

7-1994

"Reinventing Government": A Conceptual Framework for Evaluating the Proposed Superfund Reform Act of 1994's Approach to Intergovernmental Relations

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**“REINVENTING GOVERNMENT”:
A CONCEPTUAL
FRAMEWORK FOR EVALUATING THE PROPOSED
SUPERFUND REFORM ACT OF 1994’S APPROACH
TO INTERGOVERNMENTAL RELATIONS**

BY
DAVID L. MARKELL*

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The author would like to thank John Pendergrass, Senior Attorney and Director, Center for State, Local and Regional Environmental Programs at the Environmental Law Institute, and Lee Paddock, Assistant Attorney General, State of Minnesota, for their helpful comments on an earlier draft of this article. Any mistakes are my sole responsibility.

I. INTRODUCTION

Less than one year after the Clinton Administration's September 1993 release of its much publicized game plan for "reinventing government,"¹ the Administration and Congress find themselves in the midst of the reauthorization process for the federal Superfund law,² a statute that undoubtedly has engendered as much criticism concerning government effectiveness and efficiency as any other environmental law passed in this country.³

1. NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (Sept. 7, 1993) [hereinafter NATIONAL PERFORMANCE REVIEW]. For a more detailed discussion of the Clinton Administration's reinventing government effort, see *infra* part II.

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund"), 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992).

3. As John Gibbons, Director of the Office of Science and Technology Policy (formerly the Office of Technology Assessment (OTA)) noted in the forward to an OTA report on Superfund, "From its beginning, controversy has surrounded Superfund, and the program has had to cope with an unusually high level of public scrutiny, criticism, and debate." OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, PUB. NO. OTA-ITE-433, COMING CLEAN: SUPERFUND PROBLEMS CAN BE SOLVED, at iii (Oct. 1989) [hereinafter COMING CLEAN]. J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 LOY. L.A. L. REV. 825, 832 (1994) (labeling Superfund "the most controversial of the environmental statutes").

For an extensive list of materials that criticize one or more features of the federal Superfund program, see David L. Markell, *The Federal Superfund Program: Proposals for Strengthening the Federal/State Relationship*, 18 WM. & MARY J. ENVTL. L. 1, 16 n.38 (1993). Some of the titles of the materials that criticize the federal Superfund program are noteworthy for their creativity. See, e.g., E. Donald Elliott, *Superfund: EPA Success, National Debacle?*, NAT. RESOURCES & ENV'T, Winter 1992, at 11 (Elliott is a Professor at Yale Law School and former EPA General Counsel); Alfred R. Light, *Illuminating Irrationality: Self-Deception and Superfund Litigation*, 24 TOXICS L. REP. (BNA) 722 (Nov. 11, 1992); Stephen L. Kass & Michael B. Gerrard, *The Taming of the EPA*, N.Y.L.J., Apr. 23, 1993, at 3.

No doubt a key reason for the level of criticism that CERCLA has endured over its fourteen year existence is that it has proved to be a "high stakes game;" current estimates are that the cost of cleaning up a single site averages \$29 million, while the upper range estimate of the cost of cleaning up all of the Superfund sites that need remediation is \$1 trillion. Markell, *supra*, at 14-15 & n.36.

This article examines the ongoing Superfund reauthorization efforts within the framework provided by the Clinton Administration's work on "reinventing government."⁴ It uses the most recently approved Senate version of the Superfund Reform Act of 1994 (SRA)⁵ as the vehicle for analyzing the extent to which the "intergovernmental relations" features of the SRA are consistent with three techniques of good government that the reinventing government reports endorse: 1) streamlining decision making processes to maximize efficiency and minimize duplication of effort; 2) empowering implementers; and 3) encouraging creativity.⁶

4. See NATIONAL PERFORMANCE REVIEW, *supra* note 1; *infra* part II. A broader topic that I do not address in this article involves analyzing whether it is possible within our democratic system to translate clear principles such as those articulated in the National Performance Review into legislation, given the "horse trading" and "special interest" politics that are endemic to our political process. A related question is the degree to which a report such as the National Performance Review, especially to the extent it is considered to be nonpartisan and its principles widely endorsed, perhaps may serve in the future as a "filter" for framing or setting the parameters for the legislative debate, particularly on the "process" side (*i.e.*, not what should be done, but how it should be done—*e.g.*, where should authority be vested, the tools and flexibility to be given to the implementers, and the nature of oversight), recognizing that it is not possible to separate "process and substance" entirely. The National Performance Review itself suggests that the "movement to reinvent government" is non-partisan. *Id.* at 6.

5. The Superfund Reform Act of 1994, S. 1834, 193d Cong., 2d Sess. (June 17, 1994 ver.) (currently before the Senate Comm. on Environment and Public Works) [hereinafter SRA]. Although this article specifically analyzes S. 1834, its suggestions for reshaping Superfund apply to all reauthorization efforts. Currently, the House is working on its own version of the Superfund Reform Act of 1994. H.R. 3800 was approved on May 18, 1994 by the House Comm. on Energy and Commerce and on July 28, 1994 by the House Comm. on Public Works and Transportation. See *Superfund: Momentum for Reforming Law Continues; House Committee Unanimously Approves Bill*, 25 Environment Reporter (BNA) 117, 117 (May 20, 1994). The Senate Subcomm. on Superfund, Recycling, and Solid Waste of the Senate Comm. on Environment and Public Works approved the current version of S. 1834 by a party line vote on June 14, 1994. *Superfund: Senate Reform Bill Close to House Version; Negotiated Rule-Making Provisions Eliminated*, 25 Environment Reporter (BNA) 300, 300 (June 17, 1994).

6. NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS; CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, EXECUTIVE SUMMARY 2 (Sept. 7, 1993) [hereinafter NPR EXECUTIVE SUMMARY]. The National Performance Review identifies four basic or overarching principles: 1) "cutting red tape;" 2) "putting customers first;" 3) "empowering employees;" and 4) "cutting back to

The SRA's approach to intergovernmental relations between the federal and state governments reflects a considerable degree of schizophrenia on the part of Congress and the Administration. Congress and the Administration cannot make up their mind—they want states to be more involved in the program, but they do not fully trust states to perform well on their own. Because of this underlying lack of confidence in states, the SRA's structure for such intergovernmental relations squarely conflicts with the reinventing government principles: it creates a significant amount of duplication of effort in the form of site-specific federal oversight of state performance; it limits the tools states have to perform their responsibilities; and it dramatically curtails states' flexibility to perform these responsibilities in the manner they believe will be most effective.

The SRA's approach to intergovernmental relations within the federal government similarly appears to be based on a residual lack of confidence in the Environmental Protection Agency (EPA) and an apparent preference for a largely centralized rather than decentralized decision-making structure, especially in the enforcement, settlement, and allocation of responsibility arenas.⁷ In all

basics." NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 6-7. As the Review notes, these four principles are very closely linked. *Id.* The Review defines these four overarching principles to include a number of sub-principles. For example, the principle "cutting red tape" includes a series of related sub-goals including creating systems that focus on results, not adherence to process; reorienting systems to be proactive and prevent problems rather than simply punish those who make mistakes; and stripping away unnecessary layers of regulation that stifle innovation. *Id.* at 6-7. The Review's four overarching principles embrace the four principles discussed in this article, although they do not correspond precisely. Thus, the Review's themes of "cutting back to basics," which the Review defines in part as producing better government for less, and "empowering employees," both encompass the principles of "eliminating duplication," as does the Review's theme of "cutting red tape." The Review's theme of "empowering employees" encompasses the concept of "empowering implementers." *Id.* The Review's theme of "cutting red tape," which the Review defines in part as encouraging creativity by adopting systems that are "accountable for achieving results," not systems in which "people are accountable for following rules," embraces the concept of "encouraging creativity." Finally, the Review's "putting the customer first" principle covers the idea of "customer satisfaction." *Id.* See also *infra* notes 16-18.

7. While Congress has acted incrementally in recent years to decentralize a variety of environmental programs, the structure of many such programs continues to require centralized involvement. See, e.g., *infra* note 98.

three of these areas, the SRA runs counter to the reinventing government principles, creating redundancy between EPA and the Department of Justice (DOJ) and a lack of EPA empowerment by giving DOJ a sign-off on EPA decisions.

The supreme irony is that Superfund reauthorization provides the Administration and the Congress with their first opportunity to craft legislation that embodies the recently issued reinventing government principles. They largely have failed to rise to the challenge. After briefly summarizing the reinventing government principles, the remainder of this article evaluates the SRA in light of these principles. It also offers alternative approaches to intergovernmental relations in the Superfund program that will produce much greater adherence to the reinventing government principles. If adopted, these alternative approaches also simultaneously will address at least some of the underlying concerns that are responsible for the SRA's current structure, including the apparent lack of confidence in the states.

II. A BRIEF SUMMARY OF THE "REINVENTING GOVERNMENT" REPORT

One of the much-publicized objectives of the current Administration has been to "reinvent government" with the goal of making it operate more effectively.⁸ On March 3, 1993, President Clinton announced his "National Performance Review," an initiative to determine how best to "mov[e] from red tape to results to create a government that works better and costs less."⁹ In announcing this initiative President Clinton stated:

Our goal is to make the entire federal government both less expensive and more efficient, and to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment. We intend to redesign, to reinvent, to reinvigorate the entire national government.¹⁰

8. See NATIONAL PERFORMANCE REVIEW, *supra* note 1.

9. NPR EXECUTIVE SUMMARY, *supra* note 6, at 2.

10. *Id.* at inside cover.

President Clinton assigned Vice President Gore to lead this Review.¹¹ Six months later, on September 7, 1993, Vice President Gore released the Administration's Reinventing Government Report,¹² as well as a series of accompanying reports that address specific aspects of federal government operations, including environmental issues.¹³

In addition to the reports produced by Vice President Gore's team, this national effort included "Reinvention Teams" within each agency, including the U.S. Environmental Protection Agency (EPA).¹⁴ EPA conducted an "internal National Performance Review" and issued its own Phase I and II reports.¹⁵

Among other principles, the National Performance Review adopted the following three axioms for "changing government" to make it more responsive and effective: 1) "eliminating duplication" of effort,¹⁶ 2) empowering implementers by "decentraliz[ing] authority and empow[er] those who work on the front lines to make more of their own decisions and solve more of their own problems";¹⁷ and 3) encouraging creativity or "entrepreneurship."¹⁸

11. *Id.* at 1.

12. *See supra* note 1.

13. NATIONAL PERFORMANCE REVIEW, REINVENTING ENVIRONMENTAL MANAGEMENT: ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW (Sept. 7, 1993) [hereinafter REINVENTING ENVIRONMENTAL MANAGEMENT].

14. *Id.* at 1.

15. *See* EPA, PUB. NO. EPA/210-R-93-004, CREATING A U.S. ENVIRONMENTAL PROTECTION AGENCY THAT WORKS BETTER AND COSTS LESS, PHASE I REPORT NATIONAL PERFORMANCE REVIEW (Dec. 1993) [hereinafter EPA PHASE I REPORT]; EPA, PUB. NO. EPA/210-R-93-005, CREATING A U.S. ENVIRONMENTAL PROTECTION AGENCY THAT WORKS BETTER AND COSTS LESS, PHASE II REPORT NATIONAL PERFORMANCE REVIEW (Dec. 1993).

16. *See, e.g.*, NPR EXECUTIVE SUMMARY, *supra* note 6, at 1, 2 (including "eliminat[ing] duplication," "reduc[ing] waste" and "eliminat[ing] obsolete functions" as part of the "reinventing government" mission); NATIONAL PERFORMANCE REVIEW, *supra* note 2, at 2 (The recommendations in the Report will "reduce waste, eliminate unneeded bureaucracy, . . . and create a leaner but more productive government.").

17. NPR EXECUTIVE SUMMARY, *supra* note 6, at 2; NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 13, 14; REINVENTING ENVIRONMENTAL MANAGEMENT, *supra* note 12, at 5.

18. NPR EXECUTIVE SUMMARY, *supra* note 6, at 13 ("we must create a culture of public entrepreneurship—of people willing to innovate"); REINVENTING ENVIRONMENTAL MANAGEMENT, *supra* note 12, at 3, 5, 6. One strategy to achieve

III. MINIMIZING DUPLICATION OF EFFORT

This section evaluates the Superfund Reform Act of 1994 in connection with the "reinventing government" principle that duplication should be eliminated. In significant respects, the SRA fails to correct and, to some extent, exacerbates, deficiencies in CERCLA in terms of this principle.

A. "Mission Accomplished" on the "Cost Share" Front

At the outset in discussing the structural changes Congress is proposing to Superfund in the context of intergovernmental relations, it is important to highlight one clear improvement that Congress has wrought in the SRA. This improvement relates to the change that the SRA makes in the allocation of costs to the federal and state governments for sites that are cleaned up using government funds. This change, if enacted into law, will reduce duplication of effort and conflict between federal and state sovereigns.

CERCLA currently creates a built-in potential conflict of interest between the state and federal governments by giving them inconsistent financial incentives concerning remedy selection. CERCLA currently makes EPA responsible for ninety percent of construction costs and zero percent of operation and maintenance costs.¹⁹ It thereby gives EPA a financial incentive to minimize the cost of construction and maximize the cost of operation and maintenance.²⁰ CERCLA gives states the opposite financial incentive, making states responsible for ten percent of construction costs and 100 percent of operation and maintenance costs.²¹ These conflicting financial incentives give both governments a strong

this objective that the reinventing government reports allude to frequently is that of "mov[ing] from measuring activities to measuring results." EPA PHASE I REPORT, *supra* note 14, at 5; NPR EXECUTIVE SUMMARY, *supra* note 6, at 2.

19. 42 U.S.C. § 9604(c)(3). The Court of Appeals for the District of Columbia Circuit upheld this interpretation of CERCLA in response to a state challenge. *Ohio v. EPA*, 997 F.2d 1520, 1543-15. (D.C. Cir. 1993).

20. Some EPA officials deny that they act on such incentives, while several state officials disagree. Markell, *supra* note 3, at 60 & n.157.

21. 42 U.S.C. § 9404(c)(3). *Ohio v. EPA*, 997 F.2d at 1543-46.

incentive to participate in the remedial process for the same sites in order to protect their unique financial interests. As I point out in my October 1993 testimony before the House of Representatives' Subcommittee on Transportation and Hazardous Materials:

Because [CERCLA] creates this substantive potential for conflict, this structure also leads to wasteful duplication of effort. States have a strong financial incentive to participate actively in the clean-up process (even if EPA is participating actively as well) to produce a remedy that has high construction costs and low O & M costs. Further, states need to be involved at such sites to ensure that EPA's financial incentives—which are the opposite of the states'—do not drive EPA toward a remedy with low construction costs and high O & M costs. Similarly, even if EPA were willing to give a state the lead for a site . . . , with the existing cost structure EPA would need to be involved to ensure that the state acts in EPA's best interests despite the different financial incentives of the two governments. In sum, the federal government should create level cost shares throughout the process for both the federal and state governments to eliminate this potential source of conflict and duplication of effort.²²

To its credit, in the SRA Congress levels out the cost share for fund-lead projects at eighty-five percent federal and fifteen percent state for both construction and operation and maintenance costs and thereby addresses what appears to be a significant cause of the duplication of effort and conflict that sometimes characterizes EPA/State relations under CERCLA.²³

22. *Preliminary Hearings in Connection to Reauthorization of CERCLA Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 12 (Oct. 28, 1993) (statement of David L. Markell). Several state and federal officials share my view that this potential financial conflict of interest causes "contentious debates" and frequent disputes between the governments concerning site-specific remedies. Markell, *supra* note 3, at 61.

23. SRA, *supra* note 5, § 202, at 2-22 (creating CERCLA § 104(c)(ii)(A)). "Fund-lead" is shorthand for cleanups paid for out of government funds. *See also* Markell, *supra* note 3, at 59-63 ("Having a financial structure that creates a different cost share for different parts of the process appears to be a major source of tension between EPA and the states."). Other significant issues relating to government funding remain, including the ability of the federal and state governments to bear their respective shares. *Id.* at 31-32, 62; *Superfund: Operation, Maintenance Costs by States Will Rise at 'Completed' Sites*, GAO Says,

*B. Reasons to Be Less
Sanguine on the "Delegation Front"*

Congress proposes to amend CERCLA by allowing states to be delegated additional authority to handle sites.²⁴ The effectiveness in terms of minimizing duplication of this proposal is questionable. Two features of the current state/federal relationship under CERCLA are salient here. First, while I may be overstating the point somewhat, CERCLA and EPA's implementing regulations in the National Contingency Plan (NCP)²⁵ essentially make the federal Superfund process an EPA-run program with little opportunity for states to handle entire sites.²⁶ For example, in the NCP, EPA articulates its determination to make virtually all remedy selection decisions, which are at the heart of the Superfund process.²⁷

Second, duplication of effort by the federal and state governments is commonplace under CERCLA's structure. CERCLA's structure mandates that EPA provide states with the opportunity for "substantial and meaningful involvement" at sites for which EPA is in the lead.²⁸ Similarly, for those sites for which states take a lead role, EPA legally is required to maintain substantial involvement.²⁹ Because CERCLA's structure creates such built-in overlap regardless of whether a state or EPA is in charge of a site, this structure has caused many state and federal officials who participate in the remedial process to complain that the current

24 Environment Reporter (BNA) 879 (Sept. 17, 1993) (discussing the high level of O&M costs).

24. SRA, *supra* note 5, § 201 (creating CERCLA § 127).

25. 40 C.F.R. Part 300 (1993).

26. Markell, *supra* note 3, at 38-39.

27. 40 C.F.R. § 300.515(e) (1993). The one exception to EPA's insistence on retaining ultimate remedy selection authority involves non-Fund-financed State-lead enforcement sites (*i.e.*, sites that states will manage and for which states will not require federal funds to accomplish remediation). 40 C.F.R. § 300.515(e)(2)(i). The number of federal NPL sites cleaned up under state direction without federal funding appears to be extremely limited. Markell, *supra* note 3, at 38 n.103.

28. 42 U.S.C. § 9621(f) (1988); 40 C.F.R. § 300.500(a) (1993).

29. As discussed *infra* note 36 and accompanying text, EPA's "cooperative agreement" mechanism for transferring the lead to a state for a site requires EPA to remain substantially involved in that site.

structure's provision for active federal and state involvement at the same sites produces substantial duplication of effort "throughout the entire process."³⁰

Given that the size of the hazardous waste cleanup problem in this country dwarfs EPA's ability to address all of the sites that need attention,³¹ the SRA appears to take a first step toward leveraging federal resources and increasing the number of sites handled by allowing capable and interested states to play a larger role in the remediation process.³² For example, the SRA expressly authorizes EPA to delegate to states authority for fundamental decisions such as "select[ing] a remedial action and issu[ing] a record of decision."³³ In contrast, in the Preamble to the 1990 NCP, EPA states its view that it should retain such authority:

EPA believes, however, that it is not appropriate at this time to turn over the final decision-making authority on remedy selection to states EPA believes that it should retain primary responsibility for the federal Superfund program.³⁴

This new direction represents a marked potential expansion of the state role at federal Superfund sites.

30. Markell, *supra* note 3, at 42.

31. COMING CLEAN, *supra* note 3, at 13 ("Superfund is just the visible tip of an expanding national pyramid of cleanup programs."). EPA itself has concluded that the site remediation challenge is larger than EPA can handle on its own:

EPA recognizes that many more sites need to be addressed than present CERCLA resources can accommodate; by deferring some problem sites to the States, EPA believes more overall response actions can be accomplished more quickly, and EPA can direct its resources to sites that otherwise would not be addressed.

53 Fed. Reg. 51,394, 51,418 (Dec. 21, 1988) (proposed rule containing changes to the NCP as a result of the SARA amendments). Some observers, however, challenge the high priority that has been assigned to such sites. Keith Schneider, *New View Calls Environmental Policy Misguided*, N.Y. TIMES, Mar. 21, 1993, at A1, A30.

32. See Markell, *supra* note 3, at 37-39.

33. SRA, *supra* note 5, § 201(a), at 2-3 (creating CERCLA § 127(a)(3)(A)(v)).

34. 55 Fed. Reg. 8783 (Mar. 8, 1990) (final rule revising the NCP); See also *supra* note 27.

The SRA's expansion of state responsibility, however, is unlikely to achieve the reinventing government goal of minimizing duplication or produce a significant boon to efficiency and productivity because Congress has decided not to match this decision to encourage greater state involvement in addressing sites with a decision to *shift* responsibility for such sites from EPA to the states. Instead, Congress has decided to retain a significant federal, site-specific role even as to those sites which EPA delegates states the authority to address.³⁵ Congress's choice of "cooperative agreements" as the mechanism for EPA's delegating responsibility to states reflects this decision. As the definition of "cooperative agreement" makes clear, it is not a vehicle intended for true transfers of authority from the federal to the state government; instead it is a "partnership" vehicle—a "legal instrument EPA uses to transfer money . . . to a recipient to accomplish a public purpose in which *substantial EPA involvement is anticipated during the performance of the project.*"³⁶

Congress is reluctant to fundamentally restructure the state/federal relationship by shifting from site-specific "partnerships" to a new paradigm characterized by dividing responsibility for specific sites between the two sovereigns depending on their capabilities and interest. This reluctance appears to stem both from the dynamics of the political debate surrounding the Superfund reauthorization process and from various studies of state Superfund programs. Environmentalists have expressed apprehension about ceding "too much" power to states. Senate testimony reflects this concern:

Citizens have extreme apprehension about states being delegated authority for Superfund programs. We feel, in general, that if the States had carried out their responsibilities to provide all citizens with equal protection before the law with integrity and

35. See, e.g., SRA, *supra* note 5, § 201(a), at 2-1 (creating CERCLA § 127(a)(2)-(3)).

36. 40 C.F.R. § 300.5 (1993) (emphasis added). See also 40 C.F.R. § 35.6015(a)(14). In the SRA, as in CERCLA, Congress provides for the use of both cooperative agreements and contracts. The former is used as the vehicle to delegate authority to states. The latter is used primarily when EPA is in the lead for a site to address cost share and other obligations that states have under CERCLA. See, e.g., 40 C.F.R. §§ 300.5, .500(b), .510(a), .515(a) (cooperative agreements); 40 C.F.R. §§ 35.6800, .6805, 300.510(a) (contracts).

commitment, there would be no Superfund. We therefore advocate extreme caution in the delegation of Authority to States, and judicious oversight by EPA in such cases.³⁷

Studies issued by the General Accounting Office, the Office of Technology Assessment, and EPA itself, among others, provide additional support for Congress's questioning of state capability.³⁸

The legislative outcome or product of these concerns about state capabilities is Congress's compromise in the SRA of allowing states to do more, but only with substantial EPA site-specific oversight. Unfortunately, this is a "halfway" gesture that will likely do little to improve CERCLA in terms of the reinventing government goal of minimizing duplication of effort. By failing to create a "divorce" between state and federal players so that the governments divide sites and handle them largely independently, the SRA continues the "two cooks in the kitchen" routine that has triggered considerable frustration in both governments.³⁹

37. *Superfund: Hearings on S. 1834 Before the Senate Comm. on Environment And Public Works*, 103d Cong., 2d Sess. 4 (June 28, 1994) (testimony of Florence T. Robinson, North Baton Rouge Environmental Association and The Communities At Large Network). Inclusion of this quote is not intended to reflect the author's agreement with Ms. Robinson that Superfund would not be necessary had states carried out their responsibilities properly. Instead, I have included it as an example of citizens' concerns with ceding responsibility to the states.

38. GOVERNMENT ACCOUNTING OFFICE, PUB. NO. GAO/RCED-89-164, HAZARDOUS WASTE SITES: STATE CLEANUP STATUS AND ITS IMPLICATIONS FOR FEDERAL POLICY 3 (Aug. 1989); COMING CLEAN, *supra* note 3, at 13; OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, EPA, PUB. NO. 9375.6-08B-PB92-963418, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, 1991 UPDATE (Dec. 1991) [hereinafter 1991 50-STATE STUDY]. OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, EPA, PUB. NO. EPA/540/3-91/002, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, 1990 UPDATE (Sept. 1990) [hereinafter 1990 50-STATE STUDY]. OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, EPA, PUB. NO. EPA/540/8/89/011, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY (Sept. 1989) [hereinafter 1989 50-STATE STUDY]. A fourth, 1993 version of EPA's *50-State Study*, to be entitled "An Analysis of State Superfund Programs: 50-State Study, 1993 Update," is due to be issued in August 1994, as EPA document no. 9375.6-08c, NTIS PB 94-963230. Telephone conversation with John Pendergrass July 6, 1994. I have noted before that "[s]tates differ dramatically in their interest in doing Superfund work and in their ability to perform such work." Markell, *supra* note 3, at 26.

39. Markell, *supra* note 3, at 42. Another observer uses the phrase "dual masters" to make the same point regarding the current EPA/State relationship.

One obvious alternative approach to addressing the underlying concern about state capability that seems to be partially responsible for the SRA's structure of substantial, site-specific oversight, is for the federal government credibly to address the issue of state capability at the initial decision point of the process, by requiring meaningful demonstrations of capability as a condition to delegation.⁴⁰ The SRA actually already does this to a significant extent. The SRA makes EPA the "gatekeeper" for state participation as the lead agency in the federal Superfund program. The SRA establishes rigorous criteria for EPA to follow in considering delegating remedy selection and allocation authority to states, providing that states must demonstrate as a condition for such delegation 1) that they have "the capability to select remedial actions or to apply the allocation procedures, respectively, including adequate legal authority to enter into the contract or cooperative agreement, financial and personnel resources, organization, and expertise," and 2) "experience in ade-

See Superfund Reform Act of 1994: Hearings on S. 1834 Before the Senate Comm. on Environment and Public Works, 103d Cong., 2d Sess. 11 (June 28, 1994) (testimony of Alan C. Williams, Assistant Attorney General, State of Minnesota).

The proposed § 127(a)(4) requires EPA to delegate various types of responsibilities to states upon the states' application for such authorities, assuming that the state demonstrates its qualifications. SRA, *supra* note 5, § 201(a), at 2-4. The SRA's "transition rules" qualify this seemingly mandatory EPA obligation, especially for the vast majority of current National Priorities List (NPL) sites, which are EPA lead sites. *See* SRA § 201(b), at 2-18. EPA is the lead for 900 plus non-federal facility NPL sites while states serve as the lead for slightly more than 200 such sites. EPA, CERCLIS database (June 1994). Ultimately, these rules leave EPA enormous discretion for sites that already are on the NPL. *Cf.* Steven M. Jawetz, *The Superfund Reform Act of 1994: Success or Failure Is Within EPA's Sole Discretion*, 24 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,161, 10,163 (Apr. 1994). Due to these "transition rules," it is not clear how many of the sites currently on the federal NPL will be delegated to states. Sites that are not subject to state delegation will continue to be handled under some variation of the current approach, with states retaining the ability to participate in a substantial and meaningful way. SRA § 201(c), at 2-22 (creating CERCLA § 121(f)(5)).

40. While the SRA currently provides for EPA to *delegate* federal authorities and responsibilities to states, rather than *authorize* states to exercise such responsibilities using state authorities, the same principle of ensuring competence applies if Congress ultimately pursues an authorization approach. *See* Markell, *supra* note 3, at 78 n.200 (explaining difference between authorization and delegation).

quately performing or ensuring the adequate performance of similar response actions."⁴¹

Superfund is particularly amenable to the "high gate" approach to state delegation that includes a showing of demonstrated state competence because most states have been operating their own Superfund programs for several years and also have participated in the federal Superfund program.⁴² As a result, EPA has a considerable database with which to evaluate states' track records.⁴³ Further, unlike the situation for many programs, EPA currently is largely implementing the Superfund program itself and retains capacity to do so, so there is no compelling need to lower the threshold for state certification.⁴⁴

41. SRA, *supra* note 5, § 201(a), at 2-6 (creating CERCLA § 127(c)(1),(2)). See also *id.* at 2-4 (creating CERCLA § 127(a)(4)(B)).

The SRA fails to establish any criteria for delegation of other CERCLA authorities, instead delegating this duty to EPA. *Id.* at 2-4, 2-5 (creating CERCLA § 127(a)(4)(A), 127(b)). Congress should consider adding the same required conditions for all activities that it authorizes EPA to delegate.

One question is whether EPA in requiring demonstrated state performance, should be satisfied by successful state performance under programs that differ significantly from the federal approach, given the current requirement in the SRA that states must follow the NCP and EPA guidance. *Id.* at 2-6 (creating CERCLA § 127(d)); see *infra* part V. Intuitively, requiring a state to demonstrate that EPA and the public at large can have confidence in the state's ability to perform by the state's showing that it has performed successfully in the past, suggests that EPA should be wary of accepting state records of successful past performance as indicators of future successful performance if the programs under which the state operated in the past differ significantly from the program under which it will be required to operate under CERCLA. In such a case, past performance may not necessarily be a reliable indicator of future performance. This concern is one more reason why Congress should rethink requiring states slavishly to adhere to the NCP and EPA guidance, and instead allow states to "innovate around" the statutory objectives.

The flip side of this question is whether Congress should keep the gate high to states taking leadership roles but lower it somewhat by allowing states to demonstrate their qualifications through proxies for actual proven competence, including financial and personnel resources, legal authority, enforcement powers, etc. Markell, *supra* note 3, at 44 n.116 (listing several possible criteria). One partial safeguard in the SRA is its preserving EPA's right to act if a site presents an imminent and substantial danger. SRA § 201(a), at 2-16 (creating CERCLA § 127(h)(1)).

42. See 1991 50-STATE STUDY, *supra* note 38.

43. See materials cited *supra* note 38.

44. EPA and the states collectively each have approximately 3500 people working on Superfund issues. Markell, *supra* note 3, at 80 n.206.

In sum, consistent with the National Performance Review, Congress's objective in the SRA should be to establish federal and state roles so as to "eliminate[] duplication,"⁴⁵ or at least minimize it. This reinventing government principle derives from the notion that we simply cannot afford to have one set of bureaucrats (federal officials) spend a considerable portion of their resources overseeing the activities of another set of bureaucrats (state personnel), rather than performing their own work. Congress's decision not to make states full and equal partners, but instead to go only halfway towards true state empowerment by requiring substantial EPA involvement in every site that states address, likely will do little to achieve this goal of eliminating duplication. It will require allocation of scarce federal government resources to review the work of state officials rather than to work on sites for which the federal government is responsible; and it will require the allocation of scarce state resources to explain and justify state actions to federal officials rather than performing additional work. The result is likely to be frustration in terms of achieving the objectives of minimizing duplication and leveraging federal resources by expanding state responsibilities; state and federal officials seeking to implement this scheme will continue to be frustrated as well.

Instead, Congress should ensure that the gate for state accession to positions of site-specific leadership in the federal Superfund program is high by sending a strong message to EPA through the statutory language in the SRA and the legislative history that EPA should be vigilant in its role as gatekeeper and not act as a "rubber stamp" for states interested in participating in the program. Sending such a strong signal should help to insulate EPA from likely pressures to delegate. With the high barriers to state entry that these measures will create, Congress's structure should satisfy those who are skeptical of state prowess that only truly capable states will be delegated authority to handle sites, including having access to federal funds to address these sites. A significant benefit to this approach in terms of the reinventing government principle of eliminating duplication is that a structure that is vigilant on the front end concomitantly should have less

45. NPR EXECUTIVE SUMMARY, *supra* note 6, at 2.

need for the redundant, site-specific federal oversight of state performance that pervades the current SRA approach.

C. The Allocation Process

The structure that the SRA establishes for its allocation process similarly appears to be in conflict with the reinventing government principle of eliminating duplication of effort, explicitly mandating redundant (actually "tridundant") government review and resulting inefficiency.⁴⁶ The SRA offers this new procedure with the hope of encouraging settlements and reducing transaction costs. Among other things, the SRA's allocation procedures appear to be designed to streamline the Superfund process and to reduce the likelihood of a "deep pocket" approach to litigation, by allowing responsible parties to settle basically for their "share" of liability as determined by a neutral allocator and approved by the government and then barring contribution actions.⁴⁷

1. Opportunities for State/Federal Duplication and Conflict

As part of the theme of delegating responsibility to states, the SRA authorizes EPA to delegate to a state the responsibility to conduct the allocation of responsibility among responsible parties.⁴⁸ This allocation process essentially consists of six phases:⁴⁹ 1) the government identifies the responsible parties subject to the allocation process;⁵⁰ 2) a "neutral allocator" is

46. Proposed §§ 127 & 129 are the primary amendments that address the allocation issue. SRA, *supra* note 5, § 201 (creating CERCLA § 127; § 409, at 4-47 (creating CERCLA § 129). As discussed in more detail below, government "tridundancy" might be a more apt word than mere redundancy to describe intergovernmental relations concerning the allocation process. "Tridundancy," a word suggested to me by an EPA attorney, involves review of a decision by three, not merely two, different government agencies.

47. This description is an oversimplification of the process that occupies 50 pages of the SRA bill. See SRA, *supra* note 5, § 409, at 4-47 to 4-97.

48. *Id.* § 201(a), at 2-9 (creating § 127(f)(2)(B)) (states can conduct allocation; § 409, at 4-47 (creating § 129) (authorizing the allocation process).

49. SRA, *supra* note 5, at 4-66. Again, this six phase summary is a simplification of the actual process.

50. SRA, *supra* note 5, § 409, at 4-52 (creating CERCLA § 129(c)).

retained;⁵¹ 3) the allocator conducts an allocation process, in which, *inter alia*, the allocator provides the parties with an opportunity to be heard either orally or in writing;⁵² 4) the allocator issues a draft report creating a “non-binding equitable allocation of the percentage shares of responsibility of all allocation parties”;⁵³ 5) the parties have an opportunity to comment on the report;⁵⁴ and 6) the allocator issues a final report assigning shares of responsibility.⁵⁵ As part of the analysis, the allocator is empowered to assign an “orphan share,” which then will be paid by the federal and state governments (with the former bearing 85 percent of this share and the latter bearing the remaining 15 percent).⁵⁶ The SRA circumscribes the allocator’s flexibility in assigning shares in general, and in assigning an orphan share in particular, by establishing a series of factors for the allocator to consider in assigning shares, and by defining the concept of “orphan share.”⁵⁷

Once the allocator issues a final report, it is the government’s turn. If a state has been delegated authority to handle the site, including the enforcement activities and the allocation, the state has the option to reject the allocator’s report, under limited conditions,⁵⁸ or to accept it. If the state accepts the report, it is required to use the report as the basis for any settlements it negotiates under the SRA.⁵⁹

Although the SRA allows states to assume responsibility for reviewing the allocator’s report, Congress still retains a site-specific role for the federal government to play in the allocation process. If a state accepts an allocation report that contains an orphan share as the basis for a settlement, the state shall apply for federal funding of the federal share of the orphan fund by certifying to EPA and DOJ that 1) the allocation is reasonable; and

51. *Id.* at 4-62 (§ 129(e)); *id.* at 4-58 (§ 129(c)(6)(B)).

52. *Id.* at 4-68 to 4-69 (§ 129(h)(3)).

53. *Id.* at 4-66 (creating § 129(h)(1)); *Id.* at 4-69 (creating § 129(h)(4)) (orphan share).

54. *Id.* at 4-69 (§ 129(h)(3)).

55. *Id.* at 4-66 (creating § 129(h)(1)).

56. *Id.* § 202, at 2-22 (creating CERCLA § 104(c)(11)(A)). The orphan share is defined in SRA § 409, at 4-69 (creating § 129(h)(4)).

57. *Id.* § 409, at 4-67 (creating § 129(h)(2)) (factors); *Id.* at 4-69 (creating § 129(h)(4)) (orphan share). *See also* § 201(a), at 2-8 (creating § 127(f)(2)).

58. *Id.* § 201(a), at 2-10 (creating § 127(f)(2)(c)).

59. *Id.*

2) assigning an orphan share is consistent with the statutory standards in section 129(h)(4).⁶⁰ EPA and DOJ must accept a state's request for an orphan share unless they determine within 120 days that the orphan share allocation does not meet the section 129(h)(4) standards.⁶¹ The SRA prescribes that the federal government shall use a deferential standard in reviewing such certifications, authorizing the government to reject an allocator's report only when the allocation was irrational or affected by bias or fraud.⁶² Finally, Congress provides expressly that federal authority to review such certifications shall not be delegated below the Assistant Secretary level.⁶³

60. *Id.* at 2-10 (creating § 127(f)(2)(E)). The requirement that both EPA and DOJ review state decisions on allocations is an instance of "tridundancy"—a more extreme manifestation of the problem of redundancy.

61. *Id.* at 2-11 (creating § 127(f)(2)(F)).

62. *Id.* § 409, at 4-78 to 4-79 (creating § 129(l)).

63. Congress provides that federal acceptance of the allocator's report is non-delegable:

No such determination [as to whether to accept the allocator's report] may be delegated to any officer or employee of the Environmental Protection Agency or the Department of Justice below the level of an Assistant Secretary or Acting Assistant Secretary with authority for implementing this Act at the Environmental Protection Agency or the Department of Justice.

Id. at 4-79 (creating § 129(l)). While EPA does not have Secretaries in its organizational structure, EPA's counterpart is likely to be the Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA) or the Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER). These are extremely high-level political appointee positions within the agency's bureaucracy. Placing approval authority at this level means that any allocation will need to go not only through the EPA regional office that in theory will have been providing support to the state handling a particular site, but also through the EPA Headquarters bureaucracy. This high level of oversight seems curious. First, EPA Headquarters review is not required for the vast majority of Records of Decision (RODs) issued by the Regional Offices, each of which potentially may commit millions or tens of millions of dollars of federal Superfund dollars to site remediation. *See* Markell, *supra* note 3, at 47 n.117. From a financial standpoint, it is not clear why regional oversight of site allocation decisions would be inadequate. If Congress's concern is that the newness of the process warrants heightened, multiple reviews at the outset, it is unclear why such heightened review must persist. Creating such heightened review is directly inconsistent with the concept of minimizing duplication (and with the principle of empowerment discussed below).

In an anecdote, the National Performance Review applauds a National Forest Service initiative that streamlined process by moving in precisely the

Overall, it is possible to make the following observations concerning state/federal duplication in the allocation process. First, structurally the process that the SRA creates is one of site-specific review and approval by the federal government of state decisions. That is, every neutral allocator's decision that involves an orphan share and passes state muster also must be reviewed by, and pass muster with, high ranking federal officials.⁶⁴ Such a structure inherently produces rather than discourages redundancy. Second, while Congress appears to have attempted to circumscribe the federal government's role somewhat in order to minimize this problem, through its limitations on the nature of the federal government's review and its limited time frame for review, as well as through the use of a state certification process,⁶⁵ it is not promising that Congress has created review roles for two federal agencies rather than one. It similarly is not encouraging that Congress expressly prescribes that approval of state certifications must occur at extremely high levels of both federal agencies—officials at such high levels are likely to require extensive briefings before signing off on state decisions.

Congress has the best of intentions in creating this multiple review structure of the allocator's efforts. As the Administration

opposite direction from that reflected in the SRA—that is, it enabled employees to grant permits themselves rather than process them through Headquarters. NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 6. The SRA's approach requiring high level federal review of allocation decisions, in short, appears to be directly contrary to the idea in the National Performance Review Report that "[w]orking toward a quality government means reducing the power of headquarters vis-a-vis field operations." NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 70.

64. Consistent with this structure of maintaining a federal role while allowing front line responsibility to devolve to the states, the SRA also provides that "EPA may "assign . . . any responsibilities to conduct the allocation, except that the Administrator and Attorney General shall retain their authority relating to orphan share funding . . . , including the timing and terms of payment." SRA, *supra* note 5, § 201(a), at 2-9 (creating § 127(f)(2)(B)). The SRA also provides explicitly that even though EPA delegates responsibility for a site to a state, EPA and DOJ are free to participate in the same process which the state has expressed interest in handling, and which the federal government has deemed the state competent to handle, providing that "[t]he President, through either the Administrator or the Attorney General, or both, may participate in any phase of an allocation proceeding where an orphan share is identified." *Id.* at 2-10 (creating CERCLA § 127(f)(2)(D)).

65. See *supra* part III.B.

notes in its National Performance Review in discussing the existence of review and approval type procedures generally, "not one inch of that red tape appears by accident. In fact, the government creates it all with the best of intentions."⁶⁶ Congress's decision to maintain both federal and state roles in the case-specific allocation review process undoubtedly stems from its concern that the federal fisc be protected. Remember that an allocator has the flexibility to assign an "orphan share," 85 percent of which ultimately will be paid from federal coffers.⁶⁷

It nevertheless seems clear that Congress should be able to better balance this fiscal concern with the reinventing government principle of minimizing duplication. If Congress is unwilling because of a felt need to maintain federal involvement to protect the public fisc to adopt the "divide the universe" structure that will minimize duplication, Congress has at least two other options. First, incrementally, Congress should simplify the nature of federal oversight by limiting it to one federal bureaucracy. Further, Congress should allow this federal oversight role to be "delegated down" over time if not initially.

In a more radical departure from the SRA, Congress should consider approaches such as 1) setting "trigger limits" that confine federal review to orphan share allocations above a certain dollar amount; and/or 2) a structure that has more of a programmatic focus and entails EPA and the states managing the fiscal issues up front, by authorizing EPA to give each capable state an orphan share budget and then giving each such state flexibility in deciding how best to use this fund to achieve mutually agreed upon objectives (e.g., the maximum number of cleanups or the maximum reduction in risk). Other options undoubtedly are available as well. The abiding principle that should influence Congress's consideration of these options is that in addressing the

66. NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 11. Here, the duplication of effort and red tape created by this review process for the allocator's decision is likely to be significant. At least three government bureaucracies and up to six will review this decision. At the state level, at least one and perhaps two agencies will be involved, the regulatory agency and perhaps the Attorney General's office. At the federal level, up to four bureaucracies will review the decision: the EPA regional office, the EPA Headquarters office, the local U.S. Attorney's office if it is the DOJ lead for a site and the main DOJ office.

67. *See supra* note 67.

need to protect the public fisc, the structure Congress creates should address this concern in a way that minimizes duplication of effort, especially the "second guessing," site-specific variety, and maximizes the realization of other reinventing government principles discussed in Sections IV and V below, empowering the front lines personnel and encouraging their being creative or entrepreneurial in accomplishing mutually agreed upon goals.

2. *Opportunities for Duplication
and Conflict Between Federal Actors*

As indicated above, the SRA's newly proposed allocation process gives states that take lead responsibility for sites little autonomy, instead requiring that state allocation of responsibility decisions be reviewed and approved by both EPA and DOJ.⁶⁸ Congress unfortunately is consistent and does not allow EPA, for sites for which it is in the lead, unilaterally to make the decision as to whether to accept an allocation decision. Instead, again it builds in a site-specific second-guessing role for DOJ, effectively giving DOJ veto power over EPA's judgment.⁶⁹ Even EPA's ability to establish internal guidance relating to the allocation process is constrained by its obligation to "consult" with the Department of Justice.⁷⁰ In sum, the SRA's allocation structure, which provides for multiple federal bureaucracies to perform the same function (*i.e.*, reviewing allocators' decisions) appears to be directly contrary to the basic objective of eliminating duplication of effort.

Congress's decision to maintain such a clearly inefficient structure in order to limit EPA's autonomy may stem from its dissatisfaction with EPA's performance during the early Superfund years. The following statement by former Representative Florio, one of the principal congressional authors of CERCLA, is representative of such dissatisfaction:

Congress set ambitious goals for the Superfund program; . . . Notwithstanding the optimistic language in the statute, no one expected

68. *See supra* note 66.

69. SRA, *supra* note 5, § 409, at 4-78 (creating CERCLA § 129(l)).

70. *Id.* at 4-95 (creating § 129(s)) (EPA, "after consultation with the Attorney General, may promulgate rules (or guidance) of Environmental Protection Agency organization, procedure, and practices.").

a perfect agency response free of the false starts and delays normal for any bureaucratic undertaking But, Congress did expect an all out effort to attack the problem. Instead, Congress got long explanations of technical and legal problems, and after five years and over \$1.6 billion, EPA could not identify a single site it had completely cleaned up.⁷¹

To the extent that Congress retains a residual distrust of EPA's ability to conduct allocations (or to settle cases or conduct enforcement),⁷² Superfund reauthorization offers Congress an opportunity to address its concerns. The SRA's fix to this distrust of EPA—requiring outside agency review and approval of EPA's decisions—runs directly contrary to the reinventing government principles. Instead, Congress should “fix the problem” in the agency, and then empower it to carry out its responsibilities without imposing duplicative review by DOJ.⁷³

D. Settling Cases

The SRA loosens somewhat, but ultimately maintains, CERCLA's constraints on EPA's authority to settle cases unilaterally.⁷⁴ It maintains redundancy between EPA's and DOJ's roles

71. James J. Florio, Symposium, *Foreword: Superfund and Hazardous Wastes*, 6 STAN. ENVTL. L.J. 2, 5 (1987). See also Markell, *supra* note 3, at 58. This lack of confidence dates back to even before Superfund became law, when Rep. Stockman worried about giving EPA too much power with an “open-ended enabling statute that makes EPA the czar.” 126 Cong. Rec. H9439 (daily ed. Sep. 23, 1980), reprinted in 1 SUPERFUND: A LEGISLATIVE HISTORY 155 (Helen C. Needham & Mark Menefee eds., Envtl. L. Inst. 1983).

72. See *infra* part III.D-E.

73. Refashioning DOJ's role in this respect would make DOJ's role much more analogous to that of a traditional outside counsel. The “fragmented nature of environmental policy making” extends beyond Superfund. Richard J. Lazarus, *Assimilating Environmental Protection Into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 876 (1994).

74. 42 U.S.C. § 9622(d)(2). The SRA maintains a significant DOJ role in reviewing EPA-negotiated and approved settlements but limits DOJ's role somewhat by allowing EPA to finalize such settlements without DOJ review and approval at facilities where the total response costs are less than \$5 million (CERCLA's current limit is \$500,000). Even with the SRA's higher ceiling, EPA will need to obtain DOJ's approval to finalize a settlement for most sites. Letter from Elliott P. Laws, Assistant Administrator, EPA, to Al Swift, Chairman, House Subcomm. on Transportation and Hazardous Materials 18 (Jan. 26, 1994) (on file with author). The same issues apply to state efforts to settle at

that is analogous to the redundancy created in the allocation process discussed above.⁷⁵ EPA continues to lack the authority to unilaterally—that is, without DOJ approval—settle cases regarding remedial action commitments, except in limited situations.⁷⁶ Based on relatively limited legislative history on the issue, Congress's decision to create a structure with such built-in redundancy appears to stem from four primary concerns with giving EPA autonomy. First, Congress's confidence in EPA appears to be less than complete. In part, as noted above,⁷⁷ this appears to be a carryover from the early days of the Superfund program. EPA's performance during this early period of the program has been widely criticized. During the 1986 Congressional debates concerning amending CERCLA, several Senators echoed the concern with EPA's performance that Congressman Florio articulated. Senator Mitchell, for example, discussed the "sweetheart deals that EPA negotiated with PRP's several years ago."⁷⁸

sites where response costs exceed \$5,000,000. Under SRA's proposed revisions to § 122(h)(1), states will be required to obtain DOJ approval of all such settlements as well. SRA, *supra* note 5, § 408(6)(B)(iii), at 4-47 (amending CERCLA § 122(h)(1)). As one commentator notes,

This is likely to cause substantial friction in the always delicate relationship between state and federal environmental enforcement officials. States typically litigate and settle their cases under their own sovereign powers without any involvement by the federal government, and thus can be expected to chafe whenever their autonomy is lessened, as it would be by being required to ask DOJ to approve each settlement.

Fax from John Pendergrass, Senior Attorney and Director, Center for State, Local and Regional Environmental Programs, Environmental Law Institute (July 6, 1994) (on file with author).

75. See *supra* part III.C.

76. SRA, *supra* note 5, § 408(5)(D), at 4-46 (amending CERCLA § 122(g)). See 42 U.S.C. § 9622(d)(1)(a), (g) (current law).

77. See Florio, *supra* note 71, and accompanying text.

78. 132 Cong. Rec. S14,918 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell), reprinted in 2 THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986: THE LEGISLATIVE HISTORY, at "Senate Conf. Debate" (Scott C. Clarkson, Inst. of Law and Public Health Protection & James W. LaMoreaux, Env'tl. Inst. for Waste Mgmt. Studies eds., Apr. 1987) [hereinafter SARA LEGISLATIVE HISTORY]. See also Sen. Simpson's discussion of the "cloud" under which the program operated in its early years due to "the public problems of its stewardship . . ." *Id.* at S14,921. As Professor Lazarus observes, Congressional distrust of EPA extends well beyond the Superfund program. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 313; Richard J. Lazarus,

Second, Congress's decision to include DOJ in the settlement approval process also appears to have been influenced by a desire to promote consistency nationwide as well as to provide a "substantive check" on EPA by providing for review by the "experienced hands" at DOJ. As the House Judiciary Committee Report notes concerning the former issue, "centralized review and oversight will also ensure that settlements of significant claims by diverse agencies and regional offices will be consistent nationally"⁷⁹ Concerning the latter, the Report notes that "evaluating large settlement proposals involves the consideration of factors with which the Justice Department has had much experience, including the litigative risks of trying the case and the possible precedential value of the case."⁸⁰ Third, Congress appears to have incorporated DOJ review of settlements to ensure that such settlements have no adverse effects on ongoing or potential litigation.⁸¹ Finally, Congress appears to have wanted to retain judicial review of settlements as an additional check on EPA discretion and to provide a forum for public review of such settlements; and Congress considered DOJ involvement in the settlement process to be necessary to process cases through the judicial system.⁸²

A system of checks and balances such as that embodied by DOJ review and approval of EPA settlements adds some degree of value to the decision making process. At the same time, such a system appears to be squarely in conflict with the reinventing government principles of minimizing duplication and empowering implementers. A strong argument exists that we no longer can afford to address the lack of confidence or the desire for consistency concerns by creating duplicative review structures in the context of settlements just as we no longer can afford to use scarce government resources to conduct redundant reviews in the

The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?, LAW & CONTEMP. PROBS., Autumn 1991, at 205, 214-19 ("EPA bashing has become commonplace on Capitol Hill").

79. HOUSE JUDICIARY COMM. REP. NO. 253 TO H.R. 2817, 99th Cong., 1st Sess. (1985), reprinted in 1 SARA LEGISLATIVE HISTORY, *supra* note 78, at 122-57.

80. *Id.*

81. *Id.*

82. Statement of Sen. Mitchell, *supra* note 78.

allocation process. "[O]ne federal bureaucracy, or two bureaucracies if EPA Headquarters [as well as the EPA Regional Office] is involved, should be capable of negotiating settlements"⁸³

Consistent with the reinventing government principles, rather than creating external, redundant, site-specific review, Congress should create or require the creation of internal mechanisms at EPA to promote consistency and substantive adequacy in settlements.⁸⁴ Congress should also use available mechanisms periodically to conduct programmatically-oriented reviews of EPA and state performance in the settlement process.

Providing for DOJ review and approval of settlements in order to enhance DOJ's ability to ensure that such settlements do not adversely affect ongoing or potential litigation is a more difficult issue. Once a case concerning a particular site is filed in court, DOJ involvement in settlements concerning the site, and court approval of such settlements, appears appropriate. It is less clear that DOJ involvement in settlements is necessary or appropriate for sites where litigation has not been initiated. Early settlements obviously have the potential to impact future litigation. The same is true, however, with respect to every EPA decision, foremost among them probably being the remedy selection decision. Consequently, the existence of a relationship between a settlement or some other site activity and potential subsequent litigation by itself does not justify DOJ involvement in the earlier activity. A more "reinventing government-friendly" approach, again, is to create a settlement structure that minimizes the likelihood that pre-litigation settlements will undermine such litigation, and ensures that DOJ is aware of a site's pre-litigation history, including any earlier settlements.⁸⁵

83. Markell, *supra* note 3, at 58.

84. In fashioning this structure to include safeguards, Congress also should be mindful of the two principles discussed in Sections IV and V, empowerment and creativity. EPA's model consent decree is one example of an effort to promote institutional consistency.

85. Congress should determine whether it needs to create additional safeguards to compensate for minimizing DOJ's role. The SRA's settlement structure already creates considerable checks on EPA's ability to enter into settlements on terms that will undermine future litigation. Limitations on covenants not to sue, the allocation process, the impact of settlements on the liability of non-settlers, and other provisions seem to provide considerable assurance that EPA will not "sell out" the government's interests in settlements. *See SRA*,

Finally, better options exist for preserving both the "judicial and public checks" on EPA settlements that appear to have played some role in Congress's decision to involve DOJ in EPA Superfund settlements. In the 1986 debates, Senator Mitchell explained that one reason for requiring judicial review of settlements before they were finalized was to create a judicial check on agency settlements:

A court's authority to review consent decrees is not diminished or modified. There continues to be judicial review of these decrees as a check on the agency's exercise of its discretionary authority to enter into settlement agreements. The court can review the decree to determine whether the decree is in the public interest.⁸⁶

Congressman Roe discussed the role of judicial review of settlements as a tool to give the public an opportunity to serve as a check on EPA settlements through the public's chance to comment on such settlements before they were finalized:

To avoid the so-called sweetheart deals which may occur if the settlement process is abused, settlement agreements under the section [122] must be entered as consent . . . decrees and must be open for public review and comment.⁸⁷

The nation's district court judges clearly do not need this extra work. As Congress acknowledged in 1986 in allowing EPA to settle a limited number of cases administratively, doing so "will also help to reduce the number of cases filed in federal courts" thereby saving overburdened judicial resources.⁸⁸ EPA's administrative judicial system provides an alternative forum for

supra note 5, § 406, at 4-26 (amending CERCLA § 113(f)(2)); § 409, at 4-81 (creating § 129(o)); at 4-86 (creating § 129(p)); § 408(4), at 4-33 to 4-37 (amending § 122(f)) (regarding covenants). The non-settlers' ability to participate in the settlement approval process and the provision for review and approval of the settlement by the judiciary provide further assurance against EPA's producing such settlements on more than an anomalous basis.

86. Statement of Sen. Mitchell, *supra* note 78, at S14,918.

87. 132 Cong. Rec. H11,079, *reprinted in* 2 SARA LEGISLATIVE HISTORY, *supra* note 78, at "House Bill Debate."

88. HOUSE JUDICIARY COMM. REP NO. 99-253, *supra* note 79, *reprinted in* 1 SARA LEGISLATIVE HISTORY, at 122-57.

processing settlements that will accomplish Congress's goals of providing 1) a judicial check on EPA settlements, and 2) a public check on such settlements by allowing public comment on them, without the negative aspects of the current system of requiring redundant federal agency (i.e., DOJ) involvement in the settlement process and exacerbating the overloading of an already overloaded federal court system.

EPA maintains an independent judicial system that it uses to process administrative enforcement cases.⁸⁹ This administrative judiciary includes Administrative Law Judges and an Environmental Appeals Board (Board or EAB).⁹⁰ The Board seems competent to serve as an independent check on EPA-negotiated settlements and to provide a forum for public review and comment on proposed settlements for several reasons. First, the Board already performs the job of finally approving settlements under a variety of environmental programs, including the Toxic Substances Control Act and the FIFRA.⁹¹ The Board has developed formal procedures to govern its review and approval of such settlements.⁹² Finally, the Board already is involved in Superfund matters and therefore has substantive expertise in this area.⁹³

89. Edward E. Reich, *EPA's New Environmental Appeals Board*, NR&E Spring 1994, at 39, 39.

90. *Id.*

91. *Id.* at 40. Like Superfund agreements, such settlements may involve remediation issues, though not of the scope typically raised in federal Superfund cases.

92. *Id.* Environmental Appeals Board Consent Order Review Procedures (Jan. 5, 1993) (internal memorandum, on file with author). While this procedure currently does not provide for public comment as part of the review process, it could be changed to do so.

93. The Board very recently was given authority to resolve petitions for reimbursement under CERCLA § 106(b). EPA, Superfund Program; Availability of Guidance Document, 59 Fed. Reg. 38,465 (July 28, 1994). See also EPA Delegation of Authority CERCLA 14-27 (June 1994) (cited in *id.*). The EAB could perform a similar function with respect to state-negotiated settlements. Alternatively, Congress could allow EPA to delegate this function as well to states with similar administrative structures. Another option to ensure judicial review while minimizing redundancy is to empower EPA to submit such settlements to federal district court judges for their review and approval on its own, without having to proceed through DOJ. The latter approach would require special authorization within the statute. See 28 U.S.C. § 516 (1988) (reserving representation of the federal government "[e]xcept as otherwise authorized by law").

In sum, Congress has alternative structures available to it to achieve the goal of creating judicial and public review checks on agency settlement authority that would entail far less redundancy than occurs under the current structure.

*E. Enforcement: Obtaining Fines
and Other Sanctions for Non-Compliance*

The SRA lands in the same conceptual trap concerning the enforcement process as it falls into in the settlement arena, creating considerable redundancy between states and DOJ and between EPA and DOJ. As noted above, the SRA authorizes EPA to delegate to states a wide variety of authorities, including enforcement authorities.⁹⁴ The SRA, however, later circumscribes this authority, limiting a state's ability to take such enforcement action unilaterally if the claim exceeds \$300,000.⁹⁵ Instead, the state must obtain DOJ approval for state enforcement responses in such instances.⁹⁶ The SRA creates the same limitations on EPA's authority as it imposes on states if EPA is in the lead to resolve enforcement actions, again requiring DOJ involvement in such EPA-developed cases.⁹⁷

The reinventing government principles, based on the idea that we no longer can afford redundancy of government effort and instead should be empowering implementers, suggest that in the SRA Congress should decentralize the enforcement structure and remove existing impediments to administrative enforcement action by EPA and the states.⁹⁸ This issue extends beyond the immediate scope of this article as well. This centralized approach to enforcement is not unique to CERCLA among the environmental statutes. Both the Clean Water Act and the Clean Air Act expressly and dramatically limit EPA's administrative penalty authority.⁹⁹ For example, the Clean Water Act authorizes civil

94. See *supra* part III.B.

95. SRA, *supra* note 5, § 408(6)(B)(ii), at 4-46 to 4-47 (amending CERCLA § 122(h)(1)).

96. *Id.*

97. *Id.*

98. At least one state has essentially parallel administrative and civil penalty authority with no artificial limits on administrative penalty authority. N.Y. ENVTL. CONSERV. LAW Art. 71 (McKinney 1984 and Supp. 1994).

99. 33 U.S.C. § 1319(g) (1988); 42 U.S.C. § 7413 (1988 & Supp. IV 1992).

penalties of up to \$25,000 per violation per day with no statutory maximum.¹⁰⁰ It limits EPA's administrative penalty authority, however, to cases involving penalties of no more \$10,000 per day, and limits the maximum administrative penalty to \$125,000.¹⁰¹ The Clean Air Act similarly limits EPA's administrative penalty authority compared to its civil authority.¹⁰² The reinventing government principles suggest that Congress should rethink the federal government's centralized approach to enforcement. In doing so, it will need to address the issue, what should be DOJ's main role in an enforcement structure that conforms to these principles.

F. Permit Waivers

In an example of its creating unnecessary process and the unnecessary potential for conflict and duplication, Congress declines in the SRA to treat states as EPA's equal for purposes of granting exemptions from permitting requirements. Instead of acting programmatically and making the decision that like EPA, states should be exempt from permitting requirements, Congress leaves this decision to EPA to address as part of the delegation process.

One of the impediments that states have identified to their handling Superfund sites involves the issue of whether they need to obtain federal permits that otherwise would apply to the remedial activity.¹⁰³ CERCLA currently exempts EPA from having to obtain such permits,¹⁰⁴ on the ground that the remedial process is the functional equivalent of the permit process. In the federal government's view, the remedial process provides adequate assurance of public participation and of consideration of environmental

100. 33 U.S.C. § 1319(d) (1988).

101. *Id.* § 1319(g).

102. The Clean Air Act authorizes civil penalties up to \$25,000 per day for each violation while establishing a ceiling of \$200,000 for administrative penalties. 42 U.S.C. § 7413(d). With DOJ's approval, EPA may pursue administrative penalty cases that exceed \$200,000. *Id.*

103. *Superfund Reform Act of 1994: Hearings on S. 1834 Before the Senate Comm. on Environmental and Public Works*, 103d Cong., 2d. Sess. 11 (June 28, 1994 (testimony of Alan C. Williams, Asst. Attorney General, State of Michigan) [hereinafter Williams Testimony].

104. 42 U.S.C. § 9621(e)(1) (1988).

and health concerns in selecting a remedy; as a result, it has concluded that requiring EPA to proceed through a permit process would be redundant and inefficient.¹⁰⁵

The same analysis applies to states. This is particularly true given the inflexibility that characterizes the SRA's framework for delegating authority to states.¹⁰⁶ The proposed section 127(d) requires states, as a condition for being delegated authority to select remedial actions, to "agree to select such remedial actions in accordance with all of the procedures and requirements set forth in sections 113, 117, and 121 of this Act, the national contingency plan, and any other relevant regulations issued and guidelines adopted by the Administration."¹⁰⁷

Despite this, proposed section 127(e)(3) establishes a system in which a state may avoid the redundant permitting requirements

105. As EPA notes in its preamble to the 1990 NCP:

CERCLA actions should not be delayed by time-consuming and duplicative administrative requirements such as permitting, although the remedies should achieve the substantive standards of applicable or relevant and appropriate laws EPA's approach is wholly consistent with the overall goal of the Superfund program, to achieve expeditious cleanups, and reflects an understanding of the uniqueness of the CERCLA program, which directly impacts more than one medium (and thus overlaps with a number of other regulatory and statutory programs). Accordingly, it would be inappropriate to formally subject CERCLA response actions to the multitude of administrative requirements of other federal and state offices and agencies.

55 Fed. Reg. 8756 (Mar. 8, 1990) (final rule revising the NCP).

See also Lawrence E. Starfield, *The 1990 National Contingency Plan—More Detail and More Structure, But Still a Balancing Act*, 20 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,222, 10,234 (June 1990) (The interpretation that cleanups need not comply with the administrative requirements of other laws "was historically based on the position that CERCLA actions must be allowed to proceed expeditiously and that compliance with administrative and procedural provisions would slow down CERCLA actions. Moreover, the NCP sets out a detailed set of procedures of its own that CERCLA actions must follow; these render unnecessary the procedures of other environmental programs." (citations omitted)).

106. Creating this inflexibility itself is inconsistent with the reinventing government theme, which is to develop objectives and then allow the "workers" to act creatively to achieve them. See *infra* part V.

107. SRA, *supra* note 5, § 201(a), at 2-6 (creating CERCLA § 127(d)). Sections 113, 117, and 121 of CERCLA address administrative record, public participation, and cleanup standards issues, respectively. The NCP provides a detailed framework for implementing the statute.

only "if expressly provided in the contract or cooperative agreement" that it enters into with EPA for the site.¹⁰⁸ It is premature to speculate as to whether EPA routinely will include such waivers in its delegations to states. It seems sensible, however, for Congress to remove this possible issue from the EPA-State negotiating table, and provide explicitly that the permit waiver provision covers EPA and state-lead response actions.

G. Summary

In sum, despite making some improvements to CERCLA, the SRA fails materially to advance achievement of the reinventing government goal of minimizing duplication. Instead, it mandates site-specific redundancy of effort throughout the Superfund process. Congress should take three actions in the SRA to minimize duplication of effort. First, Congress should respond to its apparent underlying lack of confidence in states by ensuring that the gates to delegation do not swing open widely to admit every state that expresses an interest. Instead, its legislative structure should open these gates only to those states that have shown that they are competent to handle the tasks for which they are seeking delegation.

Second, as I pointed out in testimony before a House Subcommittee, Congress should use Superfund reauthorization as an opportunity to require EPA to develop tools for overseeing the performance of delegated states primarily from a programmatic, rather than a site-specific, perspective:

[T]he federal government should maximize its use of "creative tools" such as public accountability, and minimize its use of the traditional approach of case-specific, resource-intensive oversight of state employees by their federal counterparts. Governments collectively need to improve in allocating the majority of their resources to "field work," and in minimizing the percentage of their resources that are involved in "oversight" functions. Congress could make a contribution to good government that would transcend the Superfund program by developing more effective and more efficient ways for one governmental unit to monitor another's performance.¹⁰⁹

108. *Id.* at 2-7 (creating § 127(e)(3)).

109. *Markell Testimony*, *supra* note 22, at 5-6. *See also* NATIONAL PERFOR-

At a minimum, Congress should direct EPA to include the following components in such a programmatically-oriented oversight scheme: 1) citizen review/oversight of state performance (the issue of "customer satisfaction" with such performance),¹¹⁰ 2) EPA auditing of state performance designed to measure the quality of overall state performance, and 3) substantive measures of success designed primarily in terms of risk reduction, not consistency with federal processes.

With respect to the issue of "customer satisfaction" in particular, the SRA should create four vehicles to maximize the opportunity for productive citizen review of state performance under the Superfund program. First, it should empower citizens to participate in the threshold "delegation" decision. Section 127 does this.¹¹¹ Second, it should empower citizens to participate actively in state-lead site-specific remediation efforts. Through Title I and various sections of Title II, the SRA does this as well.¹¹² Third, the SRA should create a citizen suit mechanism that allows citizens to initiate legal action in certain instances (e.g., if a responsible party is violating the terms of its consent agreement with the state, and the state has failed to take timely action to

MANCE REVIEW, *supra* note 1, at 35. The issue of sanctions for poor performance is another issue that Congress and EPA need to address. See Markell, *supra* note 2, at 76 n.198, for a discussion of dissatisfaction with current sanctions.

110. The National Performance Review identifies customer satisfaction as a basic principle. NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 44.

111. SRA, *supra* note 5, § 201(a), at 2-4 to 2-5 (creating CERCLA § 127(a)(5)).

112. *See id.* at Titles I and II. The nature of the process that Title I of the SRA creates concerning community involvement raises another set of questions beyond the scope of this article relating to the impact of this bill, if it is passed, on the government's ability to produce large numbers of site cleanups in a timely fashion.

require compliance). While the SRA provides for citizen suits,¹¹³ its approach seems convoluted and should be reconsidered.

The SRA also should give citizens an ongoing right to comment on the quality of state performance, both on a site-specific basis and overall. New York State's State Superfund Management Board, which is a statutorily-created citizen review board of the State's Superfund program, is an example of one mechanism that Congress should consider in determining how best to increase citizen involvement, and more specifically, citizens' role as "customers" and their functioning as program reviewers.¹¹⁴

Third and finally, Congress should rethink its position on the appropriate role for the Department of Justice. Can we afford to maintain a structure that mandates routine case-specific duplication of effort by EPA and DOJ? The SRA provides Congress with a vehicle for fundamentally re-examining whether to retain a "centralized" approach to settlement and enforcement issues or whether to shift to a decentralized structure. The reinventing gov-

113. SRA, *supra* note 5, § 201(a), at 2-16 (creating § 127(g)(2)(D)). The SRA currently provides for citizen suits against EPA if a state fails to comply with a cooperative agreement. The SRA thereby appears to create a strong incentive for active, site-specific EPA oversight of state activity, precisely the type of oversight that is directly at odds with the reinventing government principle of minimizing duplication of effort. Instead, Congress should encourage site-specific citizen oversight that complements EPA's more programmatically-oriented oversight, thereby further supporting a reduction in detailed site-specific oversight of one government employee by another. Instead of the current convoluted structure which allows citizens to sue EPA when states misbehave, why not allow citizens to sue states directly, or pursue the responsible parties directly if it is the responsible parties' malfeasance or nonfeasance that is at the root of the problem?

114. See N.Y. ENVTL. CONSERV. LAW § 27-1319 (McKinney Supp. 1994). The SRA creates a "citizen governing board" to ensure that the "Citizen Information and Access Offices (CIAO's)" that the SRA also creates are managed properly. SRA, *supra* note 5, § 102, at 1-24 (creating § 117(h)(4)). The SRA should follow New York's lead and create a statewide board to review the performance of the state's overall Superfund program, not just the performance of the CIAO's. In terms of the mission of such a Board, in addition to the guidance that New York's and other states' efforts offer, the Board should conduct programmatic reviews of issues such as priority setting, response actions, and public participation. Cf. *id.* at 1-29 (§ 117(i)) ("environmental justice" study must include programmatic review of EPA or state performance).

ernment principles suggest that the latter approach deserves serious consideration.

IV. EMPOWERMENT

A second criticism of the SRA from the perspective of the "reinventing government" credo is its failure to give states all of the tools they need to be as effective as possible in performing their job of securing expeditious cleanups, with responsible parties funding the necessary work whenever possible. A key component of the reinventing government reports is the idea of "empowerment"—that is, giving "those who work on the front lines" the authority "to solve more of their own problems."¹¹⁵ As the National Performance Review stated, "[w]e must give workers the tools they need to get results . . ."¹¹⁶ The SRA is deficient in this respect, because it expressly limits the authority that states will have in performing their responsibilities.

The SRA fails to empower states by expressly preventing EPA from empowering states to use one of CERCLA's most powerful tools, section 106 injunctive authority.¹¹⁷ One theme of

115. NPR EXECUTIVE SUMMARY, *supra* note 6, at 2.

116. *Id.* at 14.

117. 42 U.S.C. § 9606(a). SRA § 201(a), at 2-4 (creating § 127(a)(3)(B)). *See also*, *New York v. Shore Realty* 759 F.2d 1032, 1049 (2d Cir. 1985).

The SRA empowers EPA to delegate responsibility to states to conduct a wide range of actions under the federal Superfund law, including 1) preliminary assessments/site investigations (PA/SI's), 2) hazard ranking system (HRS) scoring, 3) remedial investigations and feasibility studies (RI/FS's), 4) non-time critical removals, 5) records of decision (ROD's), 6) remedial designs, 7) remedial actions, 8) operation and maintenance (O & M), 9) enforcement, and 10) allocations. SRA, *supra* note 5, § 201, at 2-2 to 2-4 (creating CERCLA § 127(a)(3)(A)(i)-(xi)). CERCLA already gives state authority to use § 107 authority to recover funds they spend.

In contrast, the SRA does not permit EPA to adopt the approach used under the Clean Water Act and other statutes and authorize a state to handle NPL sites under state authority. Instead, it directs EPA to "conduct a study of the feasibility of authorizing States to use their own laws to carry out the provisions of this Act in lieu of the Federal program established under this Act." SRA, *supra* note 5, § 201(a), at 2-18 (creating CERCLA § 128). This is so despite the completion of a series of studies since 1989 by the Environmental Law Institute on state Superfund programs, including their legal authorities, and their performances. *See* materials cited *supra* note 38. *See also* Markell, *supra* note 3, at 78 n.200 (distinguishing delegation from authority).

the SRA is that we are moving from a relationship in which states play a support role through their opportunity for "substantial and meaningful involvement" in EPA's process,¹¹⁸ to a relationship in which qualified states are encouraged to take the lead for sites. Depriving states of section 106 injunctive authority is inconsistent with the concept that states are to be allowed and encouraged to take responsibility for addressing NPL sites. Such a limitation is likely to backfire by significantly undermining states' ability to effectively negotiate settlements or otherwise resolve cases successfully due to their being prevented from using this powerful enforcement tool.¹¹⁹ It thereby will increase the need for federal involvement in the state-lead cases or the need to use the federal Superfund instead of private party funds to address such sites.

The State of Colorado argued that CERCLA § 121(e)(2) provides states with injunctive authority. *Colorado v. Idarado Mining Company*, 916 F.2d 1486 (10th Cir. 1990), *cert. denied*, 499 U.S. 960 (1991). The Tenth Circuit rejected this argument. *Id.* Even if § 121(e)(2) provides states with such authority, it is not nearly as powerful a tool as § 106 because *inter alia* § 121(e)(2) lacks a treble damages provision.

118. See *supra* text accompanying note 28.

119. Several states have their own injunctive authorities. It is unlikely that courts will construe the SRA to preempt states' ability to use such authorities. Such authorities, however, do not necessarily compensate for, or justify, a decision not to give states § 106 authority. First, a structure that relies on a combination of federal and state authorities unnecessarily raises issues (e.g., the ability to bring pendent claims) that will require judicial, government, and responsible party resources to resolve. Second, states' injunctive authorities in many cases will not be as powerful as § 106 and thereby will give states less leverage to perform their responsibilities than if they were delegated authority to use § 106 injunctive authority. See, e.g., N.Y. ENVTL. CONSERV. LAW § 27-1313 (McKinney 1984 & Supp. 1994) (providing the state with injunctive authority to address Superfund sites, but not including § 106's unilateral or treble damages tools as part of this authority). See David L. Markell & Dolores A. Tuohy, *Some Thoughts on Running a Superfund Program: A State Perspective*, NAT'L ENVTL. ENFORCEMENT J., Nov. 1990, at 3, 5. CERCLA's legislative history reflects that states sought the ability to use § 106 injunctive authority. SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 71, at 152, 155-56.

One factor concerning delegating § 106 authority that complicates the delegation issue, but should not be a basis for preventing delegation, is that EPA shares such authority with DOJ. While EPA may issue unilateral administrative orders under § 106, it may invoke § 106 judicial authority only by working with DOJ. Consequently, delegation needs to address the terms and conditions for both the unilateral administrative and judicial exercise of this authority.

The likely reason for the decision not to allow states to use section 106 authority is that the federal government is concerned that states will produce adverse section 106 case law if they are given this authority.¹²⁰ The federal government, however, cannot afford to let this fear control policy in this way. Again, it makes little sense simultaneously to expand states' responsibilities, while undermining states' ability to fulfill them successfully by limiting states' authority.¹²¹

If the federal government is serious about ceding responsibility for some NPL sites to states, it is contrary to its "reinventing government" principles and likely to be counterproductive to limit the weapons in the states' arsenal.

V. ENCOURAGING CREATIVITY

It is widely recognized that states serve as valuable laboratories for experimentation in our federal system and that encouraging such behavior offers significant benefits. As Justice Brandeis noted in his famous dissent in 1932 in *New State Ice Co. v. Liebmann*, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose,

120. Markell, *supra* note 3, at 44 n.116.

121. This is particularly true since there appears to be little basis for this apparent lack of federal confidence in states' ability to create good case law. States have had the authority to use § 107 liability since CERCLA's inception in 1980. One of the most favorable § 107 precedents was established through state litigation in the *Picillo* case. *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990). Further, as occurred in *New York v. General Electric Co.*, 592 F. Supp. 291 (N.D.N.Y. 1984), the United States through DOJ may participate as *amicus curiae* in significant state cases. In that case, the court allowed the United States to submit a memorandum of law supporting the State. As the court pointed out in describing the United States' interest in the State's litigation under CERCLA:

"The interest of the United States is described in that memorandum as twofold: First, the United States relies to a great extent on the response of states to the wide-spread problems generated by the disposal of hazardous wastes. Second, the United States is vitally interested in the outcome of actions brought under CERCLA to the extent that its own CERCLA actions may be affected by any adverse rulings."

Id. at 294 n.7. Establishing the federal government's right to intervene in all state cases appears to be a reasonable step to minimize concerns associated with delegating states § 106 authority. The SRA would allow intervention as of right. SRA, *supra* note 5, § 201(a), at 2-17 (creating CERCLA § 127(i)).

serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹²² A recent Environmental Law Institute (ELI) report indicates that during the past several years states have actively fulfilled their role as laboratories in the specific context of remediating contaminated sites.¹²³ Forty-nine states (all but Nebraska) "have their own site cleanup programs using some combination of public funding and liability."¹²⁴ The approaches states have adopted vary widely: "In four separate studies completed since 1989 and another in progress, [ELI] has unearthed a wide variety of approaches used by state superfund programs around the country."¹²⁵

The authors of the ELI report reach two conclusions regarding creativity in state superfund programs that are salient here. First, the reason for the variety and creativity of state approaches to remediating hazardous waste sites is that Superfund has not been a "delegated" program; instead, states have been free to "adopt their own strategies for cleanup of the sites not handled by the EPA."¹²⁶ Second, this federal approach of allowing state experimentation has produced significant dividends. States have produced numerous cleanups of contaminated sites. In addition, in

122. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS (ACIR), PUB. NO. A-98, THE QUESTION OF STATE GOVERNMENT CAPABILITY 22 (Jan. 1985) ("Long called the 'laboratories of democracy,' states today are making a reality of this text-book description [States] undertake innovations in order to solve the different problems they face. Such initiatives broaden the scope of choices for policymakers at all levels and enable small scale testing of untried programs and procedures."); PAUL PORTNEY, PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 283 (1990); Daniel A. Farber, *Environmental Protection As A Learning Experience*, 27 LOY. L. REV. 791, 800-01 (1994) (recommending increased delegation of environmental regulatory authority to states).

123. James M. McElfish, Jr. & John Pendergrass, *Reauthorizing Superfund: Lessons From the States* (Env'tl. L. Inst.), Research Brief no. 2 (Dec. 1993), at 4.

124. *Id.* at 3.

125. *Id.* at 4. These studies are listed *infra* note 38.

126. *Id.* As the authors point out, in this sense Superfund is unlike most federal pollution statutes, in which Congress and EPA establish most of the acceptable parameters and processes, with interested and capable states being "delegated" authority to administer these statutes. See, e.g., Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1992); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1988 & Supp. IV 1992); Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1992).

terms of national policy making, "[t]hese state programs provide useful lessons for federal legislators interested in examining alternatives to the existing Superfund law and federal administrators looking for ways to make the law work better."¹²⁷ Alan Williams, an Assistant Attorney General from Minnesota active in Superfund matters, also lauds the benefits of a structure that allows state creativity, concluding that many states "often can act more quickly and efficiently than their federal counterparts" and many have response programs that are "ahead of EPA."¹²⁸

Despite the benefits that this decentralized approach to Superfund remediation has produced, the SRA dramatically curtails state flexibility; it appears to contemplate that states will be delegated authority to take the lead at federal Superfund sites only if they first agree to give up their independence and abandon their own approaches to remediation. Instead, they effectively must agree to act as "EPA clones." As noted above, for example, the SRA would require states that are interested in handling remediation of federal NPL sites, as a condition for being delegated authority to select remedial actions, to "agree to select such remedial actions in accordance with all of the procedures and requirements set forth in sections 113, 117, and 121 of this Act, the national contingency plan, and any other relevant regulations and guidelines adopted by the Administrator."¹²⁹ Similarly, section 127 requires states, in order to be delegated authority to conduct allocations, to follow the same procedures that EPA would follow if it were in the lead.¹³⁰

Mandating "process conformity" is inconsistent with one of the abiding principles of good government enunciated in the National Performance Review, that of measuring results rather than adherence to process. As the Review puts it: "Effective, entrepreneurial governments cast aside red tape, shifting from

127. McElfish & Pendergrass, *supra* note 123, at 4. In particular, they learned "two basic kinds of lessons:" "First, there are approaches pioneered by the states that . . . could improve the federal program Second, there are experiments tried by the states that . . . should not be adopted" *Id.* As Professor Farber notes, both types of lessons help to inform federal environmental policy. Farber, *supra* note 122, at 801.

128. Williams Testimony, *supra* note 39, at 4. See also *id.* at 10.

129. SRA, *supra* note 5, § 201(a), at 2-6 (creating CERCLA § 127(d)).

130. *Id.* at 2-6 (creating CERCLA § 127(d)).

systems in which people are accountable for following rules to systems in which they are accountable for achieving results."¹³¹ The Review logically concludes: "Our path is clear: We must shift from systems that hold people accountable for process to systems that hold them accountable for results."¹³² EPA Administrator Browner recently made the same point in the specific context of environmental policy: "Federal environmental laws need to be amended to give states greater latitude to choose how they will go about meeting federal standards for protecting health and the environment. We must allow for flexibility, innovation and common sense"¹³³

By requiring states to adhere rigidly to EPA process, the SRA is likely to have the opposite effect. The SRA's "straightjacket" approach almost inevitably will discourage "entrepreneurial" activity at the state level—it will stifle rather than encourage innovation.¹³⁴ Such an approach seems particularly inappropriate here given the value that state creativity already has added to the national remediation effort, and because to be delegated remedial selection authority a state first must demonstrate its track record in successfully addressing such sites.¹³⁵

This SRA-imposed symmetry is likely to be particularly unfortunate because of the probability that it will stifle state creativity not only with respect to federal Superfund sites but also with respect to the state activity at the thousands of other sites that states address on their own. States are not likely to maintain two different Superfund programs, one for NPL sites and one for non-NPL sites. Consequently, to the extent that states are interested in and believe that it is important for them to take the lead at NPL sites, their doing so will jeopardize such states' continued use of creative approaches that already have proven effective.¹³⁶ Such

131. NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 6.

132. *Id.* at 13. The National Performance Review quotes with approval from General George S. Patton to make the point: "Never tell people how to do things. Tell them what you want to achieve, and they will surprise you with their ingenuity." *Id.* at 12.

133. *General Policy: Browner Says States Need More Latitude to Meet Federal Environmental Standards*, 25 Environment Reporter (BNA) 1726, 1726 (Feb. 4, 1984).

134. *Id.*

135. SRA, *supra* note 5, § 201(a), at 2-2 (creating CERCLA § 127(a)(3)).

136. See materials cited *supra* note 38.

an approach almost certainly also will inhibit continued experimentation at the state level. Thus, the SRA is likely to greatly curtail the states' continuing in their current, productive role as "innovation centers."

An approach that is far more consistent than the SRA's with the reinventing government principles and that seems workable politically is to allow states the flexibility at least to "innovate around the statute." It has been reported widely that the SRA is the product of a delicate compromise among its various constituencies, including the environmental community and business interests.¹³⁷ Allowing states to handle sites without requiring adherence to these carefully negotiated statutory approaches undoubtedly would disrupt this compromise. States would be required, as a condition of delegation, to commit to follow the SRA's remedy selection model and its allocation process, among other provisions. Advancing the reinventing government principles of empowerment, encouraging creativity, and a focus on results, not process, by giving the states the flexibility to decide how best to meet these statutory benchmarks of performance, would not seem to threaten this fragile compromise and appears to be a change worth making.¹³⁸

VI. CONCLUSION

The Clinton Administration's recently issued reinventing government reports embrace a number of fundamental principles of "good governance," including minimizing redundancy, empowering front lines personnel, and encouraging creativity in resolving problems. Probably because of an underlying lack of confidence in state capability, among other reasons, the SRA does little to further the realization of these reinventing government principles in its treatment of intergovernmental relations. Instead, its structure directly undercuts these principles by 1) requiring "dual masters" at state-lead sites through its insistence on substantial federal involvement in those sites; 2) establishing a new allocation

137. *Superfund: Committee Action on Superfund to Precede Markup of CWA Rewrite Measure, Chairman Says*, 25 *Environment Reporter* (BNA) 435, 435 (July 1, 1994).

138. One state observer recently made a similar proposal to Congress. Williams Testimony, *supra* note 39, at 6, 10.

process that likely will exacerbate the degree of duplication that occurs under CERCLA by requiring state, EPA and DOJ review of allocation decisions; 3) retaining enforcement and settlement provisions that cede little autonomy to states (or to EPA when it is the primary agency responsible for a site), but instead make these agencies dependent in most instances on DOJ review and buy-in before they can act; 4) inherently impeding a state's efforts when EPA has delegated the state responsibility for a site by withholding from the state access to a major tool that the SRA gives to EPA, section 106 injunctive authority; and 5) requiring states not only to meet national environmental goals but also slavishly to follow national procedures in doing so.

As I note at the outset, the ultimate irony is that the SRA is the first legislative vehicle available in the environmental arena for the Administration and Congress to apply at the statutory level the recently articulated reinventing government principles. Because of the consensus dissatisfaction with the Superfund program, the opportunity appears especially ripe to make dramatic changes that ensure that the new law embodies these principles. The conclusion to the National Performance Review provides: "Unlike many past efforts to change the government, the National Performance Review will not end with the publication of a report."¹³⁹ It continues that, instead, the Review's aim is that the reinventing government efforts will "succeed in planting a seed," referring to Henry David Thoreau's statement that "[t]hough I do not believe that a plant will spring up where no seed has been, I have great faith in a seed. Convince me that you have a seed there, and I am prepared to expect wonders."¹⁴⁰ The SRA's approach to intergovernmental relations suggests that, if the National Performance Review and related efforts have planted such a seed, it has not yet found a sufficiently fertile environment in the legislative process in which to sprout.

139. NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 121.

140. *Id.*

