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The 1985/1986 Amendments to the Comprehensive Environmental Response, Compensation, and Liability Act: A Background Paper

Alan J. Gilbert

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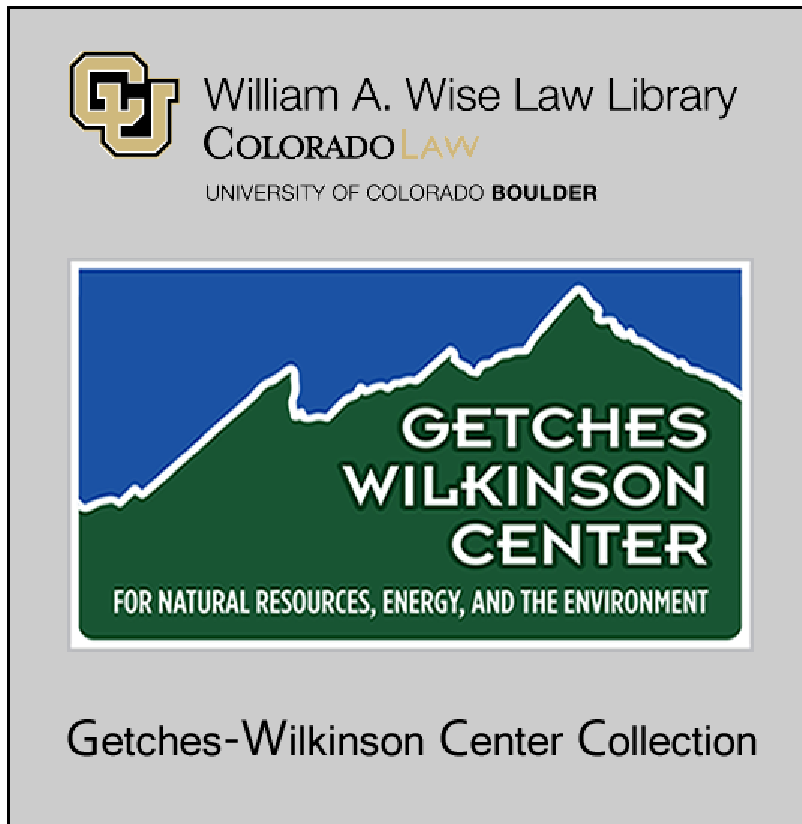

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THE 1985/1986 AMENDMENTS TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

A Background Paper

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Getting a Handle On Hazardous
Waste Controls

Natural Resources Law Center
University of Colorado School of Law
June 9-10, 1986

THE 1985/1986 AMENDMENTS TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

I. This outline is written on April 30, 1986. As of that date, a Congressional conference committee appointed to consider amendments to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") remains stalled. The April 23 issue of Environmental Policy Alert (Inside EPA Vol. III, No. 9) reports a "slow down" in the conference, and points to continued disagreement over mechanisms to finance the Superfund (formally the Hazardous Substance Response Trust Fund) as the real impediment to progress. The purpose of the outline is to describe briefly how the Nation comes to find itself in this position.

II. A recent history of the CERCLA amendments.

A. The authority of the Treasury Department to collect the taxes which replenish the Superfund ended on September 30, 1985. *See* Section 303 of CERCLA, 42 USCA § 9653. As a practical matter, Congress has used the expiration of the taxing portions of the Act as a trigger for debates on amendments to the substantive provisions of CERCLA, as well.

B. **Events in 1983.** As with most environmental issues in 1983, debates over CERCLA reauthorization may be best characterized as "lessons learned." This year marked the culmination of the darkest hours of the Environmental Protection Agency. It included the politicization and turmoil which accompanied the end of Ms. Burford's reign as EPA administrator, and the beginning of Mr. Ruckelshaus's efforts to return the Agency to the good graces of Congress and the media. It spawned the congressional mistrust of EPA nowhere better illustrated than in the "hammer provisions" of the Resource Conservation and Recovery Act amendments. Residual effects are evident in the 1985/1986 CERCLA amendments, too.

C. **Events in 1984.** Congress began the process of CERCLA amendment in earnest in the Second Session of the 98th Congress, which began in January, 1984.

1. A variety of bills were introduced in 1984. They included, among others, S. 51, S. 2892, H.R. 5640, and H.R. 5321, all concerning reauthorization, as well as S. 3014, which addressed financing mechanisms.

2. The most significant activity in 1984 was the passage of H.R. 5640 by the House on August 10. The House bill included an increase in the Superfund to $10.1 billion.

3. The principal Senate bill, S. 2892, was reported by the Senate Environment and Public Works Committee on September 13. It stalled in the Finance Committee over debates on taxing mechanisms, among other matters.

D. <u>Events in 1985</u>. Debate exploded in 1985 over the taxing strategies to be used to replenish the Superfund. In the First Session of the 99th Congress the federal budget was held hostage, for a period of time, over CERCLA funding disagreements.

1. The September 30 expiration of CERCLA taxing authority passed without definitive Congressional action.

2. EPA had announced the impending curtailments of the CERCLA program in August. It operated throughout the remainder of 1985 on monies remaining in the Superfund and interest. The Agency halted hiring,

signed no new contracts, reduced support contracts, and planned for the worst.

3. S. 51 was reported by the Senate Environment and Public Works Committee on March 8, 1985. It passed the Senate, by a vote of 86 to 13, on September 26, 1985. (The text of the bill is printed at 131 Cong. Rec. S12184 (daily edition September 26, 1985).

4. Five differing versions of a CERCLA reauthorization bill were reported by House committees in 1985. H.R. 2817, a merged compromise bill, was agreed upon by House leadership in early December. The compromise versions of H.R. 2817 passed the House, by a vote of 391 to 33, on December 10, 1985. (The text of that bill is printed at 131 Cong. Rec. H. 11619 (daily edition December 10, 1985).)

5. S. 51 and H.R. 2817 were both denominated the "Superfund Improvement Act of 1985." Each was nominally inserted into H.R. 2005, which is now formally the designation of the bills being debated.

6. A December conference was hurriedly called, in an attempt to compromise. Hope evaporated on December 19, however, when a conference

recommendation that included a $6 billion value-added-tax was rejected by the House. The House and Senate agreed to call for a 1986 conference committee. Congress adjourned on December 20.

7. This rather bland recitation of the events of the waning days of the First Session of the 99th Congress obscures the fact that the reauthorization of CERCLA was at the center of the storm that accompanied the 1985 federal budget debates. Deep philosophical disagreements arose over the use of the federal value-added-tax, in part due to its broad implications for expansion of the general federal taxing power. Indeed, the House voted twice on December 19 to remove these taxing mechanisms, after the Senate had voted once that day to restore them. President Reagan also reemphasized on December 19 that he would consider seriously a veto of any value-added-tax provision.

E. **Events in 1986.** As described in the beginning of this outline, as of April 30 the Country still lacks a Superfund Improvement Act.

1. EPA's CERCLA program limped along into March without additional funding. Non-emergency work halted in

most areas, contractors were notified of impending contract termination, and EPA officials reported dire consequences if funding was not restored quickly. Among the most troubling predictions by EPA was an alert that CERCLA personnel--within and without the government--would be forced to leave their jobs. The Nation would then face the terrible prospect of rebuilding the troubled CERCLA program anew. EPA formally informed Congress that the CERCLA program would be shut down on April 1.

2. Congress passed a stopgap CERCLA funding law on March 20 (House) and March 21 (Senate). The President signed the legislation (H.R.J. Res. 573) on April 1. That legislation freed $150 million of a $900 million EPA appropriation previously approved, but held up pending reauthorization. That $150 million budget represents a two-month extension of the CERCLA program, which will expire again on May 31. EPA is obligated either to spend the full amount of the interim appropriation, or to lose it. That fact has prompted the Agency to restart CERCLA program areas delayed or slowed in August, 1985.

3. Returning to the heart of the matter, as described above the conferees continue to work on a compromise

reauthorization bill. The various looseleaf services report agreement in several relatively non-controversial areas, but continuing difficulty in more controversial ones. The conference evidently remains stalled over funding mechanisms and levels for the Superfund, "right to know" rules, an underground tank and oil spill program, state and local authority, and a host of other issues.

4. Predictions for CERCLA reauthorization range from cautious optimism over passage before the elections in November to gloomy suggestions that reauthorization will be taken up in a lame duck session or worse. Senator Stafford has recently suggested a reauthorization of the Act without substantive change, so that substantive amendments may be taken up again after the next Congress begins. I think it is fair to say, however, that no one seriously believes that funding for the existing CERCLA program will be allowed to lapse again.

III. General comments on the bills formerly denominated S. 51 and H.R. 2817, which are now both H.R. 2005.

A. Both bills are long and complicated, but H.R. 2817 takes the prize for detail, complexity, and size. It

dwarfs S. 51. It is an understatement to point out that H.R. 2817 is truly a burden to read and understand.

B. S. 51 would allow EPA considerably more discretion than does H.R. 2817. As an example, cleanup standards in S. 51 are pegged to protection of "human health and the environment," and adopt the relevant and appropriate standard approach of the existing National Contingency Plan (Section 116, adding Section 104(c)(4)(C)). H.R. 2817, in contrast, requires a host of specific cleanup criteria to be met. Section 121 of that bill (which adds a new Section 121 to CERCLA) requires application under Section 104 of all legally applicable, or relevant and appropriate, requirements under TSCA, SDWA, CAA, CWA or RCRA standards, and expressly includes CWA water quality criteria. It sets out detailed procedures to be followed to determine the applicability of state standards, as well.

C. The bills clarify some controversial aspects of the existing CERCLA. Both, for example, contain specific rules describing settlement procedures and contribution requirements. Nevertheless, both bills--but H.R. 2817, especially--add a great deal of complexity to an already complex and confusing statutory system.

IV. Many of the provisions of the House and Senate bills are notable. A few of those are described below.

A. The bills differ considerably as to the amount and type of funding in the Superfund.

1. Under S. 51, the level of Superfund is pegged at $7.5 billion. Sections 202 and 203. A value-added-tax is used. Section 203. (*See* Section 209 for the "sense of the Senate" that financing mechanisms other than the value-added-tax should be adopted in conference, if possible).

2. H.R. 2817 pegs the Superfund at approximately $10.5 billion. *See* Sections 111(a) and 517(b). That funding is accomplished by a levy on the disposal of hazardous waste, Section 515, and through extended and increased taxes on petroleum and certain chemicals. Sections 512 and 513. Trust Funds are established for the Leaking Underground Storage Tank program and for the Oil Spill Liability program created under the statute.

B. Both bills make considerable headway in addressing settlement issues.

1. S. 51 addresses contribution (Section 135), de minimus contributors (Section 129), and releases from liability (Section 131), among other issues. It includes detailed procedures requiring EPA to settle CERCLA disputes. Section 122 of the bill, which modifies Section 104 of CERCLA, requires EPA to set out a "Nonbinding Preliminary Allocation of Responsibility" by the time each of its remedial investigation and feasibility studies is completed. The President can be required to accept a settlement offer of 50 percent of the Nonbinding Preliminary Allocation of Responsibility if the offering parties are willing to ante up their nonbinding shares. See amended Section 104(7)(B).

2. Section 122 of H.R. 2817 contains the House-passed settlement amendments. That section addresses authority to settle, consent agreements (which are required), an allowance of no acknowledgment of guilt, public participation, funding mechanisms for groundwater and surface water problems which might arise after the settlement, and de minimus contributors.

C. Both bills change the rules for Indian tribes. Under Section 101 of S. 51 and Section 207 of H.R. 2817,

Indian tribes are now to be treated very much like States for CERCLA purposes. In an interesting sidelight, a federal permit acknowledging irreversible and irretrievable effects will not bar the imposition of natural resources damages now under Section 107(f)--under either bill--unless that federal permit is consistent with the fiduciary duty of the states to Indian tribes. See Section 207(d) of H.R. 2817 and Section 101(d)(2) of S. 51.

D. Both bills contain citizen suit provisions. Under Section 206 of H.R. 2817, a citizen may sue to assert a violation of a CERCLA requirement or a contribution by the defendant to an imminent and substantial endangerment. Under Section 150 of S. 51, a citizen can sue only over a violation of a CERCLA standard or requirement or to enforce a nondiscretionary duty against EPA.

E. Mining waste receives special treatment under S. 51. Both bills, under Sections 126 of S. 51 and 105 of H.R. 2817, require another look at the Hazard Ranking System, a revision which could affect mining sites. Section 126 of S. 51, however, requires EPA to alter its hazard ranking practices, and to take into account, for example, concentration as well as volume in mine

wastes. (Section 126 of S. 51, also known as the Baucus Amendment, is under concerted attack in the conference committee. The Environmental Defense Fund has circulated a letter challenging the factual underpinnings of the provision, which is based on assertions of, high volume and low toxicities for mining waste.)

ance agent or broker residing in that ate; or

"(8) otherwise discriminate against a purasing group or any of its members.

"(b) The exemptions specified in subsecn (a) apply to—

"(1) pollution liability insurance, and omprehensive general liability insurance hich includes this coverage, provided to—

"(A) a purchasing group; or

"(B) any person who is a member of a purasing group; and

"(2) the sale of—

"(A) pollution liability insurance, and mprehensive general liability coverage;

"(B) insurance related services; or

"(C) management services;

to a purchasing group or member of the oup.

"(c) A State may require that a person ting, or offering to act, as an agent or oker for a purchasing group obtain a linse from that State, except that a State ay not impose any qualification or reirement which discriminates against a nresident agent or broker.

"APPLICABILITY OF SECURITIES LAWS

"SEC. 405. (a) The ownership interests of embers in a risk retention group shall be—

"(1) considered to be exempted securities r purposes of section 5 of the Securities t of 1933 and for purposes of section 12 of Securities Exchange Act of 1934; and

"(2) considered to be securities for purses of the provisions of section 17 of the curities Act of 1933 and the provisions of ction 10 of the Securities Exchange Act of 34.

"(b) A risk retention group shall not be nsidered to be an investment company for rposes of the Investment Company Act of 40 (15 U.S.C. 80a-1 et seq.).

"(c) The ownership interests of members a risk retention group shall not be considred securities for purposes of any State blue y law.".

TITLE V—INDOOR AIR QUALITY RESEARCH

SEC. 501. SHORT TITLE.—This title may be ted as the "Indoor Air Quality Research t of 1985".

SEC. 502. FINDINGS.—The Congress finds at—

(1) indoor air exposures account for a sigficant portion of total human exposures hazardous pollutants and contaminants the environment;

(2) various scientific studies have suggestd that indoor air pollution, including expore to naturally occurring chemical eleents such as radon, poses a significant ublic health and environmental risk;

(3) high levels of radon have been measred within structures throughout the counry and within the Reading Prong;

(4) existing Federal indoor air quality rearch programs are fragmented and undernded;

(5) the Environmental Protection Agency's rograms on indoor air quality and radon ave been hindered by a lack of clear statuory authority for conducting research on door air quality; and

(6) an adequate information base concerng potential indoor air quality problems, cluding exposure to radon, does not curntly exist and should be developed by the ederal Government.

SEC. 503. INDOOR AIR QUALITY RESEARCH ROGRAM.—

(a) DESIGN OF PROGRAM.—The Administrar of the Environmental Protection Agency all establish a research program with reect to indoor air quality, including radon. ch program shall be designed to—

(1) gather data and information on all asects of indoor air quality in order to contribute to the understanding of health problems associated with the existence of air pollutants in the indoor environment;

(2) coordinate Federal, State, local, and private research and development efforts relating to the improvement of indoor air quality; and

(3) assess appropriate Federal Government actions to mitigate the environmental and health risks associated with indoor air quality problems.

(b) PROGRAM REQUIREMENTS.—The research program required under this section shall include—

(1) research and development concerning the identification, characterization, and monitoring of the sources and levels of indoor air pollution, including radon, which includes research and development relating to—

(A) the measurement of various pollutant concentrations and their strengths and sources,

(B) high-risk building types, and

(C) instruments for indoor air quality data collection;

(2) research relating to the effects of indoor air pollution and radon on human health;

(3) research and development relating to control technologies or other mitigation measures to prevent or abate indoor air pollution (including the development, evaluation, and testing of individual and generic control devices and systems);

(4) demonstrations of methods for reducing or eliminating indoor air pollution and radon, including sealing, venting, and other methods that the Administrator determines may be effective;

(5) research, to be carried out in conjunction with the Secretary of Housing and Urban Development, for the purpose of developing—

(A) methods for assessing the potential for radon contamination of new construction, including (but not limited to) consideration of the moisture content of soil, porosity of soil, and the radon content of soil, and

(B) design measures to avoid indoor air pollution; and

(6) the dissemination of information to assure the public availability of the findings of the activities under this section.

(c) ADVISORY COMMITTEES.—The Administrator shall establish a committee comprised of individuals representing Federal agencies concerned with various aspects of indoor air quality and an advisory group comprised of individuals representing the States, the scientific community, industry, and public interest organizations to assist him in carrying out the research program for indoor air quality.

(d) IMPLEMENTATION PLAN.—Not later than ninety days after the date of the enactment of this Act, the Administrator shall submit to the Congress a plan for implementation of the research program under this section. Such plan shall also be submitted to the EPA Science Advisory Board, which shall, within a reasonable period of time, submit its comments on such plan to Congress.

(e) INTERIM REPORT.—No later than one year after the date of this Act, the Administrator shall prepare an interim report providing—

(A) a preliminary identification of the locations and amounts of radon in structures across the United States, and

(B) guidance and information materials based on the findings of research of methods for mitigating radon.

(f) REPORT.—

(1) Not later than two years after the date of enactment of this Act, the Administrator shall, in consultation with advisory committees and groups identified in subsection (c), submit to the Congress a report assessing—

(A) the state of knowledge concerning the risks to human health associated with indoor air pollution, including naturally occurring chemical elements such as radon;

(B) the locations and amounts of indoor air pollutants, including radon, in residential, commercial, and other structures throughout the country;

(C) the existing standards for indoor air pollutants, including radon, suggested by Federal or State Governments or scientific organizations and the risk to human health associated with such standards;

(D) the research needs and relative priority of these needs;

(E) the potential effectiveness of possible government actions necessary to mitigate the environmental and health risks associated with indoor air quality problems, including radon, in existing and in future structures,

and making such recommendations as may be appropriate.

(2) In developing such report, the Administrator shall consult with the National Academy of Sciences on the scientific issues regarding the quality of indoor air and the risks to human health associated with indoor air pollution.

(g) CONSTRUCTION OF SECTION.—Nothing in this section shall be construed to authorize the Administrator to carry out any regulatory program or any activity other than research, development, and the related reporting, information dissemination, and coordination activities specified in this section. Nothing in this section shall be construed to limit the authority of the Administrator or of any other agency or instrumentality of the United States under any other authority of law.

(h) AUTHORIZATIONS.—There are authorized to be appropriated to carry out the activities under this section not to exceed $3,000,000 for each of the fiscal years 1986 and 1987.

Amend the title so as to read: "An Act to extend and amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and for other purposes.".

The text of the House amendments to the Senate amendments is as follows:

HR 2817

In lieu of the matter proposed to be inserted by the Senate, insert:

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

This Act may be cited as the "Superfund Amendments of 1985".

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SEC. 2. CERCLA AND ADMINISTRATOR.

As used in this Act—

(1) CERCLA.—The term "CERCLA" refers to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (52 U.S.C. 9601 et seq.).

(2) ADMINISTRATOR.—The term "Administrator" means the Administrator of the Environmental Protection Agency.

SEC. 3. LIMITATION ON CONTRACT AND BORROWING AUTHORITY.

Any authority provided by this Act, including any amendment made by this Act, to enter into contracts to obligate the United States or to incur indebtedness for the repayment of which the United States is liable shall be effective only to such extent or in such amounts as are provided in appropriation Acts.

TITLE I—PROVISIONS RELATING PRIMARILY TO RESPONSE AND LIABILITY

SEC. 101. AMENDMENTS TO CERCLA DEFINITIONS.

(a) USE OF TERM "PRESIDENT".—

(1) ADMINISTRATOR.—CERCLA is amended by striking out "President" each place it appears (except in subsections (e)(2) and (f) of section 301 and section 307(b)) and inserting in lieu thereof "Administrator".

(2) DEFINITION.—Section 101(2) of CERCLA (defining the term "Administrator") is amended by inserting before the semicolon at the end thereof the following: ", except as provided in subsection (b)".

(3) DELEGATIONS OF AUTHORITY.—Section 101 of CERCLA is amended by inserting "(a) IN GENERAL.—" after "101." and by adding at the end thereof the following new subsection:

"(b) USE OF TERM 'ADMINISTRATOR'.—

"(1) DELEGATIONS RETAINED.—Where, before the date of the enactment of the Superfund Amendments of 1985, any authority under this Act was delegated to the head of any other department, agency, or instrumentality of the United States (or where any such authority has been retained by the President), the term 'Administrator' refers to the head of such department, agency, or instrumentality (or to the President in the case of an authority retained by the President).

"(2) EXCEPTION FOR FEDERAL FACILITIES.—Paragraph (1) shall not apply to any authority delegated to a department, agency, or instrumentality with respect to any facility owned or operated by that department, agency, or instrumentality. With respect to such facilities, the term 'Administrator' when used in this Act refers to the Administrator of the Environmental Protection Agency.".

(b) HAZARDOUS SUBSTANCES.—Section 101(a)(14)(C) of CERCLA is amended by inserting after "Congress" the following: "and not including used oil that is listed or identified as a hazardous waste under the Solid Waste Disposal Act if such used oil (i) is treated, managed, or recycled in such a way as to remove or render harmless the hazardous constituents contained in such oil or such used oil does not contain hazardous constituents, and (ii) such used oil is in compliance with a final rule promulgated by the Administrator, which rule shall authorize the Administrator to order any corrective action necessary for any release of used oil.

(c) RELEASE.—Section 101(22) of CERCLA is amended by inserting after "environment" the following: "(including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)".

(d) REMEDIAL ACTION.—Section 101(24) of CERCLA (relating to the definition of "remedy" or "remedial action") is amended—

(1) by striking out "welfare. The term does not include offsite transport" and all that follows down through the semicolon at the end of such paragraph and inserting in lieu thereof "welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials;"; and

(2) by striking out "or" before "contaminated materials" and inserting in lieu thereof "and associated".

(e) RESPONSE.—Section 101(25) of CERCLA is amended by striking out "and"

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