



Summer 1980

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Recommended Citation

Carol L. Anderson, *Superfund Proposed to Clean up Hazardous Waste Disasters*, 20 Nat. Resources J. 615 (1980).

Available at: <https://digitalrepository.unm.edu/nrj/vol20/iss3/12>

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NOTE

SUPERFUND PROPOSED TO CLEAN UP HAZARDOUS WASTE DISASTERS

SOLID WASTE: Major legislation to establish public trust fund now pending in Congress. Bills propose coverage for oil spills, hazardous waste spills and abandoned dump sites. Industry levied fees and government appropriations would finance the trust.

BACKGROUND

In the past few years towns scattered across America have become victims of hazardous waste disasters.¹ The Environmental Protection Agency is suing Hooker Chemical for \$124 million in damages from the incident at Love Canal.² A \$2 million per year commercial fishing ground was destroyed in Virginia from the effect of pesticide dumping.³ At least 30,000 residents of Butte, Montana have been exposed to radiation from buildings constructed with phosphate waste slag.⁴ Releases of hazardous wastes from inactive and abandoned sites are the most serious environmental problem facing our Nation today.⁵

A Congressional subcommittee report issued in November 1979 surveyed 53 chemical manufacturers who had been dumping since 1950. The companies reported 3,383 disposal sites into which 765

1. The Resource Conservation and Recovery Act, defines hazardous waste as a solid waste or combination of solid wastes which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or contribute to mortality, irreversible or incapacitating reversible illness or pose a substantial hazard to human health or the environment when improperly treated, stored, transported, or disposed of. 42 U.S.C. § 6903(5) (1976). RCRA provides federal regulatory authority for hazardous waste management.

2. Wall Street Journal, December 21, 1979, at 8, col. 4. At Love Canal in Niagara Falls, New York, 240 residents had to be permanently evacuated when pesticide residue and cancer-causing solvents, disposed by Hooker Chemical, seeped through soggy ground and into basements. See Brown, *Portrait of a Polluter*, 1 AMICUS 20 (Winter, 1980).

3. Memorandum to members of the Senate Subcommittee on Environmental Pollution and Resource Protection from the staff of the Senate Committee on Environment and Public Works (September 24, 1979) at 1 [hereinafter cited as Committee Memorandum of Sept. 24, 1979] (copy on file in NRJ office).

4. 10 ENVIR. REP. (BNA) 152 (1979). New incidents occur with alarming frequency.

5. Letter to Congressional colleagues from Rep. James J. Florio, Chairman, Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce (October 31, 1979) (copy on file in NRJ office).

million tons of waste were deposited; over one-third were abandoned.⁶

In the spring of 1979, the Environmental Protection Agency (EPA) and the Department of Justice announced that investigation and action against the creators of improper waste sites would be their highest enforcement priority.⁷ Of the estimated 30,000-50,000 hazardous waste sites in the United States, 1,200-2,000 pose dangers to human health. Half of the hazardous sites are abandoned, and projected total costs of clean up range from \$13-42 billion.⁸ Of the 35-50 million tons of hazardous waste and the even larger amounts of hazardous process chemical produced annually by American industry, EPA estimated that only 10 percent are disposed of in an environmentally safe manner.⁹

In response to these recent developments, the EPA has reprogrammed \$12 million in fiscal 1980 funds, and shifted 235 people to its hazardous waste management program under the Resource Conservation and Recovery Act (RCRA).¹⁰ The Senate nomination of Eckardt C. Beck for Assistant Secretary of Water and Waste Management last year was based largely on his assurances of more ambitious EPA hazardous waste regulation.¹¹

LEGISLATION INTRODUCED

Congressional concern for the problems of hazardous waste is reflected in three major legislative proposals. What these measures have in common is the establishment of a large national trust fund, a "Superfund" financed by appropriation, taxation or both to pay for the emergency or remedial clean up and containment of mismanaged or accidental hazardous waste sites.

The Carter Administration's bill, introduced in June of 1979, is

6. HOUSE COMMERCE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, 96th Cong., 1st Sess. WASTE DISPOSAL SITE SURVEY (GPO 052-070-051-48-5 1979).

7. 10 ENVIR. REP. (BNA) 3 (1979). Their goal is 300 investigations and 50 prosecutions annually.

8. 9 ENVIR. REP. (BNA) 2085 (1979). These costs do not include third party damages or clean up of groundwater contamination.

9. Committee Memorandum of September 24, 1979, *supra* note 3, at 4.

10. 10 ENVIR. REP. (BNA) 1678 (1979). Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1979). RCRA was a major amendment to the Solid Waste Disposal Act of 1965, originally codified at 42 U.S.C. §§ 3251-3259 but subsequently codified in scattered sections of 42 U.S.C. §§ 6901-6987. RCRA has been characterized as too little too late. Regulations implementing the Act were to have been issued by April 1, 1978. As of last winter they were not yet in place despite litigation initiated by the Environmental Defense Fund and a court ordered implementation schedule. See Ginsberg, *Land Pollution: Where Do We Go From Here*, 1 AMICUS 30 (Winter 1980).

11. 10 ENVIR. REP. (BNA) 1543 (1979).

the most ambitious since it includes coverage for hazardous waste spills, oil spills and abandoned sites.¹² Edmund S. Muskie of Maine and John Culver of Iowa, co-chairmen of two subcommittees of the Senate Committee on Environment and Public Works, have introduced a more limited version which covers only hazardous substances released into the environment and abandoned hazardous dump sites, two areas not now covered by legislation.¹³

Representative James Florio of New Jersey proposed a streamlined version in October, 1979, to include inactive and abandoned sites only.¹⁴ Other related proposals recently submitted are a House Merchant Marine and Fisheries bill to clean up oil spills only,¹⁵ a post-closure liability measure from Randolph Jennings, chairman of the Senate committee named above,¹⁶ and another House bill similar to Florio's but financed solely by government appropriation.¹⁷

Last spring Congressional attention at the sub-committee level was focused on the Culver-Muskie version in the Senate, and the Florio version in the House. Earlier this year, Congressional leaders were hopeful for passage in 1980 but it now appears that inflation and federal budget concerns, as well as foreign policy and election year priorities, will hinder the bill's progress.¹⁸ Moreover, critical aspects of the Superfund concept are causing considerable controversy and delay. This article briefly discusses three of those areas: coverage, financing, and liability, with particular emphasis on the Culver-Muskie proposal.

COVERAGE

Existing legislation designed to clean up hazardous waste releases is severely limited. The three sections of the Clean Water Act (CWA) which authorize funds for the removal and disposal of oil and other hazardous substances are restricted in scope to water pollution incidents.¹⁹ "Frequently, EPA is finding it does not have authority to

12. S. 1341, 96th Cong., 1st Sess. (1979) [hereinafter cited as the Administration bill].

13. S. 1480, 96th Cong., 2d Sess. (1980) [hereinafter cited as the Muskie bill].

14. H.R. 5790, 96th Cong., 1st Sess. (1979) [hereinafter cited as the Florio bill].

15. H.R. 85, 96th Cong., 1st Sess. (1979).

16. S. 1325, 96th Cong., 1st Sess. (1979). The post-closure liability measure proposes a mechanism for accumulating funds during the operation of a permitted facility that would be available for damage and liability claims after closing.

17. H.R. 6931, 96th Cong., 2d Sess. (1980).

18. Interview with Dave Lennett, Environmental Defense Fund, Washington, D.C., March 18, 1980.

19. Committee Memorandum of September 24, 1979, *supra* note 3, at 4. The Clean Water Act was a 1977 amendment to the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976) and is codified in scattered sections of 33 U.S.C. §§ 1251-1376 (Supp. II 1978).

act or that its legal authority is tenuous and depends on broad on-the-spot interpretation of the law."²⁰ The CWA, for example, creates difficult burdens of proof by requiring a showing of "imminent and substantial endangerment to the public health or welfare" before any of the authorized \$10 million replenishable fund can be spent to clean up pollution.²¹

The Resource Conservation and Recovery Act prohibits future hazardous dumping; sets standards for existing generators, transporters, owners and operators; and authorizes and creates a regulatory structure to track such wastes.²² However, it is not designed to deal with past dumping practices or abandoned disposal sites.²³ In the absence of a fund, a financially solvent perpetrator must be found, sued and collected from before any money is available. Other obstacles include the high cost of identifying chemicals in the ground and tracing them to their source, lack of records for old dump sites, corporate veils which obscure assets of responsible parties, and the inability of small firms to pay.²⁴

In light of these legislative shortcomings, the administration's proposal,²⁵ buttressed by research done by the EPA and Department of Justice, seeks a comprehensive mechanism which would cover releases into all elements of the environment and releases from abandoned sites.²⁶ This bill also follows the CWA example by combining oil and hazardous substance releases. EPA has argued that a joint measure will promote administrative efficiency, since standards and enforcement in all three areas are vastly similar.²⁷

The Culver-Muskie Superfund bill,²⁸ offered partly in the name of political expediency, provides for "liability, compensation, clean up, and emergency response for hazardous substances released into the environment and the clean up of inactive hazardous waste disposal sites."²⁹ Although the Culver-Muskie bill eliminates coverage for oil spills, it provides a broader definition of hazardous substances.³⁰

Rep. Florio's bill³¹ seeks to balance priority needs with rapid

20. *Id.*

21. 33 U.S.C. § 1364 (1978). This section of the Act, however, has never been funded.

22. 42 U.S.C. §§ 6901-6987 (1976).

23. For a further analysis of the limitations inherent in the RCRA see Goldfarb, *The Hazards of our Hazardous Waste Policy*, 19 NAT. RES. J. 249 (1979).

24. Committee Memorandum of September 24, 1979, *supra* note 3, at 5.

25. Administration bill, *supra* note 12.

26. 10 ENVIR. REP. (BNA) 5 (1979).

27. 10 ENVIR. REP. (BNA) 1090 (1979).

28. Muskie bill, *supra* note 13.

29. 10 ENVIR. REP. (BNA) 1242 (1979).

30. Muskie bill, *supra* note 13, at § 2(13).

31. Florio bill, *supra* note 14.

passage of legislation by covering only abandoned sites. The House Subcommittee on Transportation and Commerce has sole jurisdiction over this proposal.³² The measure would amend the Solid Waste Disposal Act to provide authority to respond to presently unregulated hazardous waste releases through the creation of the Hazardous Waste Response Fund.³³

Although the Environmental Defense Fund and other leading lobbyists favor coverage for all three disaster situations, their position is not inflexible.³⁴ The Chemical Manufacturers Association (CMA), spokesman for the chemical industry, has testified that oil spill, chemical spills and waste disposal incidents should all be treated separately and that no new Federal programs are needed to handle spills of hazardous substances.³⁵ CMA also opposes the Muskie bill's sweeping prohibition on releases since it undercuts existing environmental regulations based on technological limits and the extent of danger to public health.³⁶

FINANCING

The greatest problem with existing legislation is the limited funding levels.³⁷ Two alternative means are being considered to finance the clean up of hazardous wastes: industry paid fees alone, or industry fees plus government appropriations.

The Muskie bill anticipates a broadly based, adjustable fee levied on the generators, importers, and manufacturers of hazardous substances, with no government support.³⁸ The resulting fund could approach \$500 million annually, and be reauthorized after seven years.³⁹

Both the administration's and Florio's proposals contemplate a fee levied on industry which will comprise most of the fund, along with some federal appropriation. The Florio bill proposed 75 percent from industry and 25 percent from federal sources to raise \$3 billion

32. 10 ENVIR. REP. (BNA) 1478 (1979).

33. Florio bill, *supra* note 14, at § 3041.

34. Interview with Dave Lennett, Environmental Defense Fund, Washington, D.C., March 18, 1980.

35. Statement of Frank B. Friedman on behalf of the Chemical Manufacturers Association before Joint Hearings of the Senate Subcommittees on Environmental Pollution and Resource Protection Committee on Environment and Public Works (September 7, 1979) (copy on file in the NRJ office).

36. *Id.*

37. Committee Memorandum of September 24, 1979, *supra* note 2, at 4.

38. 10 ENVIR. REP. (BNA) 767 (1979).

39. Muskie bill, *supra* note 13, at § 5(c)(2).

over four years,⁴⁰ while the administration's bill urges an 80-20 split up to \$500 million with reauthorization after four years.⁴¹

Based upon EPA research, the administration's proposal would collect fees from suppliers of petrochemical feedstocks and inorganic raw materials as they are produced and shipped, or imported and used on site at their first processing operation.⁴² The Florio bill would expand the collection activity to certain acids, heavy metals, and crude oil.⁴³ All three approaches acknowledge the need to spread the cost broadly across the economy in order to ease economic dislocation and inflationary tendencies.

Industry reaction to the fee system has been largely negative, its position being that such a plan will cause prices to rise, feed inflation, and adversely affect small manufacturers.⁴⁴ Even more disturbing to industry representatives, however, is the possible burden the Superfund will place on the generating aspect of hazardous waste production. Industry also has raised the question of the constitutionality of levying a fee on present generators not responsible for previous dump sites which now have been abandoned.⁴⁵

Environmental groups prefer the Culver-Muskie recommendation because it places a greater responsibility on chemical producers. They perceive the 20 percent federal funding as a form of corporate bail-out, which makes the trust's level of financing vulnerable to the political appropriation process.⁴⁶ Although the Muskie bill raises industry's share of the cost and provides interim funding sources while fees are being collected, environmentalists concede that it will be more difficult and expensive to administer and will place a greater hardship on small businesses.⁴⁷

LIABILITY

The liability issues have created as much controversy as has the fee system. No existing legislation specifically authorizes compensation

40. 10 ENVIR. REP. (BNA) 1753 (1979).

41. 10 ENVIR. REP. (BNA) 224 (1979).

42. *Id.*

43. Florio bill, *supra* note 14, at § 3042(a).

44. 10 ENVIR. REP. (BNA) 1164 (1979).

45. Statement of Frank B. Friedman, September 7, 1979, *supra* note 35. The imposition of industry fees to clean up abandoned dumpsites raises several constitutional questions since it requires fees from persons who would receive no direct benefit. The CMA argues that the fee system in the Muskie and Administration bills may amount to a constitutionally proscribed bill of attainder since it applies to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial. See Chemical Manufacturers Association, *CMA and Superfund*, (July 19, 1979) (A statement presented to the Senate Committee on Environment and Public Works) (Copy on file in NRJ office).

46. 10 ENVIR. REP. (BNA) 193 (1979).

47. 10 ENVIR. REP. (BNA) 767 (1979).

for victims of hazardous waste disasters. The Clean Water Act and the Resource Conservation and Recovery Act rely on traditional liability standards and tests. Third party victims have no access to the federal courts and must seek compensation under state tort laws applying negligence and nuisance theories. The victim bears the cost and burden of proving technically complex causes and effects.⁴⁸

The administration's bill eases these problems somewhat by subjecting owners and operators of vessels or facilities which are the source of or pose a threat of pollution to joint, several and strict liability for costs and damages covered by the fund. With respect to disposal sites, anyone who has caused or contributed to a release, including past disposers and generators, is liable.⁴⁹ There are selected liability limits and defenses. Only damages for loss of property and the opportunity to harvest marine life may be claimed in the case of spills.⁵⁰

Similarly, the Florio bill proposes changes in the liability requirement, in order to facilitate easier recovery for plaintiffs, by making any person who causes or contributes to releases strictly, jointly and severally liable for removal and containment costs and all damages for personal injury, property injury, and economic loss.⁵¹ However, traditional standards of negligence and causation between actual injury and the release are not altered. In the absence of a liable party, the Florio Superfund is authorized to pay only for removal, containment, and clean up costs of hazardous waste violations.⁵²

The Culver-Muskie proposal is perhaps the most far reaching and innovative. It calls for extensive third party claims and spells out less restrictive burdens and tests for liability. Under a federally created cause of action, owners and operators of vessels and facilities discharging, releasing, or disposing of hazardous substances in violation of the Act will be held jointly, severally and strictly liable for all costs of removal, containment, or emergency responses; all damages for economic loss or loss due to personal injury; loss of personal property or the use of personal property; loss or destruction of natural resources; loss of profit or income due to loss of personal property or natural resources; out-of-pocket medical expenses; and loss of tax royalty or rental profits by political subdivisions.⁵³ There

48. Committee Memorandum of September 24, 1979, *supra* note 4, at 5.

49. Administration bill, *supra* note 12, at § 604.

50. *Id.* at § 607.

51. Florio bill, *supra* note 14, at § 3061.

52. *Id.* at § 3032.

53. Muskie bill, *supra* note 13 at § 4(a)(1) and (2) (1980). These liability provisions do not apply where a person found liable under the bill can prove that a discharge, release or disposal was caused by an act of God or war.

are no liability limits.⁵⁴ Where no party can be held liable, the fund will cover containment and emergency response; removal costs; restoration costs; out-of-pocket medical expenses; and cost assessment of short and long term injury and research related outlays.⁵⁵ Another unique feature is the rebuttable presumption and reasonably related test contained in the draft version of the Muskie bill.

Notwithstanding the ordinary requirements for proof of cause in fact or proximate cause of damage, injury, or loss, a discharge, release or disposal shall be presumed to have caused the injury or disease complained of and the associated medical expenses if a plaintiff seeking damages under this subsection offers evidence tending to establish a reasonable likelihood that (i) the injured or diseased party was exposed to a hazardous substance found in a discharge, release, or disposal for which the defendant may be held liable under this section, and (ii) such a hazardous substance or such a discharge, release or disposal could have caused the injury or disease of the class or type for which medical expenses are sought.⁵⁶

This provision is significant because it abolishes traditional requirements for proof of cause in fact and proximate cause and replaces it with a reasonably related test—that a reasonable person could conclude that the medical expenses and the injury or disease which caused them are reasonably related to the discharge, release or disposal.⁵⁷ The bill also specifies that the trier of fact shall consider as relevant and material information as to an increase in the incidence of a disease or injury, and laboratory and other studies.⁵⁸

Industry views the looser liability scheme as a regulatory mechanism designed to reduce pollution.⁵⁹ Chemical Manufacturers Association has challenged this approach for its adverse effects on small business,⁶⁰ excessive insurance and bonding costs,⁶¹ and possible constitutional issues.⁶² Environmentalists however, are standing firm in favor of stiffer liability propositions, since they put plaintiff and defendant on more equal footing and recognize the inherently dangerous nature of hazardous wastes.

54. *Id.* at § 4.

55. *Id.* at § 6.

56. *Id.* at § 4(c)(2)(A).

57. Statement of Frank B. Friedman, September 7, 1979, *supra* note 35.

58. Muskie bill, *supra* note 13 at § 4(c)(1)(A).

59. 10 ENVIR. REP. (BNA) 1164 (1979).

60. *Id.*

61. 10 ENVIR. REP. (BNA) 1187 (1979).

62. CMA argues that the retroactive change in liability principles amounts to an *ex post facto* denial of due process. Statement of Frank B. Friedman, September 7, 1979, *supra* note 35, at 10.

CONCLUSION

As more hazardous waste disasters occur, public pressure for remedial legislation should increase. The need for swift passage will surely be of greater concern than coverage for all three kinds of disasters, particularly if CWA is adequate to cover oil spills. Land pollution from hazardous waste spills and abandoned and operating sites, however, involves many different circumstances, chemicals and consequences. New legislation which gives broad authority to respond to a wide range of these emergency conditions is needed now.

In the final analysis, the debate over public or private sector financing is spurious—taxpayers and consumers will pay. Given the lack of recognized, efficient alternatives, it seems reasonable that clean up costs be spread throughout society, as have the price of other environmental safety measures which industry has been forced to employ. Hazardous waste clean up can be viewed as an external cost of doing modern business which can no longer be ignored.

The liability question is largely one of who will benefit from the fund. If government policy is to let consumers and taxpayers carry the burden of financing the fund, then government policy needs to mandate that consumers and taxpayers receive the dividends. In this case a liberal liability threshold, along with the more generous compensation provisions of the Culver-Muskie bill, creates a form of national insurance against the ruinous effects of a hazardous waste disaster. Funding should also be at a level adequate to compensate third party victims for economic losses when no party can be found liable, or no other form of insurance is available.

Based upon current research and documentation, it is inevitable that the danger of existing and abandoned hazardous waste disposal sites and spills will continue to pose serious health problems to the American public. Swift passage of workable legislation to finance clean up and emergency responses is incumbent upon congressional leadership. The key to successful Superfund legislation, however, depends on the recognition that hazardous waste disposal, treatment, and containment must be a cooperative venture between government and industry.⁶³

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63. 10 ENVIR. REP. (BNA) 1644 (1979). In Europe a cooperative approach has resulted in a more advanced and successful hazardous waste management program.

Eds. note: At the end of June 1980, the Muskie bill was undergoing markup by the Senate Committee on Environment and Public Works. The Administration bill was no longer being seriously considered. On the House side, the Committee on Interstate and Foreign Commerce reported out an amended substitute version of the Florio bill (now H.R. 7020) on May 16, 1980. The House Ways and Means Committee amended and approved H.R. 7020 on June 20, 1980 to create a \$1.2 billion fund financed 75 percent from a tax on industry and 25 percent from government sources.