Amending Superfund

Reform or Revanche?

Kent Jeffreys

The Clinton administration has now presented its long-promised Superfund reform proposals to Congress. A casual look at the Superfund Reform Act of 1994 could certainly give the impression of significant reform. Yet as presented, the administration's amendments fail to tackle the key flaws of Superfund and actually add several new problems that appear designed primarily to buy off special interests.

In a few areas the administration's recommendations make sense, but as a whole they are a serious disappointment. The Clinton proposal includes a host of complicated adjustments that attempt to respond to the confusion arising from Superfund litigation and settlement procedures. For example, the administration proposal would address such issues as statute of limitation conflicts and federal liability under state law, and would clarify the appropriate application of many provisions of the current Superfund law. Yet the most important—and unfortunate—aspects of Superfund will remain essentially unchanged.

There are some problems with Superfund that could be resolved with a few lines of technical language; but what Superfund really needs is a complete overhaul of its purpose and goals. The federal government's failure has demonstrated what many knew all along: local hazardous waste sites are local problems. The federal effort to create a centralized response to old waste sites has, predictably, resulted in mismanagement, excessive cleanup costs, and tremendous litigation expenses.

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What is Superfund, and Does it Work?

The original Superfund was a federal response to the infamous discovery of toxic waste beneath the residential community of Love Canal, New York, and the fear that similar sites were widespread. Although the passage of time has demonstrated that human health was not greatly at risk and that, in fact, the state was responsible for causing the chemical release, the legacy of Love Canal still haunts American environmental policy.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), created the original Superfund, a five-year, $1.6 billion trust fund. The stated intent was to provide federal funding for the

cleanup of chemical wastes if responsible parties could not be found or were unable or refused to pay. The original law insisted that at least 400 "National Priority List" sites be identified and placed under the program. As befits a pork barrel project, every state was guaranteed at least one site on the list, regardless of the Environmental Protection Agency's (EPA's) relative risk assessments.

In 1986 the Superfund Amendments and Reauthorization Act extended the trust fund for another five years and greatly increased taxes to provide $8.5 billion for the program. Most recently, the Omnibus Budget Reconciliation Act of 1990 stretched Superfund to 1994 and added yet another $5.1 billion in authorized taxes. Total authorized expenditures for Superfund have now reached $15.2 billion.

Revenues for this huge environmental program come from a series of taxes, especially on crude oil and petrochemicals. In addition, certain potentially hazardous chemicals are taxed and there is a general Superfund tax on corporate profits. There is no direct relationship between the creation of waste sites and the taxing structure of Superfund. Other revenues are also available to Superfund, including loans from the Treasury's general revenues, fines and penalties, and any amounts recovered from parties found responsible for waste dumping.

The current Superfund program authorization expires on September 30, 1994. As if to prove that even death (of a program) does not relieve American taxpayers of their burdens, the taxing authorization for Superfund continues until December 31, 1995.

Although Superfund accounts for about 25 percent of the EPA's budget, few even within the EPA contend that it works as intended. More important, no one can show that Superfund is protecting human health or safety to any measurable degree.

(Not all Superfund expenditures are completely useless. Many of its emergency removal actions have been worthwhile. Yet only about 3 percent of the EPA's projected costs for Superfund sites involve removal actions of any kind. In this regard, it is not clear why the federal government should pay for local responses to local problems.)

To justify its high costs, Superfund was touted as a "polluter pays" program. Whenever a culpable party could be linked to the waste disposal site, compensation would be sought from those "potentially responsible parties," or PRPs. Yet Superfund's liability structure goes far beyond the principle of "polluter pays." Superfund liability is based upon an incredibly tough combination of common-law remedies. The original Superfund legislation imposed strict liability for handlers of hazardous chemicals. This means that even if an individual displayed the utmost care, future events could create full liability.

In addition, Superfund liability is retroactive, which means that actions that were perfectly legal (perhaps even mandated by state law) when undertaken may later trigger Superfund liability. And to top off the lunacy of Superfund, Congress imposed joint-and-several liability. This means that a party even peripherally responsible for any portion of the material at a Superfund site can be held financially responsible for the entire cleanup. (The administration proposals also seek to clarify application of *de minimis* and *de micromis* PRPs. As a rule, the EPA does not charge those smallest of PRPs directly, but waits for the large corporations to sue the smaller parties to bring them into the process. The administration seeks to limit those suits.) The theory is that a loss must be imposed somewhere, so the deepest pockets will be picked.

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That combination of liability rules results in a coercive legal structure designed to force firms to participate in the federal program. The easily predicted result is that targeted firms cross-sue one another, sometimes dragging hundreds of other firms, banks, insurance companies, and even municipal governments into the Superfund mess. Although the Clinton administration's new proposals address several of those equitable concerns, it fails to deal successfully with the

force that is directly driving Superfund cleanup costs: the EPA's risk assessments.

Those risk assessments are truly bizarre. By assuming extremely unlikely—sometimes physically impossible—events will occur in the future, the EPA is able to create the impression of risk where none exists. For example, the EPA consistently assumes that future site uses will include children, who will live there for 70 years, ingesting slightly less than a teaspoon of local dirt every day, and exclusively relying on contaminated local groundwater for bathing and drinking. (In one of the few bright spots of the administration proposals, the EPA would no longer always assume that a subdivision will be built on top of each site, if such a usage would be incompatible with surrounding land-use patterns. However, that is only one of the false assumptions built into every Superfund Hazard Ranking System application.) Coupled with excessively pessimistic assumptions of harm from that mythical exposure, the EPA is able to "prove" that a given site poses a significant risk to local citizens. Superfund standards are irrationally strict, similar to requiring every kitchen in America to be as sterile as a hospital operating room. The reason corporations fight so hard in court is because the stakes are so high. The average cost of a Superfund cleanup now exceeds $25 million as a direct result of unreasonable cleanup standards.

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What is worse, liability does not necessarily end even if a site is eventually removed from the National Priority List of sites. EPA bureaucrats can decide to apply a more stringent cleanup standard in the future and seek additional payments from the same parties. Thus, PRPs must fight strenuously in court to avoid being stuck with a large share of the costs, both now and in the future. It is no wonder that Superfund has created an avalanche of litigation. Indeed, at least during the early years of Superfund, litigation and other non-cleanup costs were consuming as much as 80 percent of the resources at some sites.

Community Involvement: Blessing or Curse?

Despite the near-universal agreement that Superfund isn't working, the Clinton administration's plan attempts to salvage the program rather than deal honestly with its failures. The Superfund Reform Act of 1994, as originally drafted, has nine sections or "Titles." Most of the major issues surrounding Superfund are touched upon, including overlitigation, local community participation, human health, allocation of liability among PRPs, and insurance company costs.

In a move to lessen the litigation spawned by Superfund, a nongovernmental arbitration board would be created to allocate shares among the PRPs at a given site. Such allocation determinations would not be binding unless accepted by the individual parties, but once accepted, would insulate the party from suit by other parties. This would essentially replace the joint-and-several-liability aspects of the current Superfund law.

That allocation procedure would be mandatory at all sites for which a remedial action has not been selected prior to passage of those amendments. Otherwise, a PRP would have to request allocation and satisfy certain other requirements. The actual allocators are to be chosen from a list of neutral third parties who are not employees of the federal government. The list is drawn up at the sole discretion of the administrator of the EPA.

The allocation would be determined according to criteria such as the toxicity of the substances contributed by each party, the degree of care exercised by each party, and the type of involvement with the generation or disposal of potentially hazardous substances. In addition, the allocator would assign an estimated portion of responsibility to an "orphan share." This could include insolvent or unidentified parties.

The administration proposes that if firms pay a premium—above and beyond the actual cleanup cost share found through the allocation process—they can essentially purchase "insurance" against the day when the federal govern-

ment decides to reopen a site. Judging from past history, any firm that can afford it will pay the premium, if only to avoid essentially unlimited future liability.

In addition, the proposed reforms would stress community involvement. The administration endorses the idea that "earlier, direct, and regular community involvement would enhance the communities' participation throughout the cleanup process." That is simply a tautology: increasing the level of community involvement will increase the level of community involvement. To that end, the administration plan makes it slightly easier for communities to receive so-called Technical Assistance Grants. Up to $50,000 (in cash and services) is available to local representatives to assist residents in wading through the bureaucratic and scientific tangles of Superfund. In addition, the administration would create Community Work Groups to "promote early, direct and meaningful public participation throughout the Superfund process." The EPA would expand its bureaucratic scope by establishing Citizen Information and Access Offices in "each state and tribal land affected by a Superfund site." In other words, potentially everywhere. Such proposals would enhance the EPA's ability to solicit community views even during the assessment stage at a potential Superfund site.

The administration proposal carefully chooses words to convey the fact that subjective views, opinions, and feelings will be allowed to influence the site identification and remedy selection process. Phrases such as "concerns and interests" and "views and preferences" clearly indicate that it is not expertise that is being solicited. This is not likely to improve the Superfund process.

Because the Superfund site selection and remediation process frightens local residents, they are likely to demand far more costly action than is reasonable or necessary—as long as someone else must pay for it. Furthermore, inviting an entire community into the highly technical Superfund process is more likely to slow it down than to speed it up, and to make it more contentious rather than less. For example, local businesses may want to expedite cleanup of a site so that bank lending can resume; yet neighborhood activists may use the community review process as an opportunity to protest "pollution."

While there is nothing wrong, in principle, with community involvement, caution should be employed. It is likely that communities will demand more expenditures unless some of the costs—both direct and in terms of lost opportunities—are borne locally. Without the discipline of costs, it is unclear how greater amounts of potentially frightening information being made available to local communities will lead to calm, scientific consideration.

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Insuring Controversy

Title VIII, the Environmental Insurance Resolution Fund, is sure to be one of the most controversial aspects of the Clinton reform plan. Insurance companies have asserted for years that their policies expressly excluded the sort of pollution liability associated with Superfund sites. Courts have not always accepted this defense. The resulting uncertainty has hurt both insurers and the insured.

The Clinton approach would create a Board of Trustees comprised of the administrator of the EPA, the U.S. attorney general, the U.S. treasury secretary (ex officio) and five members appointed by the president. The proposal specifies that the Board members, as such, would not be considered employees or officials of the U.S. government, nor should the Resolution Fund be considered a federal agency or establishment except under express conditions. The Fund itself would consist of $500 million in annual new taxes (rising in later years) collected from property and casualty insurers.

The Board would try to settle disputes over insurance policies arising out of waste disposal at National Priority List sites before January 1, 1986. Eligible parties would have 60 days to irrevocably accept or reject Board settlement offers. The most striking provision of those pro-

posals is that judicial review of this process is expressly prohibited.

Settlements among the parties would be paid for out of the newly created Fund, but would not exceed $15 million for any party. This is to cover a particular percentage of total eligible costs, dependent upon the state in which the waste exists. This differential is proposed because some state courts have favored insurance companies and others have favored the insured. (The breakdown would be: eligible parties could receive 20 percent of eligible costs in the 10 states considered least favorable to the insured, 60 percent in the 10 states most favorable to the insured, and 40 percent in all other states.)

The new Insurance Resolution Fund will not be the only controversial aspect of the Clinton proposals. In public, everyone in the administration agrees that it is time for major reform of Superfund. Yet in private, they have agreed to keep Superfund (and its associated special interests) on life support indefinitely.

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Environmental Racism

Even more politically transparent is the administration's attempt to incorporate language to deal with the recent focus on environmental racism. The environmental racism movement is based on the assumption that poor and minority communities are disproportionately targeted for hazardous waste sites and other forms of pollution. Although, to date, no Superfund site has been shown to be motivated by racism, the push for a special response from the federal government continues.

Environmental racism is just beginning to make an impact on policy. The Clinton administration has drafted an executive order on environmental racism that instructs federal agencies to gather data on environmental risks based on income, race, color, and national origin. The executive order further stipulates that it shall be federal policy "to eliminate any disproportionate risks" being borne by minority communities. That data is almost certain to become the basis for expansion of Superfund (and related programs) in the near future.

The easy response would be to condemn those measures as political pandering of the worst sort, yet the possibility of state-imposed racism cannot be dismissed out of hand. American history is filled with demonstrations that the law can be applied in an uneven and even racist manner. However, the cases presented as evidence of environmental racism are, thus far, nothing of the sort.

Perhaps the leading example of that purported racism occurs across the south side of Chicago. Admittedly, this region is notable for its racial and ethnic segregation. Yet it is not a convincing example of environmental racism. The south side of Chicago was heavily industrialized and polluted before African-Americans were even allowed to live there. The ironic twist of this story is that economic opportunity in Chicago's factories is now being cast as a racist plot to poison minority communities.

Demands are being made to declare most of this urbanized area a giant Superfund site. Sadly, even if 100 percent of the groundwater and soil contamination were removed from that region—at a cost of untold millions of dollars—the health of residents would not improve, because local health problems are not being caused by soil and groundwater contamination. Yet if Superfund remains a federal program, it is only a matter of time until some of those unwarranted demands are accepted.

In essence, the administration proposals admit that such situations do not qualify as true human health risks. Therefore, the administration endorses the concept of multiple sources of risk. The EPA has failed to establish any reasonable correlation between Superfund site pollution and specific diseases in any surrounding communities. Since no single cause has been identified for any number of unrelated maladies, from various cancers to miscarriages, the EPA now argues that everything must cause them. The theory is not completely ridiculous. Although no single pollutant may be sufficient to cause harm, the possibility of synergistic combinations cannot be dismissed. That is precisely the problem: no evidence can be presented to prove that "multiple risk factors" are not

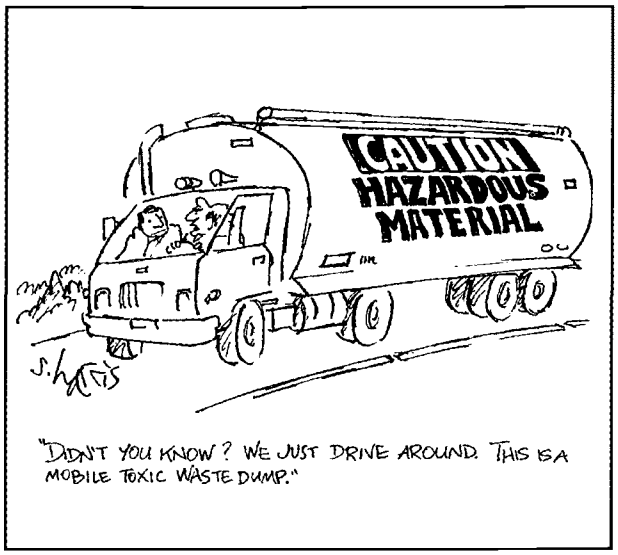
causing some specific harm. Eventually, if you add up a sufficient number of factors, you will find a correlation—even when causation is absent.

The administration's Superfund amendments would establish at least 10 "demonstration projects" to explore the risks associated with multiple sources of pollution. And, "to the maximum extent practicable," the EPA shall make those projects coincide with designated "empowerment zones" (generally economically depressed urban or rural areas). In most cases, of course, the actual exposure to chemicals will not result from proximity to a Superfund site, but rather from air pollution, municipally supplied drinking water, or some other source. Nevertheless, Superfund is to be amended to account for that off-site contamination.

Obviously, many poor communities suffer from inadequate health care, but actual evidence of health consequences from Superfund sites remains elusive. Having failed to establish any health benefit to the host community from massive Superfund cleanup efforts, the government will now directly provide health services under the guise of environmental remediation.

One might argue over whether it is appropriate to subsidize health services in rural or poor communities, but it is disingenuous to disguise them as environmental responses. If the federal government truly desired to help people in those communities, it would abandon the pretense and stop wasting money on the cleanup projects. The truth is that the risk assessments for single sources are almost entirely guesswork. Multiplying a wild guess by a hunch will not produce a stronger confidence interval.

Perhaps the best laboratory for testing the "multiple sources of risk" theory is that stretch of the Mississippi River between Baton Rouge and New Orleans, Louisiana. There is a heavy concentration of petrochemical and other industrial facilities along that water highway. As a result, the levels of exposure to pollution through the air and water are significantly higher than those found at any Superfund site in the country. (Most Superfund site exposures remain hypothetical, in any case.) There is no debate over the existence of the pollution or whether people are exposed to it. Under the guiding theory of Superfund, where there is pollution, there is cancer. And in fact, southern Louisiana has, for many cancers, a higher death rate than the national average. For many observers this was conclusive evidence of the validity of the theory underpinning Superfund. This region of Louisiana was even nicknamed "Cancer Alley."



Yet communities in southern Louisiana have been studied extensively by medical personnel in order to ferret out the root cause of this elevated death rate. The results have been somewhat surprising—and completely ignored by the Clinton administration. While some cancer death rates were higher, it turned out that the incidence of cancer was normal, occasionally even below the national average. There was no cancer epidemic. There was, instead, a lack of medical care. Thus, although residents did not develop cancer at higher-than-average rates, they died of cancer at higher-than-average rates because they received inadequate or tardy medical attention. Similar conclusions were drawn from studies of miscarriage rates in "Cancer Alley."

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Thus, unlike the rest of the Superfund reforms proposed by Clinton, the direct provi-

sion of medical care is likely to provide real benefits to people. Yet there is no justification for basing this community welfare program on Superfund. This scheme actually serves to highlight the bankruptcy of Superfund: since it cannot stand on its own merits, it will be treated as a legislative Christmas tree and decorated with attractive goodies.

The Clinton Plan and the States

Another major section of the Superfund Reform Act of 1994 is dedicated to redefining the role of the states. For example, the current formula requires states to pay 10 percent of the cost of Superfund remedial actions. Clinton would increase this to 15 percent, a small step in the right direction. (States must shoulder 100 percent of the future costs for operation and maintenance of facilities at the site. However, thus far, very few sites have reached this final stage so there is little experience for estimating operating and maintenence costs.)

However, since the original passage of Superfund in 1980, most states have developed technical and managerial expertise comparable to that of the feds. Thus, many states are capable of managing hazardous waste sites without further federal involvement. After all, most waste sites are exclusively intrastate, so it makes sense to make both the costs and benefits a state-level concern.

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Unfortunately, the administration proposal appears to be an attempt to split the states into two groups. One group would consist of those states with a well-developed internal capacity for handling waste sites (and which are therefore chafing under EPA oversight). That might be seen as an opportunity to relieve some of the pressure for extensive reform coming from the state level. By slowly reducing its control of sites on a state-by-state basis, the EPA can point to the emancipated states to deflect criticism by the others.

Yet this process is much too timid. Superfund does not require a Band-Aid; it requires euthanasia. Instead of making further attempts to salvage a failed federal program, Superfund should be turned over to the states, period. Despite, or perhaps because of, Superfund's dismal performance, there has been little political demand for this move. One mechanism that might make it possible is the State Revolving Loan Fund concept. In fact, just such an approach was adopted in order to phase out the federal role in building municipal wastewater treatment facilities.

The Wastewater Treatment Construction Grant program is the second-largest federal construction program in history (behind only the Interstate Highway System). Although Congress first provided funds to local wastewater treatment projects as early as 1956 under the Federal Water Pollution Control Act Amendments, major financial assistance was not forthcoming until comprehensive 1972 amendments created the Clean Water Act. For the years 1973 through 1976, for example, $18 billion was committed to the construction grant program. Total expenditures have since exceeded $60 billion.

Under Title II of the Clean Water Act, the EPA administered the federal grant program. A state-by-state allocation formula was used to distribute the grants. Municipalities could use the funds for constructing or improving wastewater treatment projects within the limitations of various approved categories. Those categories were further restricted by certain 1982 amendments, which also increased the requisite state share of costs from 25 percent to 45 percent.

In 1987, the State Water Pollution Control Revolving Fund Program was established by Title VI of the newly amended Clean Water Act. The State Revolving Funds were established through $8.4 billion in federal contributions along with a state "match" of 20 percent. The federal contribution toward capitalization of those state loan funds will stop at the end of fiscal year 1994. After that, the states will be wholly responsible for funding.

An estimated $84 billion worth of wastewater treatment facility construction expenditures remained unfunded when the federal govern-

ment switched to the revolving loan fund concept. Considering that over $60 billion has already been spent by federal taxpayers for construction grants, it is clear that the scale of the wastewater treatment program is similar to that of Superfund.

A few other points should be kept in mind when comparing the wastewater treatment grant program conversion with the proposal to create a similar program for Superfund sites. First, the impacts of wastewater often cross state boundaries, so a strong justification for federal involvement existed. Because wastewater is primarily a surface water problem, humans are more likely to be exposed to it than to a Superfund site's contamination. Unlike almost all Superfund sites, surface wastewater often carries infectious agents. Thus, wastewater presents a far more significant threat to human health than Superfund sites. Yet this did not prevent Congress from converting the program into a revolving loan fund, retaining only oversight functions for the EPA.

The principle behind the revolving funds is rather simple, even if the execution can be complex. With a grant program, the money is loaned to the municipality or state. Under a revolving loan fund, the monies must be paid back over time, creating strong incentives to avoid waste and inefficiencies.

Over half of the states have determined that, as a result of the revolving fund process, local governments were developing more accurate user fees and charges to reflect actual costs of maintenance, operation, and replacement. In addition, local control was expected to lead to the discovery of cheaper alternatives. And finally, greater flexibility was injected into the system by allowing states to target the funds toward actual needs rather than goals defined by the federal program.

However, the U.S. General Accounting Office identified several impediments to efficiency and cost-effectiveness under the revolving fund policy, many associated with EPA oversight. The greatest obstacles were created by the so-called federal cross-cutting authorities, which are "statutes that promote certain other national policy goals such as equal employment opportunity or protection of endangered species" and certain requirements carried over from the construction grant program under the Clean Water Act, particularly Davis-Bacon wage requirements. Many of those restrictions are scheduled to expire at the end of the 1994 fiscal year.

While the revolving loan concept is not perfect, neither is any alternative. All 50 states now have established revolving loan funds and are developing expertise in administering them. A similar process involving Superfund sites is likely to proceed even more smoothly.

Conclusion

It is difficult to find a better example of a federal program perpetuating failure than Superfund. Its original purpose was to eliminate the assumed risks to human health posed by chemical waste sites. Yet, since most sites do not pose any measurable risk in the first place, there is little justification in maintaining Superfund as a federal program.

While completely abolishing the Superfund program would be the wisest course, political dynamics make this as difficult as cleaning up a National Priority List site. Thus, Superfund should be phased out as a federal environmental program. The best alternative would be to phase in a revolving state loan fund, similar to the changes made in the sewage treatment facility grant program.

In fact, this loan approach to environmental policy can and should be adopted for the full range of federal programs, from asbestos removal to the purchase and management of endangered species habitat. Attaching fiscal responsibility to environmental goals will go a long way toward improving the results of federal policy.