMANIAN & DAVID MORELL, BEYOND SUPERFAILURE: AMERICA'S TOXICS POLICY FOR THE 1990S (1992); *Hearings, supra* note 12, at 7-515. The models for Superfund reform discussed in Part II of the article are culled from a variety of sources; however, the models are principally derived from the aforementioned sources.

ated cleanup and cost allocations (such as government funding for orphan shares) and use of innovative technology. The focus is on pragmatic, negotiated cleanup plans or selective use of binding arbitration. All of these features would limit or exempt the liability of certain PRPs (e.g., municipalities).

C. Greater Health Services, Environmental Justice, and Community Involvement Model

Proponents of this model of reform emphasize the critical importance of focusing policy change on public health standards and remediating inimical environmental effects on minority neighborhoods by aggressively pursuing site listing and high-quality cleanups in communities of minorities that are calculated to mitigate adverse health and environmental effects. Moreover, advocates of this reform paradigm maintain that "[w]e can't discuss *what* should be the standard of remediation at a hazardous waste site without discussing *who* should establish the level to which a site is cleaned. Any solution that does not include the citizens living in close proximity to the site is unacceptable."[26] Accordingly, those supporting this model of reform suggest such policy innovations as more ample community technical assistance grants, changes in the hazardous ranking system to take into account the true exposure of the surrounding community, demonstration projects to enhance community input, changes in the law to provide for increased information to communities, compilation of demographic information about proposed sites, and programs to provide health services for residents living near cleanup sites.

III. SOME FIRST PRINCIPLES FOR SUPERFUND REFORM

In order to achieve meaningful reform of the CERCLA-SARA line of Superfund law, Congress must focus, as much as possible, on fundamental principles. Without such a purposeful and teleological approach, the Superfund program is likely to continue to be an unwieldy and ineffective "monster" of the law.

The following "first principles" approach is offered as a preliminary starting point in what should become a broad-based national debate on the subject.

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[26] *Different Standards for Industrial Use, supra* note 22, at 39.

A. The Principle of Targeting and Goal Setting

As pointed out by Professor Robert S. Summers, there are three reasons why goals analysis should be central to the enterprise of both making and interpreting the law. First, Summers contends that "a description of a particular form of law is essentially incomplete if it does not include some account of, or reference to, its intermediate or ultimate goals" since law must be "seen as a complex of means and goals."[27] Specifically, in this regard, Summers argues that:

> Legal means may not be readily understandable, even as means, unless they are brought into relation with relevant goals. Consider, for example, the various government transfer payments in modern societies. One cannot adequately grasp the complex forms of law providing for these payments without taking account of their goals, for example, to relieve poverty, lessen inflation, equalize wealth, enhance liberty, or whatever. Identical forms of such law vary greatly in meaning depending upon which of these goals is primary. Thus, an essentially complete description of any such form of law must include an account of these goals.[28]

A second argument asserted by Summers in favor of a goals-sensitive analysis of law is "that descriptions of law which take account of or refer to goals are more faithful to the reality of law as a human artifact than are merely technological descriptions." This result is so, according to Summers, because "[w]e generally understand legal precepts as designed to serve goals and thus expect that they are, at least to some extent, adopted to these goals."[29]

Summers' third point in support of a goals-sensitive conception of law "derives its force from the evident requirements of an interpretive method that effectively implements the goals of particular forms of law."[30] Summers observes:

> In general, the language of a legal precept cannot be interpreted appropriately if it is divorced from all conceptions of the goals it is to serve. Such language does not act by itself, reveal its legal

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[27] ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 71 (1982).

[28] *Id.* (original emphasis).

[29] *Id.* at 72.

[30] *Id.* at 73.

> purposes, and the authoritative goals it is designed to serve may not have been spelled out. Yet, these goals may dictate an interpretation different from that suggested by the lay meaning of the language used. As a result, one must infuse the language with relevant goals (intermediate or ultimate) in order to determine its legal meaning. *Thus one cannot determine what a precept means, and therefore tell what it is without considering what it is for. On this view, a particular form of law considered as a whole, is a complex of means and goals.*[31]

Indeed, a recent article published in the *Resources for the Future's Center for Risk Management Newsletter* noted some critical ambiguities in what goals Congress intended to achieve with the existing Superfund program. Thus, by way of illustration:

> In considering whether to change the liability standards, it is important for Congress to identify the behavior it is trying to encourage. Is the goal of Superfund to:
> - clean up sites on the NPL,
> - provide an incentive for cleaning up sites not on the NPL, or
> - provide an incentive for better management of hazardous substances, as well as consider the kinds of behavior and sites that would be affected by any change in the liability scheme [?][32]

Other potential goals that Congress should consider during the reauthorization debate are: whether one of the purposes of the law is to reduce public health risk from exposure to abandoned hazardous wastes; whether information about abandoned hazardous wastes and waste sites should be used as an aid to private, common law toxic tort suits; whether there are limits on community participation rights when the greater numbers and complexity of interests involved in deciding the cleanup fate of a site substantially bog down the decision-making process in cleaning up the site; whether rapid, but appropriate, cleanup of hazardous waste sites should be one of the purposes of the law and if so, to what extent should economic incentives be employed to facilitate the goal and to what extent should the rapid cleanup goal be primary or subsidiary to other policy goals?

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[31] *Id.* (emphasis added).

[32] Katherine N. Probst et al., *Superfund*, 5 CENTER FOR RISK MGMT. NEWSL. (Center for Risk Mgmt., Washington, D.C.), Summer 1993, at 2, 4.

B. The Principle of Meticulous Framing of Acceptable Costs

"The frameworks used to guide analysis and the decisions made regarding proposed health and safety regulations are inextricably linked."[33] Thus,

> [I]f an agency is required by law to ban any substance shown to be a carcinogen, little or nothing is gained by an elaborate analysis of the economic and other implications of alternative decisions. The decision framework establishes priorities among issues and changes the way both regulators and nongovernmental decisionmakers view health and safety issues.[34]

In undertaking its reauthorization of Superfund, Congress needs to follow the principle of meticulous framing of acceptable risks by improving on the vague, ill-understood, and poorly-defined cleanup standards peppered throughout the legislation. On one end of the spectrum, Congress may choose to require—for certain types of high-impact sites—a "cost-oblivious" standard where cleanup "at any cost" is mandated in order to effectuate public health concerns. On the opposite end of the policy spectrum, Congress might choose a "strict cost-benefit analysis" for other types of low-impact sites where the EPA would be ordered to implement "the most stringent obligations to consider costs and benefits" in a cleanup decision. In between these two outer limits of the cost-policy framework, Congress could utilize "cost-effective" or "cost-sensitive" decision criteria.[35]

C. The Principle of Fairness

The principle of fairness, as explained by John Rawls,

> holds that a person is required to do his part as defined by the rules of an institution when two conditions are met: first, the institution is just (or fair) . . . ; and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests. The main idea is that when a number of persons engage in a mutually

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[33] LESTER B. LAVE, THE STRATEGY OF SOCIAL REGULATION: DECISION FRAMEWORKS FOR POLICY 8 (1981).

[34] *Id.*

[35] *See generally* William H. Rodgers, Jr., *Benefits, Costs and Risks: Oversight of Health and Environmental Decisionmaking*, 4 HARV. ENVTL. L. REV. 191, 201-10 (1980), *reprinted in* ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW 234, 237-38 (3d ed. 1991).

> advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefitted from their submission.[36]

In other words, "[w]e are not to gain from the cooperative labors of others without doing our fair share."[37]

Congress would do well to seriously examine the principle of fairness applied in the context of joint and several liability—with a theoretical right of contribution—under the prevailing Superfund model. For example, are municipalities which generate municipal solid waste (MSW) consisting of a tiny fraction of toxic substances in the same position as profit-making industries who have profited greatly from avoiding the full costs of production and use of large quantities of hazardous wastes? For that matter, should generators of relatively small quantities of hazardous wastes—small businesses and the like—be governed by the same equitable considerations as Fortune 500 companies that lead the nation in various categories of hazardous waste produced? Similarly, should residents adjoining an urban Superfund site—where the total impact of air, water, and land pollution may far exceed non-urban sites—be treated the same, in terms of remedial relief, as residents surrounding an NPL site that is, nevertheless, free of environmental insults? These questions pose some difficult distributional issues.

CONCLUSION

A variety of problem areas and policy issues confront Congress in its reauthorization debates over the CERCLA-SARA paradigm of hazardous waste cleanup. In response to these challenges, policy proponents have offered variations of three Superfund reform plans: (1) a retroactive liability diminution/fund expansion model, (2) a streamlined cost allocation and cleanup standards reform model, and (3) a greater health service, environmental justice, and community involvement model.

This article concludes, however, that instead of starting out with specific policy models for Superfund reform in mind, Congress would be wise to consider a few "first principles" of reform

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[36] JOHN RAWLS, A THEORY OF JUSTICE 111-12 (1971).

[37] *Id.* at 112.

designed to achieve a more purposeful, teleological thrust to the nation's hazardous waste cleanup law. These first principles are: (1) the principle of targeting and goal setting, (2) the principle of meticulous framing of acceptable costs, and (3) the principle of fairness.