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SUPERFUND REAUTHORIZATION: IMPACT ON STATE ENVIRONMENTAL ENFORCEMENT†

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IN addition to my involvement with New York State environmental enforcement and policy, I have been involved with various other states through my participation in the National Association of Attorneys General (NAAG). Over the past couple of months we have been looking at the CERCLA Reauthorization Bill.¹ While I am going to talk generally about the states' view on the Reauthorization process and various issues that have been raised by it, I do want to give the usual disclaimer (that most government people like to give), which is that what I say here today will not necessarily reflect the views of my state or any other state.

I have been asked to talk about regional issues, and in organizing my presentation, I have classified the various state views into three categories: (1) CERCLA as a paradigm; (2) state input and implementation of state law and standards, and (3) federal provision of resources. The last category refers to money, which is obviously very important to the states. Finally, I plan to touch briefly on natural resource damages, which is an important and crucial part of CERCLA that needs protection and encouragement in any new legislation. While it is not explicitly addressed by Senate Bill 1834, I believe some comments may be helpful.

The first category is "CERCLA as a paradigm." CERCLA serves as an example of how the law may address hazardous substance problems. The most important element in CERCLA has been the imposition of strict, joint and several liability.² And while many industry people and others feel that this was an extreme and unusual approach, CERCLA, in fact, implemented venerable common law principles, particularly the concept of strict liability for older hazardous activities. It did so on a nationwide basis.

As a result of CERCLA, we have avoided the need to litigate the common law standard of nuisance and strict, joint and several liability on a case by case basis.

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1. Superfund Reform Act of 1994, S. 1834, 103d Cong., 1st Sess. (1994).

2. 42 U.S.C. §§ 9601(32), 9607(a) (1988).

Even before CERCLA was passed, New Jersey and New York courts both imposed strict, joint and several liability pursuant to nuisance law and various types of state standards.³ And quite often, as seen in New York, New Jersey and other states, CERCLA provided a model for state statutes to treat those non-National Priorities List (non-NPL) sites. This model has been used in New York and New Jersey and other states, and its use has led to numerous types of clean-ups.

I think it would be fair to say that most states do not want to eliminate strict, joint and several liability, and that it is crucial that any revision of the statute maintains these elements of liability. NAAG in fact, has already adopted a resolution to that effect. The resolution, which was adopted by the fifty states plus various other entities in NAAG, maintains strict, joint and several liability in the Superfund process.

Another thing to consider when we talk about changing CERCLA is whether changes in the statute will result in learning curve problems. Most commentators are in agreement that the statute did not work well for the first five — maybe even eight — years after it was passed. Part of the reason for the lag was a result of the time it took to ascertain what the statute meant, coupled with the time it took to communicate that meaning to the regulated community.

I know from my own personal experience that when the requirements of CERCLA were explained to Potentially Responsible Parties (PRPs) and their lawyers back in the early 1980s, they looked at us like we were crazy. While we may have been crazy, we were still serious, and by imposing extensive liability through CERCLA, we eliminated all defenses. Defense lawyers, in particular, could not understand that concept. Well, they understand it now. And in fact, I think there is every reason to believe that not only is the statute working substantially better now than it did in the past, I think it is fair to say that it is working very well.

In New York, sixty-five to seventy percent of all clean-ups are being funded by the PRPs and are being conducted without litigation. Meetings with the Department of Environmental Conservation have led to entry of orders on consent, because the regulated community, e.g., the PRPs know what their liabilities are. The statute is now clear and has been very effective in cleaning up those sites.

Nevertheless, there is a need to reduce transaction costs, and I think that all states would welcome particular measures implemented by any newly-reauthorized CERCLA that would reduce transaction costs. The consensus in most states is that if the Environmental Protection Agency (EPA) had really been diligent in its efforts to reduce

3. *See, e.g., State v. Schenectady Chems., Inc.*, 479 N.Y.S.2d 1010 (App. Div. 1984); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050-52 (2d Cir. 1985).

transaction costs, there already existed adequate authority to do so within the statute as presently written. For example, there are provisions in the statute for expedited *de minimis* settlements and for NBARS on the allocation of liability.⁴ EPA rarely used these provisions and, as a result, *de minimis* parties in particular have been engaged in long drawn-out processes. New York, for example, has had its disputes with EPA Region II over when to do settlements and what the scope of them should be. Thus, changes in the statute which would allow settlements and allocations to be performed more quickly and easily would be welcomed.

But again, the idea that there are too many transaction costs and that they are too high is quite overstated. First, a recent Rand study that was completed this fall showed that thirty-five to forty percent of the transaction costs in all Superfund litigation relate to insurance coverage.⁵ In other words, the transaction costs do not relate to the clean-up program itself, but rather to the battles between companies and their insurance carriers.

In evaluating whether Superfund works, however, I do not believe that costs incurred through insurance disputes should be indicative of anything. These considerations raise insurance law issues and not environmental issues.

Furthermore, while the initial transaction costs in most Superfund cases are relatively high, in the long run, once the parties come together to enter into a settlement and begin the clean-up process, the costs, as a total percentage of clean-up costs, are substantially reduced. The Rand study found that once the remedy has begun, the expectation is that transaction costs relating to legal costs (in particular at Superfund sites), are going to drop to a level that is consistent or even below the typical costs in traditional tort litigation.⁶

In sum, while there are clearly steps that could be taken to reduce transaction costs, I do not believe that the problem is nearly as severe as it is claimed to be.

Senate Bill 1834, which is the one major proposal that we have before us, has succeeded in large part in maintaining joint and several liability. When the states consider the Bill, they will generally support those aspects which involve the retention of joint and several liability.⁷

Currently, a party can avoid joint and several liability by settling through the allocation process.⁸ Simply put, when settlements occur, parties avoid joint and several liability by paying their part. The Bill does not substantially change that concept.

4. 42 U.S.C. §§ 9622(g), 9622(e)(3) (1988) (nonbinding allocations of responsibility and *de minimis* settlements).

5. *EPA Should Heed Own Study*, Bus. Ins., Nov. 15, 1993, at 8.

6. *Id.*

7. S. 1834 § 404.

8. 42 U.S.C. §§ 9622(f)-(g), 9613(f)(2) (1988).

Other proposals for the Reauthorization that have been put before Congress by various interest groups failed the strict, joint and several test, which states feel is essential to CERCLA. One proposal which has been strongly opposed by most states is the public works proposal which shifts all of the costs to the public with no liability for events that occurred before 1986.

Senate Bill 1834 sets forth a variation of the so-called mandatory fair share proposals, but it eliminates the mandatory aspect of the fair share.⁹ The proposals which often require a fair share allocation and eliminate joint and several liability have been and will continue to be opposed by the states.

In concluding my discussion of this category, I emphasize the successes of CERCLA that are not so apparent in the mythology but are part of the actual history of Superfund. First of all, there have been monumental changes in industrial processes, a drastic reduction in the production of hazardous waste, and a significant elimination of impermanent disposal methodologies to get rid of that waste. That is probably the most important success of CERCLA, in that it has changed the way in which business has actually operated and in how industrial processes have been looked at during evaluations. Companies now realize that they are going to be liable forever (unless they change the law, of course) for their wastes. As a result, they are producing less and dealing with it in a much more responsible way. This is something that we must continue to encourage and I believe that any change in CERCLA that eliminates or diminishes that strong incentive to stop generating waste and to deal with it properly will be strongly opposed by the states. Remember, we are stuck with the garbage when we are done producing it.

Now to the second major success of CERCLA. Despite all the criticisms of the way it has been implemented, it has the potential for redressing years of environmental injustice. Environmental hazards were traditionally sited disproportionately in low income minority neighborhoods — neighborhoods composed of people of color. While it is true that CERCLA did not always address clean-ups fairly, the point is that CERCLA has the power to correct environmental injustices and any proposal that changes or threatens this ability should be defeated.

Unfortunately, Senate Bill 1834 contains significant problems with respect to environmental justice. While it establishes procedures for better community input, it eliminates a series of CERCLA requirements which fundamentally address environmental justice.¹⁰

Primarily, under the Bill there is no community veto on the choice of remedy selection. Thus, while the community's views will be heard,

9. S. 1834, Title IV, *Liability and Allocation*.

10. *Id.* §§ 101-05.

it is the government that will decide the clean-up remedy. The significance of the Bill's elimination of the community veto is that local decisions on land use can be overridden by the federal government in choosing remedies at sites. This can have serious consequences.

Finally, and perhaps most important from an environmental justice point of view, the Bill eliminates the preference for permanent remedies in favor of remedies that employ treatment.¹¹ As a result, containment remedies will be more likely in all neighborhoods, which could potentially lead to exposure of neighborhood residents when remedies fail or are not properly implemented.

When Vernice Miller spoke earlier, she noted that it was significantly less likely that minority communities would witness the implementation of permanent remedies.¹² Is it fairer or preferable to say that should the Bill pass, there will be no permanent remedies anywhere? I am not sure that that is environmental justice and a fair way to proceed.

The second category of state views has to do with "state input and implementation of state law." A basic premise of environmental law for years has been that federal environmental statutes do not preempt state law. In other words, they set the floor, not the ceiling. At the risk of sounding like Ross Barnett or George Wallace, I am a firm believer in state rights, at least when it comes to environmental law. Senate Bill 1834 essentially pre-empts state laws in numerous areas,¹³ and consequently creates very serious problems.

Let us focus on one area, that of clean-up standards. Under the current law there are "applicable, relevant and appropriate standards" (ARAs)¹⁴ that have to be met. There are no ARAs in the Senate Bill. Furthermore, under this proposal there are not even mandatory federal standards. Under the proposed Bill, President Clinton, who will be acting as EPA in this case, will choose what is the appropriate federal standard to apply at a facility.¹⁵ While Senate Bill 1834 does give lip service to applying more stringent state standards,¹⁶ the only state standard that has to be applied is one which is "specifically addressing remedial action that is adopted for the purpose of protecting human health or the environment with the best available scientific evidence through a public process . . ."¹⁷ I counted eight issues in that sentence, and I believe there will be enormous litigation over defining state standards according to this passage.

11. *Id.* §§ 501-07.

12. Vernice D. Miller, *Toward a Reasonable Allocation Scheme: A Public Interest Perspective on Superfund Reauthorization*, 5 *FORDHAM ENVTL. L.J.* 317, 319 (1994).

13. S. 1834 §§ 201-07.

14. 42 U.S.C. § 9621(d) (1988).

15. S. 1834 § 201(a)(j).

16. *Id.* § 201(a)(g).

17. *Id.* § 502(d)(5)(A)(ii).

Another problem with the Bill is that CERCLA section 121(f)(1) of the current statute,¹⁸ which provides for meaningful state input on decision making, has been eliminated. In its place there is a delegation and referral process, which is something which the states have wanted. However, the Bill has eliminated mandatory consultation with the states.

Again, to give an example, under the current statute, before EPA can take a site off the NPL, it must obtain state concurrence.¹⁹ Under the new Bill, it does not. The process would be turned into an administrative procedure that is not subject to rule-making in terms of delisting sites. All that would be required is some public notice.

The third category I want to discuss is resources — money. I find it absolutely perplexing to try to figure out how costs will be allocated under the proposed Bill. In comparing the amendments with the current statute, the Bill makes absolutely no sense in this aspect.

One important issue that remains unresolved by the proposal is the treatment of operation and maintenance costs. Currently, states pay one hundred percent of operation and maintenance costs. I think the Bill was meant to change that, but it is unclear. States would certainly welcome a change in which there is cost sharing for operation and maintenance expenses.

Finally, a word on natural resource damages.²⁰ The Bill does not address natural resource damages, which have become a very important issue among the states. We have essentially five proposals that we believe the Bill should include.

First, we believe that CERCLA should require that natural resource damage assessment decisions made by the states or by federal trustees are reviewed on the administrative record.

Second, we would like the statute of limitations on natural resource damages in CERCLA²¹ to contain the same requirements as the Oil Pollution Act,²² so that there is consistency between the two statutes of limitations.

Third, the Bill provides that enforcement costs and oversight costs for the federal government are to be considered response costs.²³ We believe that enforcement and oversight costs should be considered response costs for the states, and that natural resource damage assessments and recovery costs should be considered response costs as well.

Fourth, it would be helpful if the Bill made clear that natural resource damage recoveries could be spent on a regional basis. This would allow, for example, a recovery for an oil spill on the south shore

18. 42 U.S.C. § 9621(f) (1988).

19. *Id.*

20. 42 U.S.C. § 9613(g) (1988).

21. *Id.*

22. 33 U.S.C. § 2717 (1990).

23. S. 1834 §§ 404(f)(4), 409(i)(5).

of Staten Island to be spent to acquire wetlands on the eastern shore of Staten Island.

Finally, although Superfund currently allows the use of Fund moneys to conduct natural resource damage assessments,²⁴ it is in direct conflict with the Internal Revenue Code, which governs the actual expenditures from the Fund.²⁵ That should be changed, so that natural resource damages can be paid for by the Fund.

24. 42 U.S.C. § 9611(b) (1988).

25. 26 U.S.C. § 9507(c)(1)(A) (1988).

