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1,400 sites eligible and scheduled for Superfund action on that list. Superfund enforcement staffing will increase by one-third, to over 300 positions. Our budget for the Superfund program overall is up \$100 million to a total of \$410 million.

To prevent a repetition of the practices that make Superfund necessary, we are also accelerating hazardous waste management under the Resources Conservation and Recovery Act. We have increased our RCRA enforcement staff by 134 percent to 175 positions. We are vigorously pursuing the permitting of disposal facilities and the enforcement of Class I monitoring regulations relating to groundwater.

As we improve our performance in controlling toxics within the media programs, we are also concentrating resources to attack an important set of toxic substances across media lines. The existing chemicals program under the Toxic Substances Control Act is starting to move. We have published proposals aimed at controlling the carcinogens MDA and MBOCA and have asked for public comments on whether formaldehyde should be similarly controlled. There is now, for the first time, an effective existing chemical screening program; we are now making screening decisions on 50 chemicals a year. In addition, we have just decided to develop comprehensive management plans for several

significant chemicals, designed to link all EPA authorities so as to efficiently minimize risk from these contaminants. Finally, the Agency is about ready to issue a dioxin strategy which sets both a blueprint for identifying the problem and taking actions to reduce human exposure.

In addition to this new work, we are evaluating our current asbestos control program to see how effective it has been in reducing public health risk, and are conducting a survey of asbestos in public buildings to assess the level of health danger that represents. We will be evaluating more extensive regulation of this dangerous substance over the next year. Meanwhile, we have added \$500,000 to the asbestos inspection program and will add a like amount in Fiscal '85. Inspections for compliance have jumped from over 200 in FY '83 to a projected 800 in FY '84.

Beyond the management and improvement of existing programs, we need to find some general ways of improving our approach, as an Agency, to the problems posed by toxic chemicals in the environment. To this end, we have established a Task Force on Toxics Integration, which is scheduled to complete its work soon. We expect to receive recommendations on: how we can get the risk assessments we need and how we can im-

prove them; how we can develop a consistent policy for the management of risk within the structure of present statutes; how we can respond more effectively to the highly visible crises that grow up around particular chemicals; and how the Federal government as a whole can do a more efficient and consistent job of controlling dangerous substances.

To sum up, we are serious about our commitment to clean up the environmental errors of the past, to restrict the production and release of dangerous substances now, and to safeguard against degradation in the future. Our present budget and our stated priorities stand as warrants of that intent. All told, our programs devoted to toxics control account for nearly \$690 million, or 45 percent of EPA's operating budget. The Administrator's top four priorities are all concerned with the control of toxics. In all, this constitutes a dramatic shift in how EPA performs. We can no longer look only at the ends of pipes and stacks. We must better understand why a myriad of toxic substances can affect us across an extremely wide range of severity—through the air, through the food chain, and through the surface or ground waters. Armed with that information, we will make the hard choices that comprise real environmental management. □

Toxic Victim Compensation

A. James Barnes
EPA General Counsel

The first assignment that I received from Administrator Ruckelshaus on my return to the Agency in May was to coordinate EPA's activities on toxic victim compensation and to represent the Agency in discussions within the Administration. It was readily apparent that compensation of those exposed to toxic substances is a difficult issue which involves serious social justice/social equity considerations—and that how we resolve the issue can have far-reaching consequences for our society. In my remarks I will first briefly characterize the issue and then indicate how the Administration is approaching it. Finally, I will identify some of the major problems and areas of inquiry that we are pursuing.

One of the most striking features on returning to EPA is the deep and widespread public concern—as well as the extensive Agency efforts—concerning toxic or hazardous substances. Thirteen years ago when the Agency began, the symbols of environmental concern were oil-soaked seagulls, smog in L.A., and a river in Cleveland that occasionally caught fire. Today, they have

been replaced by Love Canal and Times Beach—symbols of the public concern about toxic and hazardous substances. They illustrate the deep public apprehension about exposure to toxics. Some is fear of the unknown—such as dioxins—while other substances such as asbestos are feared because they are so pervasive in our industrial/consumer society.

We have moved fairly aggressively to deal with the problems posed by toxic or hazardous substances. Several major pieces of legislation have been enacted including RCRA (Resource Conservation and Recovery Act) which seeks to improve our transportation, treatment, storage and disposal of hazardous waste, CERCLA (Superfund) which deals with past disposal problems that pose significant risks, and TSCA (Toxic Substances Control Act) which addresses the safety of new chemical substances before they are introduced into the environment. Now the related question of what we are doing about persons who may have been injured by exposure to hazardous materials has been raised onto the public agenda.

No one who is familiar with the anguish of someone who has a brain-damaged child, who has had a miscarriage, or who has cancer can be oblivious to the very real human concerns involved. Where the person happens to have had some exposure to toxic materials—be it at work or in the environment—it is not unexpected that some may draw a connection between the exposure and the injury or disease—irrespective of whether science would support such a link. Compensation of these individuals poses a serious social justice/social equity issue and involves the elemental question of which risks of an industrial society are to be borne by individuals, which by persons who are considered responsible for the particular activity, and which by the society as a whole. But to recognize that this represents a serious issue does not foreordain the answer of a new federally directed compensation scheme or a new federal right to litigate.

There are, as you know, a variety of proposals now before Congress dealing with a range of toxic compensation issues including asbestos, radiation, Agent Orange and toxic victim compensation in general. Behind most of these proposals is the belief that the present compensation schemes—primarily state tort law—are not adequate. Certainly there are a number of difficulties with the way the tort system currently works.

These include:

- the long latency period associated with some diseases and time that it may take to discover that an individual has a particular disease or injury may extend beyond the statute of limitations that has been established as an outside limit during which a cause of action must be brought;
- there may be difficulties in establishing which person or persons are responsible for causing a particular injury and the related question of whether the persons who are liable are financially responsible;
- in many cases it may be difficult to establish the requisite causal relationship between the alleged exposure and the injury or disease that ultimately resulted;
- the tort system commonly entails substantial transaction costs (in terms of dollars and time) that may reduce the recovery available to the potential victim or indeed make it uneconomical to seek a remedy to begin with. Overall, the difficulties with the tort system can be characterized as *uncertainty* and *unfairness* in providing unequal results in otherwise similar circumstances.

A concomitant problem with the current tort system, of course, is uncertainty for industry and insurers as to their potential liability for actions that have taken place largely in the past. The spectre of major companies seeking the protection of the bankruptcy law and fights between, and among, insured and various insurers are only

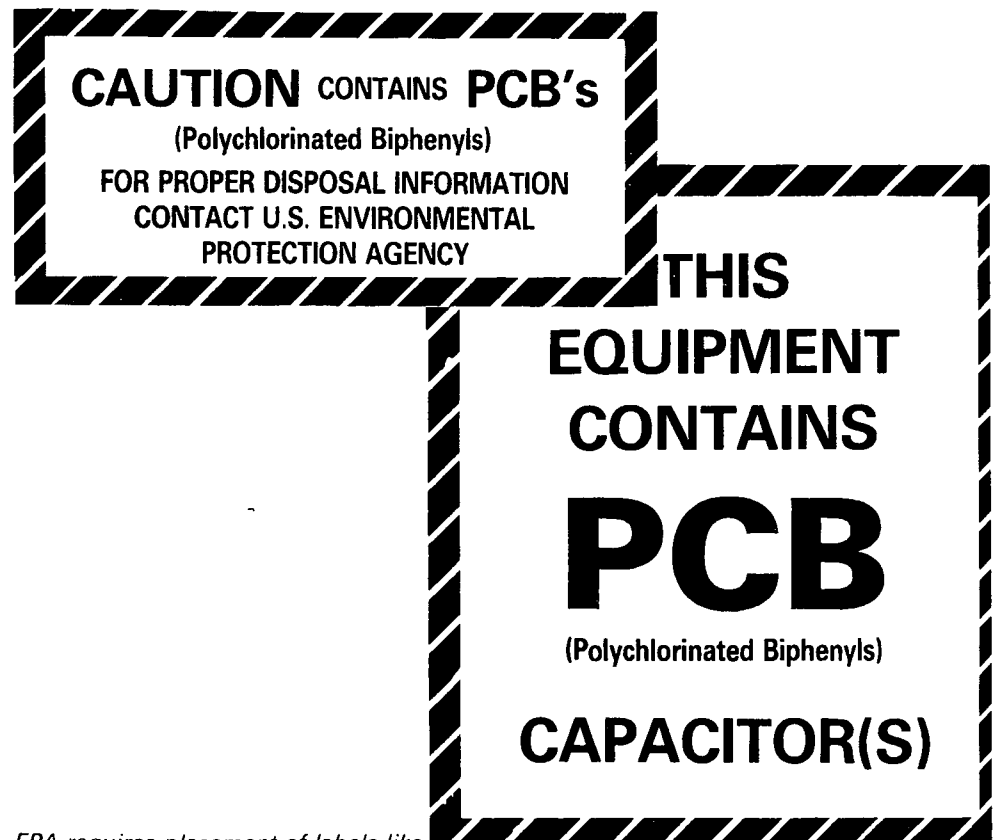
some evidence of the unease that the situation poses.

With legislative consideration of some of the victim compensation proposals likely, the President recently established a Cabinet Council Working Group to follow the issue and to develop the Administration's position. The Working Group is composed of senior officials under the leadership of Mike Horowitz, the General Counsel of the Office of Management and Budget, and Assistant Attorney General Paul McGrath. Several points concerning the structures and approach of the Working Group should be noted. First it is a broad-based effort effectively to utilize the resources of the Executive Branch; some twelve agencies are participating. Various agencies have different contributions and perspectives. Some of the agencies, such as the departments of Labor and Health and Human Services, have experience with existing compensation schemes; some such as EPA and the Office of Science and Technology Policy have experience with the scientific questions involved; other agencies such as OMB, Council of Economic

Advisors and Treasury can contribute the economic analysis required; and the Department of Justice can provide legal analysis.

Second, the Working Group is looking to develop an overall policy in the toxic victim compensation area. There are a number of generic issues that are involved regardless of whether we are talking about Agent Orange, asbestos or toxic victim compensation generally. However, an approach used in dealing with one problem may well become a precedent for some of the related areas—and might make it difficult to justify different results. For example, EPA's decision to buy out property in the Times Beach, Missouri area because of the dioxin problem can affect the discussions about compensation for those exposed to Agent Orange. Moreover, we believe that these topics are closely related politically and that it is important to consider the degree to which we will allocate relatively scarce societal resources to the politically strong or the momentarily notorious.

A third important element in the Administration's approach is that we are determined



EPA requires placement of labels like these on electrical transformers and other equipment containing significant amounts of PCBs, industrial chemicals which can cause serious health and environmental problems. While Congress has prohibited the manufacture of these chemicals, substantial amounts of this material are still present in older electrical and other industrial equipment.

to see public policy made in this area in a responsible way because of its importance, its complexity, and the significant cost ramifications involved, as well as the long-term implications for our tort system and various support programs. The Administration will insist on a careful, thorough, thoughtful analysis and a full airing of the issues and the considerations of these proposals before action is taken. For its part, the Administration currently has an intensive fact gathering and analytical effort under way which is the most extensive that I have seen at the Cabinet Council level.

What are the major issues and areas of inquiry that we are focusing on as we seek to establish an Administration position on these issues? First, we are trying to define the nature and the scope of the problem that is to be addressed. Who are the "victims" that we are concerned about compensating? In allocating resources do we want to distinguish between individuals with cancer where the cause is unknown and those where the cancer can be linked—albeit tenuously in some cases—to exposure to a certain substance? What about similar injuries? For example should the brain-damaged child living near a hazardous waste site be treated differently than one whose damage was caused in an accident with an uninsured motorist? To what degree should the proposed schemes be retroactive and to what degree prospective only? All of these questions involve underlying issues of fundamental fairness in our society. Closely related is the question of whether we should expand access and redefine causation to stretch our tort system in new and unaccustomed ways, or whether we should turn to an administrative scheme that is less of a "lottery" and more predictable and universal in scope of coverage.

Second, we are reviewing existing compensation schemes. Here we are looking to the extent to which victims are compensated by existing public and private mechanisms—such as the tort system, insurance and generic health and income maintenance programs like Social Security and Medicare. In the course of this exercise we are carefully reviewing the CERCLA 301(e) Study Report that was completed in 1982. We are also looking at the federal government's experience with other administrative compensation schemes such as the black lung program, as well as state experience with workmen's compensation.

Third, we are looking carefully at the contribution science is now in a position to make. In particular, from EPA's perspective, we are examining the role that some of the legislation proposes the Agency should play. Certainly there is considerable frustration with the current tort system and the difficulties of establishing a legally sufficient causal nexus in many cases. This frustration may lead to the temptation to presume a causal nexus where it is difficult to show causation. At EPA we frequently operate on the edge of science in setting standards as to levels of exposure. There is a real question as to whether the law can force science to produce a degree of precision certainty beyond that achievable with our present knowledge and resources. In some of the proposed legislation EPA would be asked to produce criteria documents and to make case-by-case determinations as to whether there is a causal nexus between alleged exposure to hazardous waste at a particular site and a disease or injury to a person. An initial look at these proposals raises serious questions; first, as to whether EPA would be able to do what the legislation asks, and second, whether utilizing our limited scientific resources and capacity to try to establish these relationships or to disprove them is really wise use of our resources—or alternatively whether it suggests simply another high transaction cost that would involve the proposed compensation determinations.

Another matter of concern to EPA is the potential conflict of interest that might be created for it. EPA is currently required to identify substances for the purpose of regulating them and to set standards for safe exposure in the society; some of the legislation would require EPA listing of substances as prerequisite to liability and some legislation would require it to also act as a judge to make determinations as to whether exposure at a given level resulted in a particular injury or disease to a person. Another conflict could be produced between EPA's obligations under CERCLA (Superfund) to act to remove imminent hazards to public health by cleaning hazardous waste sites and the responsibilities that it might have to make compensation determinations. These two responsibilities could be inherently in conflict because cleaning up a site would likely involve rapid action to remove wastes from the site whereas concern about making compensation decisions would suggest leaving the material in place so that extensive testing and analysis could be carried out.

A fourth area of inquiry has to do with the economics of the various toxic compensation proposals and their long-term fiscal implications for society, government and industry. Here we are looking at what kinds of losses are to be compensated, who pays, how, what mechanism is to be used, what transaction costs are to be contemplated, how solid are the cost projections, how is the

program integrated with other compensation programs? We believe we need to be cognizant of the experience with the black lung program and with the kinds of cost estimates that are already before us concerning the asbestos litigation as well as the proposed legislation.

All of these questions, and others we are pursuing, involve initial definition of the "problem" we face, followed by analysis of the various proposed schemes, as well as analysis of other alternatives that might address any identified problems, including changes in workmen's compensation, adjustments in state tort laws, and adjustments to other income maintenance or health protection schemes. We all have a major stake in the intelligent analysis and resolution of the various issues that are involved in this process. Doubtless there will be differences of opinion within the Administration and in Congress—just as there are likely to be differences within society. But we are determined that on this issue, as on others that involve fundamental questions of social equity, that we are careful and thoughtful in the way we analyze the problem; and hopeful that with that kind of approach we arrive at a policy that is wise and consistent with the philosophical underpinnings of our society. □