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Developments in Hazardous Waste Management

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foul up other people's backyards. Finally, Section V describes how these new sewerage systems have, themselves, produced a different type of waste and how the newer problem of now fouling our own backyards, rather than someone else's, has not yet been solved.

I. DEVELOPMENTS IN HAZARDOUS WASTE MANAGEMENT ......................................................NANCY JAMES

A. Introduction

One of the foremost environmental problems to emerge in recent years is the disposal and containment of hazardous waste. Numerous incidents of spills, leaks, or releases of hazardous substances have come to light. Ensuing investigation has revealed a threat to human and environmental health of as yet unknown proportions.

The Environmental Protection Agency (EPA) estimates that hazardous waste production reached fifty-seven million metric tons in


The term "hazardous substances" will be used in this paper to mean "elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment." Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, § 102 94 Stat. 2767 (to be codified in 42 U.S.C. §§ 9602).

22. One of the most publicized of these incidents is the Love Canal disaster. From 1942 to 1951, Hooker Chemical Corporation dumped over 21,000 tons of toxic chemical wastes into an old canal in Niagara Falls, New York. Hooker then covered the dump and conveyed the canal property to the City Board of Education. The Board built a school and playground on part of the site and conveyed the rest to the city and a developer. Some time in 1976, chemicals from the dump began to seep into the basements of houses encircling the canal. Subsequent studies and tests revealed a high incidence of miscarriage, birth defects, and other medical problems. Monitoring confirmed the existence of significant levels of toxic, carcinogenic, and teratogenic substances inside the houses and in surrounding soil and surface water. See Comment, Hazardous Waste: EPA, Justice Invoke Emergency Authority, Common Law in Litigation Campaign Against Dump Sites, 10 Env'tl. L. Rep. (ELI) 10034, 10035 (1980).

Other examples of toxic pollution are found in the contaminated groundwater of Woburn, Massachusetts; Dover and Jackson Townships, New Jersey; New Hanover County, North Carolina; Hardeman county, Tennessee; and Lathrop, California. Chemical wastes migrated from disposal sites into lakes, rivers, and streams in Muskegon, Michigan; Riverside County, California; West Point, Kentucky; and Saltville, Virginia. Fires and explosions erupted at disposal sites in Gary, Indiana and Elizabeth, New Jersey. See Parisi, Who Pays? Cleaning up the Love Canals, N.Y. Times, June 8, 1980, § 3, at 1, col. 1. See also Magnuson, The Poisoning of America, Time, Sept. 22, 1980, at 58.
1980 and that, absent new regulations, ninety percent of that waste would be disposed of in an unsound manner. Based on its study of inactive and uncontrolled hazardous waste sites, EPA estimates that 30,000 to 50,000 sites existed in 1970—of which 1,200 to 2,000 present a serious health risk. The estimated cost of remediating this problem is staggering. Congress assessed the expense of removal and containment of all hazardous waste that presently endangers public health and the environment to be between thirteen and twenty-two billion dollars.

The lack of established procedures for dealing with such a crisis situation prompted Congress to consider several proposals for defining liability and responding to hazardous substance emergencies. After much negotiation and compromise, the Ninety-sixth Congress in its final days enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. This article examines the new law, its roots, and its future.

B. Background

Before passage of this “superfund” legislation, there was no comprehensive federal definition of liability or compensation for harm

23. See notes 56-58 and accompanying text infra.


26. Id. at 20.

27. See notes 63-66 and accompanying text infra.


30. “Superfund” became the generic term for various bills proposing, among other things, a large trust fund to pay for emergency pollution cleanup.
caused by hazardous waste. Rather, authority existed in various statutes for a federal response to specified toxic or hazardous substance problems. Although the federal government occasionally provided emergency assistance, an affected state often bore alone the expense of cleanup, monitoring, and other necessary remedial action.

1. Common Law

Hazardous pollution incidents impose costs not only on governments but frequently result in personal, propertary, or economic injury to private individuals. Such private parties have had to rely on state common law remedies for compensation. The common law, however, is not designed to cope with environmental pollution injuries. The generally applicable principles of tort and property law are oriented toward disputes between individuals, and thus are unsuitable for large-scale incidents injuring many persons. Such plaintiffs often face formidable problems with statutes of limitation,


32. Id. See, e.g., Section 311 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321 (1976 & Supp. III 1979) (threatened or actual discharge of oil or hazardous substances into navigable waters activates federal response; section authorizes cleanup funding, to be reimbursed by discharger who is held strictly liable); Section 504(b) of FWPCA, id. § 1364 (authorizes assistance for emergencies resulting from release of pollutant or contaminant into the environment); Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. §§ 1811-47 (Supp. II 1978 & Supp. III 1979) (authorizes response to finance cleanup and compensate certain economic injuries from oil pollution; costs recoverable from strictly liable owners and operators of discharging offshore facilities and vessels).

33. For example, federal technical assistance followed the Kepone pollution of the James River in Virginia and the carbon tetrachloride pollution of the Ohio River. Cong. Research Serv., Library of Congress, Superfund Issue Brief No. IB77019 at 1-2 (1980). The 1978 presidential declaration qualifying the Love Canal area for federal disaster assistance was, however, the first such designation resulting from chemical pollution. Maugh, Toxic Waste Disposal a Growing Problem, 204 SCIENCE 819, 820 (1979).


36. Pfennigstorf, supra note 34 at 353-54.
proof of causation, long and costly litigation, and complex technical issues. These legal barriers to recovery press many victims to settle for less than adequate compensation and dissuade others from even pursuing damages.

2. Statutory Law

Although the federal and state legislatures made moderate responses to hazardous substance threats, most statutes focused on abatement and left common law limitations intact. Typical statutes created pollution prevention and control standards, compliance mechanisms, and noncompliance penalties. They did not, however, establish principles of liability and compensation for third party injuries.

Many states enacted statutes requiring that persons disposing of hazardous waste obtain liability insurance or otherwise demonstrate financial responsibility. A smaller number of states established funds for cleanup of hazardous substances or maintenance of hazardous waste disposal sites. Legislation in only a few states, however, explicitly covered certain third party damages.

3. Resource Conservation and Recovery Act

Recognizing that waste production and disposal could not continue
unrestrained, Congress enacted the Resource Conservation and Recovery Act (RCRA)\textsuperscript{46} in 1976. Its objectives were to protect health and the environment and to conserve resources through improved waste management techniques.\textsuperscript{47} Subtitle C\textsuperscript{48} of RCRA provided for a "cradle to grave" regulatory scheme to control hazardous waste.\textsuperscript{49} The major provisions of the Act directed EPA to (1) identify and list hazardous wastes;\textsuperscript{50} (2) establish minimum operating standards\textsuperscript{51} and permit systems\textsuperscript{52} for handlers of such wastes; (3) set up an information reporting system\textsuperscript{53} for tracking the waste from generation through disposal,\textsuperscript{54} and (4) promulgate guidelines for and to approve state hazardous waste programs.\textsuperscript{55}

Although Congress ordered EPA to promulgate regulations for implementing RCRA within eighteen months of its October, 1976, enactment,\textsuperscript{56} final regulations for Subtitle C did not appear until May of 1980.\textsuperscript{57} Furthermore, those regulations did not become effective.

\textsuperscript{47} Id. § 6902.
\textsuperscript{48} Id. §§ 6921-31.


\textsuperscript{50} 42 U.S.C. § 6921 (1976).
\textsuperscript{51} Id. §§ 6922-24.
\textsuperscript{52} Id. § 6925. Note that permits were required only for treatment, storage, or disposal of hazardous waste.
\textsuperscript{53} Id. § 6903(12).
\textsuperscript{54} Id. § 6922(5).
\textsuperscript{55} Id. § 6931.
\textsuperscript{56} Id. §§ 6921-26.
\textsuperscript{57} 40 C.F.R. §§ 260.1-265.430 (1980).
WASTE MANAGEMENT

until six months after issuance. 58

RCRA suffers several major shortcomings besides the delay in its implementation. First, the statute left the siting of facilities to state regulation and gave no guidance for handling the inevitable problem of local opposition. 59 Second, RCRA focused on the disposal stage, leaving the generation of hazardous waste unrestricted. 60 Third, the Act controlled future waste handling and active disposal facilities, but gave EPA little authority to deal with past practices or inactive sites. 61 Fourth, the statute failed to provide funds for emergency action to alleviate imminently dangerous situations. 62 Finally, the Act ignored the problem of third party damages. In sum, while Congress aimed RCRA in the right direction, it failed to address adequately numerous important issues.

C. Evolution of the Act

The deficiencies of previous legislation plus increasingly frequent reports of contamination incidents illuminated the need for further action. Federal legislators suggested various schemes to fill in the gaps. Most of the schemes proposed some type of systematic federal program, including a funding mechanism capable of responding to hazardous substance emergencies. 63 Three bills that eventually

60. Id. at 255. Under the Act, the generator's only responsibility was to provide information. A more logical and farsighted approach to waste management would have required generators to curtail hazardous waste production as well. Id.
61. Comment, Hazardous Waste: EPA, Justice Invoke Emergency authority, Common Law in Litigation Campaign Against Dump sites, 10 ENVTL. L. REP. (ELI) 10034, 10034 (1980). Under section 7003, EPA could seek an injunction against any hazardous waste operation "presenting an imminent and substantial endangerment to health or the environment." RCRA, 42 U.S.C. § 6973 (1976). The "imminent endangerment" requirement presents a difficult burden of proof. Hazardous Waste Crisis, supra note 24, at 10066. In addition, EPA can use the section only against the present owner of the inactive site location. Id. No part of the statute contended with those abandoned sites for which no responsible owner or operator is available.
63. See, e.g., S.1341, 96th Cong., 1st Sess, 125 CONG. REC. S7695 (daily ed. June
moved to the forefront were H.R. 85, H.R. 7020, and S.1480.

The House of Representatives chose to separate the problem of abandoned waste sites from that of oil and chemical spills. H.R. 85 authorized two funds of $375 million each, one for oil spills and the other for hazardous substances spills into navigable waters. Both funds would be established over five years from taxes on the oil and chemical industries.

The House in H.R. 7020 focused on abandoned hazardous waste disposal sites. It provided for a national inventory of inactive sites and a program for emergency action and containment. The bill proposed a Hazardous Waste Response Fund, based on a five-year accumulation of $880 million from industry fees and $300 million from federal appropriations. The bill further created a cause of action in strict liability to allow the federal government to recover the costs of response measures. Neither H.R. 85 nor H.R. 7020, however, gave third-party victims a federal court claim.


68. See id. at 5-8.


70. See id. at 6-9.


72. See id. at 6-9, 14.

73. See id. at 10.

Senate bill S. 1480 took a much more comprehensive approach, and consequently incurred greater opposition. The Senate's approach rested upon several premises: First, those responsible for damage caused by hazardous substances should bear the cost of cleanup and compensation. Second, a federal fund must finance response action when the liable party is unknown or does not or cannot pay the costs. Third, the fund should consist mainly of contributions from those associated with the profiting from hazardous substances. Fourth, the federal response should include cleanup of chemical disasters. Finally, those suffering economic, health, and other injuries should receive adequate compensation.

The bill established a fund of $4.085 billion to accumulate over six years, with about eighty-seven percent coming from industry fees and the remainder from federal revenues. This fund would compensate third parties sustaining medical, proprietary, and economic losses whenever a liable party was unknown or failed to satisfy the claim. The fund would also cover governmental expenditures for emergency containment and cleanup, restoration of natural resources, resident evacuation and relocation, and long-term treatment or removal of hazardous substances.

The Senate proposal also contained novel liability provisions. Persons responsible for a hazardous release would be strictly liable, jointly and severally, for all government response costs and certain third party damages. Furthermore, the bill at last gave victims a federal cause of action for personal injury.

As the session drew to a close, however, the Senate was unable to

75. See, e.g., 11 ENVIR. REP. (BNA) 327-28, 707-08 (1980).
76. See S. REP. No. 848, 96th Cong., 2d Sess. 13 (1980).
77. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. See id. at 69.
83. See id. at 64-69.
84. See id. at 51, 64-69.
85. See id. at 31.
86. See id. at 32.
87. See id. at 36, 64.
reach agreement on S.1480. Aware of the pressing need for legislation, members relinquished that bill and passed another, similar to H.R. 7020. The House approved this compromise bill on December 3, and President Carter signed it into law on December 11, 1980.

D. The Act

1. Financing and Coverage

The Hazardous Substance Response Trust Fund comprises the central feature of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Taxes imposed for five years on industries producing crude and refined oil and forty-two specified chemicals will contribute $1.38 billion to the fund. Five

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88. See 11 ENVIR. REP. (BNA) 1041 (1980).
89. Id. at 1097. Senator Mitchell (R-Maine) stated that, in view of a likely filibuster by opponents of S.1480, "we are faced with a choice of this compromise, or no bill at all." Id.
94. Id. § 221 (amending I.R.C. § 4611).
95. The Act will tax oil at a rate of 0.79 cents per barrel. Id.
96. The Statute taxes industries producing the following chemicals at the specified rate:

<table>
<thead>
<tr>
<th>Chemical</th>
<th>Tax Per Ton</th>
<th>Chemical</th>
<th>Tax Per Ton</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acetylene</td>
<td>$4.87</td>
<td>Potassium dichromate</td>
<td>1.69</td>
</tr>
<tr>
<td>Chromite</td>
<td>1.52</td>
<td>Sodium dichromate</td>
<td>1.87</td>
</tr>
<tr>
<td>Benzene</td>
<td>4.87</td>
<td>Cobalt</td>
<td>4.45</td>
</tr>
<tr>
<td>Butane</td>
<td>4.87</td>
<td>Cupric sulfate</td>
<td>1.87</td>
</tr>
<tr>
<td>Butylene</td>
<td>4.87</td>
<td>Cupric oxide</td>
<td>3.59</td>
</tr>
<tr>
<td>Butadiene</td>
<td>4.87</td>
<td>Hydrochloric acid</td>
<td>0.29</td>
</tr>
<tr>
<td>Ethylene</td>
<td>4.87</td>
<td>Hydrogen fluoride</td>
<td>4.23</td>
</tr>
<tr>
<td>Methane</td>
<td>3.44</td>
<td>Leaf oxide</td>
<td>4.14</td>
</tr>
<tr>
<td>Naphthalene</td>
<td>4.87</td>
<td>Mercury</td>
<td>4.45</td>
</tr>
<tr>
<td>Propylene</td>
<td>4.87</td>
<td>Nickel</td>
<td>4.45</td>
</tr>
<tr>
<td>Toluene</td>
<td>4.87</td>
<td>Antimony</td>
<td>4.45</td>
</tr>
<tr>
<td>Xylene</td>
<td>4.87</td>
<td>Antimony trioxide</td>
<td>2.85</td>
</tr>
</tbody>
</table>
annual appropriations of $44 million from general federal revenues will constitute the remainder of the $1.6 billion trust fund. The Act also enables the Treasury to advance appropriations to the fund, repayable by September 30, 1985.99

The statute authorizes the federal government to undertake response measures whenever a release or threatened release of any hazardous substance endangers the public health or environment.100 The fund will pay governmental and other approved removal costs.102 The Act also allows expenditures for longer term remedial actions if the affected state agrees to pay ten percent of those costs.104 In addition, the state must assume future maintenance of the remedial actions and secure an acceptable disposal facility.105

The Act provides a detailed claims procedure for persons desiring reimbursement from the fund.107 A claimant must first present the claim to the owner or operator of the facility or vessel responsible

<table>
<thead>
<tr>
<th>Substance</th>
<th>4.45</th>
<th>Stannic chloride</th>
<th>2.12</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arsenic</td>
<td>4.45</td>
<td>Stannic chloride</td>
<td>2.12</td>
</tr>
<tr>
<td>Arsenic trioxide</td>
<td>3.41</td>
<td>Zinc chloride</td>
<td>2.22</td>
</tr>
<tr>
<td>Barium sulfide</td>
<td>2.30</td>
<td>Zinc sulfate</td>
<td>1.90</td>
</tr>
<tr>
<td>Bromine</td>
<td>4.45</td>
<td>Potassium hydroxide</td>
<td>0.22</td>
</tr>
<tr>
<td>Cadmium</td>
<td>4.45</td>
<td>Sodium hydroxide</td>
<td>0.28</td>
</tr>
<tr>
<td>Chlorine</td>
<td>2.70</td>
<td>Sulfuric acid</td>
<td>0.26</td>
</tr>
<tr>
<td>Chromium</td>
<td>4.45</td>
<td>Nitric acid</td>
<td>0.24</td>
</tr>
</tbody>
</table>

97. Id. § 303 (to be codified in 42 U.S.C. § 9653).
98. The Act authorizes appropriations for fiscal years 1981 through 1985. Id. § 221 (to be codified in 42 U.S.C. § 9633(3)).
99. Id. § 223(c) (to be codified in 42 U.S.C. §§ 9633(3)).
100. Id. § 104(a)(1) (to be codified in 42 U.S.C. § 9604(a)(1)).
101. See id. § 101(23) (to be codified in 42 U.S.C. § 9601(23)), for the definition of “removal.”
102. Id. § 111(a) (to be codified in 42 U.S.C. § 9611(a)).
103. See id. § 101(24) (to be codified in 42 U.S.C. § 9601(24)), for the definition of “remedial action,” which includes permanent containment of waste sites, monitoring, and relocation of residents where necessary.
104. Id. § 104(e)(3)(C) (to be codified in 42 U.S.C. § 9604(e)(3)(C)).
105. Id. §§ 104(e)(3)(A)-(B) (to be codified in 42 U.S.C. §§ 9604(e)(3)(A)-(B)).
106. See id. § 101(21) (to be codified in 42 U.S.C. § 9601(21)), for the definition of “person.”
107. See id. § 112 (to be codified in 42 U.S.C. § 9612). Section 111 describes who may assert a claim against the Response Trust Fund. Eligible claimants include federal and state governments and other persons approved to carry out the national contingency plan outlined in § 105. Id. 111(a) (to be codified in 42 U.S.C. § 9611).
for the release of hazardous substances.\textsuperscript{108} If the claim remains unsatisfied for 60 days, the claimant may initiate a court action against the owner.\textsuperscript{109} In this alternative, the claimant may file the claim with the administrator of the fund,\textsuperscript{110} who will attempt to arrange a settlement between the parties.\textsuperscript{111} If they do not reach a settlement within forty-five days of filing, the administrator may pay the claim.\textsuperscript{112} The Attorney General may then sue all liable parties to recover any compensation paid out of the fund.\textsuperscript{113} Claim presentation or commencement of suit must generally occur within three years of discovery of the loss.\textsuperscript{114}

A new agency within the Public Health Service will study and monitor the health effects of toxic substances.\textsuperscript{115} The administrator of this agency will maintain a national register of persons exposed to toxic substances and, in case of public health emergency, direct medical care and testing to exposed persons.\textsuperscript{116}

2. Liability and Penalties

Persons either arranging for disposal or disposing of hazardous substances at a facility from which there is an actual or threatened release, and the owner of the facility, are liable for all removal or remedial costs which the federal and state governments or other ap-

\textsuperscript{108} Id. § 112(a) (to be codified in 42 U.S.C. § 9612(a)). The term “owner” includes both owners and operators, and the term “facility” includes both facilities and vessels.

\textsuperscript{109} Id.

\textsuperscript{110} Id.

\textsuperscript{111} Id. § 112(b)(2) (to be codified in 42 U.S.C. § 9612(b)(2)). By settling, the parties waive all claims against the fund. Id. If a liable party is unknown, the administrator will attempt to settle the claim against the fund. Id.

\textsuperscript{112} Id. § 112(b)(3) (to be codified in 42 U.S.C. § 9612(b)(3)). A dissatisfied claimant may appeal an award to the federal district court. Id. If the administrator desires an award altogether, a Board of Arbitrators will review the claim. Id.

\textsuperscript{113} Id. § 112(c)(3) (to be codified in 42 U.S.C. § 9612(c)(3)).

\textsuperscript{114} Id. 112(d) (to be codified in 42 U.S.C. § 9612(d)). Federal district courts have exclusive original jurisdiction over all cases under the Act, id. § 113(b) (to be codified in 42 U.S.C. § 9613(b)), with the exception that only the District of Columbia Circuit Court of Appeals may review cases involving regulations promulgated under the Act. Id. § 113(a) (to be codified in 42 U.S.C. § 9613(a)).

\textsuperscript{115} Id. § 104(i) (to be codified in 42 U.S.C. § 9604(i)). The Agency for Toxic Substances and Disease Registry will report to the Surgeon General. Id.

\textsuperscript{116} Id.
proved persons incur. Liability also extends to damaged or lost natural resources under federal or state control.

A defense to liability arises when the release and consequent damages are caused by an act of God, war, or an independent third party. The Act does not cover damages resulting from federally permitted releases. Where a facility operating under permit in accordance with Subtitle C of the Resource Conservation and Recovery Act releases hazardous substances, the facility's liability transfers to a Postclosure Liability Fund following closure of the facility in accordance with EPA regulations. The Postclosure Fund, consisting of up to $200 million (distinct from the Response Trust Fund) will be formed from taxes imposed on hazardous waste deposited at licensed disposal facilities.

Owners of facilities handling hazardous waste who do not demonstrate specified levels of financial responsibility may face penalties of $10,000 per day of violation. The Act also authorizes fines and imprisonment for an owner or operator's failure to notify the appropriate agency of a hazardous substance release or of a facility's existence and for failure to maintain accurate records of the location and contents of hazardous substance facilities. In addition, willful violation of a presidential order to abate a hazardous

117. Id. § 107(a) (to be codified in 42 U.S.C. § 9607(a)). Section 107(c)(1) (to be codified in 42 U.S.C. § 9607(c)(1)) sets liability limits, however, for vessels and specified facilities.

118. Id. §§ 107(a)(4)(C), 107(f) (to be codified in 42 U.S.C. §§ 9607(a)(4)(C), 9607(f)).

119. Id. § 107(b) (to be codified in 42 U.S.C. § 9607(b)). A third party defense arises only if the defendant shows he exercised due care and "took precautions against foreseeable acts or omissions" of the third party. Id. § 107(b)(3) (to be codified in 42 U.S.C. § 9607(b)(3)).

120. Id. § 107(j) (to be codified in 42 U.S.C. § 9607(j)).

121. Id. § 232.

122. Id. § 107(k) (to be codified in 42 U.S.C. § 9607(k)).

123. See id. § 231 (amending I.R.C. § 4682).

124. A tax of $2.13 per dry weight ton will apply to hazardous waste received at qualified disposal facilities after September 30, 1983. Id. § 231 (amending I.R.C. §§ 4681-82).

125. See id. § 108 (to be codified in 42 U.S.C. § 9608).

126. Id. § 109 (to be codified in 42 U.S.C. § 9609).

127. Id. § 103(b) (to be codified in 42 U.S.C. § 9603(b)).

128. Id. § 103(c) (to be codified in 42 U.S.C. § 9603(c)).

129. Id. § 103(d) (to be codified in 42 U.S.C. § 9603(d)).
stance threat may result in a fine of $5,000 per day of violation.\textsuperscript{130}

3. Other Provisions

The statute does not preempt additional state-imposed liability or requirements, except for additional contributions to a compensation fund or further evidence of financial responsibility.\textsuperscript{131}

Within 180 days of the statute’s enactment, the President must establish procedures and standards for responding to hazardous substance releases, including a national list of priority facilities.\textsuperscript{132} Within the same time period, EPA must publish guidelines for using the statute’s response authorities.\textsuperscript{133} Congress may, however, veto any agency rules or regulations issued pursuant to the Act.\textsuperscript{134}

The Act further requires the formation of a study group composed of twelve representatives of various legal organizations.\textsuperscript{135} The group must report to Congress by December, 1981, on “the adequacy of existing common law and statutory remedies in providing legal redress” for hazardous substance-related injury to persons and the environment.\textsuperscript{136}

\textsuperscript{130.} \textit{Id.} § 106(b) (to be codified in 42 U.S.C. § 9606(b)).
\textsuperscript{131.} \textit{Id.} § 114 (to be codified in 42 U.S.C. § 9614).
\textsuperscript{132.} \textit{Id.} § 105 (to be codified in 42 U.S.C. § 9605).
\textsuperscript{133.} \textit{Id.} § 106(c) (to be codified in 42 U.S.C. § 9606(c)).
\textsuperscript{134.} \textit{Id.} § 305.
\textsuperscript{135.} \textit{Id.} § 301(e)(2).
\textsuperscript{136.} \textit{Id.} § 301(e)(1). The study group is to evaluate:
\begin{itemize}
  \item[(A)] the nature, adequacy, and availability of existing remedies under present law in compensating for harm to man from the release of hazardous substances;
  \item[(B)] the nature of barriers to recovery (particularly with respect to burdens of going forward and of proof and relevancy) and the role such barriers play in the legal system;
  \item[(C)] the scope of the evidentiary burdens placed on the plaintiff in proving harm from the release of hazardous substances, particularly in light of the scientific uncertainty over causation with respect to—
     \begin{itemize}
       \item[(i)] carcinogens, mutagens, and teratogens, and
       \item[(ii)] the human health effects of exposure to low doses of hazardous substances over long periods of time;
     \end{itemize}
  \item[(D)] the nature and adequacy of existing remedies under present law in providing compensation for damages to natural resources from the release of hazardous substances;
  \item[(E)] the scope of liability under existing law and the consequences, particularly with respect to obtaining insurance, of any changes in such liability;
  \item[(F)] barriers to recovery posed by existing statutes of limitations.
\end{itemize}
\textit{Id.} § 301(e)(3).
E. Evaluation

The new statute falls short of the hopes and expectations of many persons.\textsuperscript{137} It makes important strides, however, in developing a body of law to deal with hazardous substance problems.

A major accomplishment lies in the Response Trust Fund. The industry fee arrangement appropriately places the bulk of hazardous substance response costs upon those who profit most from the creation of such substances.\textsuperscript{138} In addition, since the amount of the fee depends upon the volume of taxable substances generated, the system may induce industries to decrease production of hazardous matter.

Imposing the full costs of cleanup measures upon the persons responsible for spills or releases provides an incentive for careful handling and proper disposal. Similarly, the penalty provisions for noncompliance with the statute's requirements appear sufficiently stringent to motivate compliance in most cases.

The Act authorizes prompt federal participation in the cleanup of hazardous substance releases and inactive disposal sites. Swift action will avoid much of the unnecessary escalation of environmental and health damage that often accompanies indecision and inertia.\textsuperscript{139} The statute approves important removal and remedial measures and recognizes the necessity of restoring damaged natural resources. Finally, the Act seems to allow fairly speedy reimbursement from the fund for eligible claimants.

On the negative side, the Act leaves many crucial issues unresolved. Serious problems surround the liability provisions. First, the statute should have retained the "strict, joint and several liability" language of the earlier Senate version.\textsuperscript{140} This deletion may make

\textsuperscript{137} For various reactions to the Act, see 11 ENVIR. REP. (BNA) 1231-32 (1980).

\textsuperscript{138} The taxpayers' contribution of $220 million to the fund should answer the criticism of those who propose that all of society should bear the burden since all of society reaps the benefits of hazardous substance production.

\textsuperscript{139} For example, by mid-1980 the state of New York and the city of Niagara Falls had spent approximately $36 million testing and containing the wastes in Love Canal and relocating a small percentage of the residents wishing to move. Parisi, \textit{Who Pays? Cleaning Up the Love Canals}, N.Y. Times, June 8, 1980, § 3, at 4, col. 1. EPA estimates that the original cost of proper disposal would have been $40 per ton of waste. The $36 million already spent comes to $1800 per ton. \textit{Id.} at 5, col. 3. As another example, the estimated cost of cleaning up the source of the kepone pollution of the James River would have been $250,000 in 1975. The 1980 estimate of cleaning up the river was $2 billion. Magnuson, \textit{The Poisoning of America}, TIME, Sept. 22, 198, at 69.

\textsuperscript{140} See note 65 and accompanying text \textit{supra}.
full recovery of damages difficult. Although the government need not prove negligence, it will have to show the extent of each party's liability in the case of multiple defendants. Second, the inclusion of a third party defense may leave an escape route by which some persons will avoid legal responsibility. Third, allowing owners who close their facilities in compliance with federal regulations to transfer their liability to the government may create another unnecessary loophole.141

An additional problem lies in the power of Congress to veto any rules and regulations issued under the Act. This provision will undoubtedly aggravate the usual delays in implementing a new law.142

The biggest gap in the legislation is the absence of compensation provisions for victims of hazardous substances. Restriction of third party damages to government claimants is a woefully inadequate approach. Most urgently needed is compensation for immediate medical expenses due to personal injuries.143 Compensation for economic harm, such as lost income, and private property damage is needed as well. It is essential to provide victims with a federal cause of action144 so that recovery for such injuries becomes a realistic possibility.145

141. One environmental lobbyist suggests that this transfer of liability sets "a dangerous precedent" and that Congress should be slow to relieve facility owners of responsibility. 11 ENVIR. REP. (BNA) 1232 (1980). A spokesperson for the National Solid Wastes Management Association predicts, however, that the postclosure liability fund will temper local opposition to siting and encourage construction of new facilities. Id. at 1231.


143. S.1480 contained a provision for out-of-pocket medical expenses. See notes 83, 85-86 and accompanying text supra.

144. S.1480 included such a provision. See note 67 and accompanying text supra. Regarding the absence of a federal court claim, Representative Albert Gore, Jr. stated that "[e]xisting state tort laws present a convoluted maze of requirements . . . that make it extremely difficult for a victim to be compensated for damages. A clear, uniform federal law defining a victim's cause of action in these areas is sorely needed . . . ." H. R. REP. NO. 1016, Pt. I, 96th Cong., 2d Sess. 63-64 (1980).

145. The Act does require a study of the adequacy of common law remedies. Other studies, however, have already concluded that the common law tort approach is unsatisfactory. See, e.g., Michigan Case Study, supra note 35.
F. Conclusion

Despite industry opposition and shifting political winds, Congress managed to enact a surprisingly strong piece of legislation. The "superfund" begins where the Resource Conservation and Recovery Act stopped. Systematic regulation and tracking of hazardous wastes are now backed by a funding mechanism for corrective action. Still needed, however, are devices to assure that those responsible for hazardous substance injuries will bear the costs and that those harmed will receive compensation. 146


II. DEVELOPMENTS IN NUCLEAR WASTE DISPOSAL

STEVEN SIMONS

A. Introduction

The proper role of states in nuclear waste disposal is an increasingly debated legal issue. 147 Under the Atomic Energy Act of 1954, 148 the federal government is responsible for management and regulation of high-level nuclear waste disposal. 149 Nevertheless,

146. Environmental Action lobbyist Marchant Wentworth labeled the Act "a property bill and not a victims bill." 11 ENVIR. REP. (BNA) 1232 (1980). Similarly, Senator George Mitchell (R-Maine) found the law deficient "because while it provides for the cleanup of places and compensation for damage to things, it provides nothing for what is the most important part of the problem, damage to people." 11 ENVIR. REP. (BNA) 1097 (1980). Upon CERCLA's passage, both Rep. James Florio (D-NJ and sponsor of H.7020) and Rep. John La Falce (D-NY and representing the Love Canal district) indicated they would seek victim compensation legislation in the Ninety-seventh Congress. 11 ENVIR. REP. (BNA) 1261 (1980).


149. Id. at § 2021(C).

Although the Act makes the federal government responsible for high-level waste regulation, some aspects of nuclear regulation may be delegated. See Swan, Management of High-Level Radioactive Wastes: The AEC and the Legal Process, 1973 LAW & SOC. ORD. 263, 286.

150. High-level wastes are a by-product of the reprocessing of spent fuel for further use as nuclear fuel. Linker, Beers, & Lash, Radioactive Wastes: Gaps in the Regulatory System, 56 DEN. L.J. 1, 5 (1979) [hereinafter cited as Gaps in the Regulatory System.] Federal regulations define high-level wastes as "those aqueous wastes resulting from the operation of the first cycle solvent extraction system, or equivalent,