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The Superfund Liability Scheme: A Goal-Based Approach to Reauthorization

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The Superfund Liability Scheme: A Goal-Based Approach to Reauthorization

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"The paramount goal of Superfund[1] is prompt cleanup of hazardous waste sites."[2] An additional goal of Superfund is to efficiently and equitably allocate response costs among responsible parties.[3] A third goal is to deter current and future releases of hazardous substances.[4] This article argues that the first and third goals of Superfund should take priority over the second, and retroactive liability for pollution caused prior to the passage of CERCLA should be eliminated.

Debates in the environmental arena frequently involve a clash between self-interested regulated entities, public interest groups, and a government attempting to look good in the face of whatever the current political tide holds. During the current battle over Superfund reauthorization, the lines are already being drawn. In 1994, debate over CERCLA should include an examination of the goals of Superfund, and a prioritization of those goals.

Issues that have been the focus of early debates in the Superfund re-authorization battle include: (1) the status of *de minimis* contributors to a site;[5] (2) the liability of municipalities;[6]

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[1] Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1992) [hereinafter CERCLA], commonly known as "Superfund."

[2] *Superfund Reauthorization: An Opportunity to Rectify Major Problems*, 24 Env't Rep. (BNA) 1024 (Oct. 1, 1993).

[3] *See* Christopher D. Knopf, *Breaking New Ground: Recovery of Transaction Costs in Private CERCLA Cost-Recovery Actions*, 28 WILLAMETTE L. REV. 495, 498 (1992).

[4] *See* Michael A. Ohara, *The Utilization of Caveat Emptor In CERCLA Private Party Cleanups*, 56 LAW & CONTEMP. PROBS. 149, 151-52 (1993).

[5] *Guidances on Small Volume Contributors, Federal Liens Given to Regions by Agency*, 24 Env't Rep. (BNA) 587 (Aug. 6, 1993).

[6] *Municipal Representative Sees Merit in Industry Group's Liability Proposal*, 24 Env't Rep. (BNA) 848 (Sept. 10, 1993).

(3) the definition of response costs;[7] (4) the definition of cleanup standards;[8] and (5) issues involving insurance.[9]

An issue at the heart of the reauthorization debate is whether the broad net of CERCLA liability should be radically altered in an attempt to more effectively accomplish the fundamental goal of Superfund. This broad net currently catches a wide variety of entities and holds them strictly and retroactively, as well as jointly and severally, liable.

I. THE BASICS OF CERCLA LIABILITY

Any discussion of changes of the CERCLA liability system should begin with at least a basic introduction to the current system. The current liability system of CERCLA holds nearly anyone remotely connected with a piece of property jointly and severally liable and then leaves liable parties to fight among themselves as to the allocation of that liability based on whatever equitable factors seem just. Such a complex system entails enormous transaction costs which are connected to investigation and litigation.

A. Joint and Several Liability

In nearly every Superfund case, the significance of joint and several liability lies in the existence of the "orphan's share." The orphan's share is that share of liability attributable to unknown sources (such as unknown dumpers at a particular site) or financially insolvent parties. Because a Superfund site frequently involves activities taking place over a long period of time or involving very little record keeping, the orphan's share of liability can be very substantial in a given case.[10]

Assuming a company is in some way connected with a contaminated piece of property, the company likely will be held jointly and severally liable for cleanup costs associated with that property, and correspondingly for a portion of the orphan's

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[7] *Superfund Reauthorization: An Opportunity to Rectify Major Problems*, 24 Env't Rep. (BNA) 1020 (Oct. 1, 1993).

[8] *Id.* at 1021.

[9] *Id.* at 1021, 1024.

[10] For an excellent discussion of allocation of CERCLA liability and the fight over orphan's shares *see* Daniel R. Hansen, *CERCLA Cost Allocation and NonParties' Responsibility: Who Pays the Orphan Shares?*, 11 J. ENVT'L L. 37 (1992).

share.[11] Although CERCLA is not explicit on the issue, courts assume that §107 of CERCLA imposes joint and several liability on responsible parties.[12]

Courts look to common law principles in applying joint and several liability.[13] The party seeking to avoid joint and several liability may do so only if (1) there are distinct harms at the site, or (2) there is a reasonable basis for determining the contribution of each cause to a single harm at the site.[14] Although as a legal matter a party may be able to avoid joint and several liability, as a practical matter making such a showing has proved to be almost impossible.[15]

Therefore, the traditional strategy of the EPA has been to find a small number of Potentially Responsible Parties (PRP's), hold them jointly and severally liable, and allow those parties to seek out and obtain contribution from other entities connected with the site.[16] The EPA followed this strategy in *U.S. v. Alcan Aluminum Co.*[17] In *Alcan*, the defendant was one of twenty potentially responsible parties for a cleanup effort of the Susquehanna River. The other nineteen potentially responsible parties entered into a consent decree with the EPA regarding the extent of their liability for the cleanup. Alcan refused to settle. The trial court granted summary judgment to the government and ordered Alcan to pay the remainder of the cleanup costs. This amounted to over $473,000, a figure well above Alcan's actual share of contribution to the site.[18] The Court of Appeals reversed and remanded the case to the trial court with the following instructions:

> We find that the court should have conducted a hearing to determine the divisibility of harm to the Susquehanna River, and

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[11] To some extent, this is an oversimplification. CERCLA does provide for certain defenses, including the third party defense, 42 U.S.C. § 9607(b)(3), the act of God defense, 42 U.S.C. § 9607(b)(1), and the act of war defense, 42 U.S.C. § 9607(b)(2). The third party defense, which is sometimes asserted by "innocent landowners," involves intense factual inquiries that will impose substantial legal and investigation fees on a defendant attempting to assert such a claim.

[12] *See, e.g.*, U.S. v. Monsanto Co., 858 F.2d 160, 171-73 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

[13] *See, e.g.*, U.S. v. Alcan Aluminum Co., 964 F.2d 252, 268 (3rd Cir. 1992); *see also* RESTATEMENT (SECOND) OF TORTS, § 433A (1965).

[14] *Monsanto*, 858 F.2d at 172.

[15] *See* Hansen, *supra* note 10, at 42.

[16] WILLIAM TUCKER, THIS IS NO WAY TO SAVE THE EARTH 169, 173 (1993).

[17] U.S. v. Alcan Aluminum Co., 964 F.2d 252 (3d Cir. 1992).

[18] *Id.* at 270.

> will remand the case for the court to do so. If Alcan can establish in that hearing that the harm is capable of reasonable apportionment, then it should be held liable only for the response cost relating to that portion of harm to which it contributed. Further, if Alcan can establish that the hazardous substances in its emulsion could not, when added to other hazardous substances, have caused or contributed to the release or the resultant response costs, then it should not be liable for any of the response costs.[19]

Despite the procedural opportunity *Alcan* gives to a party seeking to avoid joint and several liability, in reality *Alcan* provides little comfort. Companies seeking to avoid joint and several liability must show a very strong factual basis in support of their claim. The defendant bears the burden of proving that liability should be apportioned. Only rarely have courts held that the defendant has met this burden.[20]

Courts have refused to allocate liability under §107 based on the volume of waste dumped into a site.[21] Courts have also rejected apportioning liability based on different stages of cleanup.[22]

B. Contribution Claims Between PRP's

Assuming a court imposes joint and several liability, it must next face the issue of contribution and allocation of damages, that is, whether each party must actually pay towards cleanup costs, and if so, then in what amount. In determining each party's contribution to cleanup, courts use equitable discretion under §113(f)

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[19] *Id.* at 271.

[20] *Compare Monsanto*, 858 F.2d at 172 (finding defendant had failed to establish a reasonable basis for apportioning liability) *with* United States v. Otati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985) (finding reasonable basis for allocation of liability).

[21] O'Neal v. Picillio, 682 F. Supp. 706, 725 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1988); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 811 (S.D. Ohio 1983).

[22] *O'Neal*, 682 F. Supp. at 725. Assuming that a court is willing to allocate liability in a given case, the next question is how such an allocation is made. Courts generally approach the allocation of liability by applying common law principles of fault. *See, e.g, Alcan*, 964 F.2d at 271; *Monsanto*, 858 F.2d at 171-72; *see also* United States v. Tyson, No. CIV.A.84-2663, 1988 WL 7163, *2-*3 (E.D. Pa. 1988). A minority of courts allocate liability based on equitable factors. *See* United States v. A&F Materials Co., 578 F. Supp 1249, 1256-59 (S.D. Ill. 1984); Note, *Contribution Under CERCLA: Judicial Treatment after SARA*, 14 COLUM. J. ENVT'L. L. 267, 271-72 (1989). Other courts have criticized this approach, holding that equitable factors are appropriate only for apportioning damages, not liability between defendants. *See Monsanto*, 858 F.2d at 172.

in deciding the amount each party should pay.[23] In apportioning liability or allocating damages between responsible parties, CERCLA gives courts broad discretion in making such an apportionment. Section 113(f) states:

> (1) Contribution. Any person may seek contribution from any other person who is liable or potentially liable under § 9607(a) of this title, during or following any civil action under § 9606 of this title or under § 9607(a) under this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under § 9606 or § 9607 of this title.

This language itself provides little guidance as to how courts apportion liability in any particular action. Courts have concluded that Congress intended cleanup costs to be equitably allocated among parties according to their relative culpability rather than any automatic equal share rule.[24]

An automatic pro rata of liability is inconsistent with §113.[25] In *ENSCO*, the court used six traditional factors (commonly known as the Gore Factors) to allocate liability between jointly and severally liable co-defendants:

> (1) The ability of the parties to demonstrate that their contributions to a discharge or release of a hazardous waste can be distinguished from those of others;
> (2) The amount of hazardous waste involved;
> (3) The degree of toxicity of the hazardous waste involved;
> (4) The degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste;
> (5) The degree of care exercised by the parties with respect to the hazardous waste concern, taking into account the characteristics of such hazardous waste; and

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[23] Weyerhauser Co. v. Koppers Co., 771 F. Supp. 1420, 1426-27 (D. Md. 1991).
[24] Envtl. Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 508 (7th Cir. 1992).
[25] *Id.* at 508; U.S. v. R.W. Meyer, Inc., 932 F.2d 568, 571-73 (6th Cir. 1991).

(6) The degree of cooperation by the parties with the federal, state or local officials to prevent any harm to the public health or the environment.[26]

This list of factors is not exhaustive. In fact, many courts have considered other factors in allocating liability, including the nature of any transactions transferring the property at issue,[27] any economic benefits received by a party from contaminating activity,[28] and any discount of a transfer price of a piece of property in light of likely environmental harm.[29]

II. CERCLA'S EFFECT IN THE REAL WORLD

An introduction into CERCLA's liability scheme illustrates the complexity of the issues faced by courts in allocating liability, and, more importantly, the difficulty faced by businesses, insurers, and government entities in predicting what a court will do in any given case.[30]

The real complexity of CERCLA, however, does not come from the legal context, but rather from the practical difficulties inherent in conducting litigation under this liability scheme. At the beginning of a CERCLA action, an attorney attempting to advise a client normally has no idea what the history of a piece of land is, and has an extremely rough estimate at best as to the extent of cleanup costs at issue. At that point, therefore, the attorney is completely unable to advise a client regarding the likely extent of that client's liability. This problem is particularly acute under a joint and several liability scheme where a client's potential liability includes not only its contribution to site conditions, but also a potential share of liability for other parties' actions. Accordingly, it is very difficult for an attorney to advise what an

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[26] *ENSCO*, 969 F.2d at 508 (citing U.S. v. A&F Materials Co., 578 F. Supp. 1249, 1256(S.D. Ill. 1984)).

[27] *See* Smith Land and Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); *In re* Sterling Steel Treating, Inc., 94 BR 924, 931 (Bankr. Mich. 1989); BCW Ass'n. Ltd. v. Occidental Chem. Corp., No. CIV.A.86-5947, 1988 WL 102641 (E.D. PA 1988).

[28] *Weyerhaeuser*, 771 F. Supp. at 1427.

[29] *Smith Land*, 851 F.2d at 89; PVO Int'l, Inc. v. Drew Chem. Corp., [19 Litigation] Envt'l. L. Rep. (Envtl. L. Inst.) 20077, 20080 (D.N.J. June 27, 1988).

[30] Authors have argued, however, that in fact CERCLA liability as applied by the courts is very predictable. *See* Stagger, *Saving the Forest for the Trees in CERCLA Liability*, 10 YALE J. ON REG. 493 (1993).

appropriate early settlement of the claim should be. In almost every case, substantial investigation is a must.

From a practitioner's perspective, the first step in any litigation is to figure out what happened. The factual inquiry in all but the most basic Superfund case is, therefore, to define the entire history of activities on a given piece of land. An attorney should seek to get a handle on the client's potential share of liability and identify other entities that should be "included in the party."

Such an inquiry involves a wide ranging search for documents from parties and non-parties. This search includes all the attendant disputes over the scope and propriety of subpoenas and the difficulty of gleaning what actually took place on a site from an often sparse factual record. Typically, the documentary record is sketchy because records were not kept or entities previously connected with a piece of property are insolvent. Further, a thorough inquiry of a well-used dump site frequently involves an enormous number of interviews with potential witnesses. These interviews may include everyone who has worked near the property, as well as those in the neighborhood.

Complications increase exponentially because of the number of parties involved in Superfund cases, ranging anywhere from two to thousands of parties. Simply scheduling events can involve extensive negotiation.

Significant complaints lodged against the Superfund liability system include the unfairness of imposing liability on certain responsible parties and problems with enforcement policy.[31] Two major categories of complaints that undermine the existence of the current system concern the extent of transaction costs associated with Superfund litigation and inequitable allocations of cleanup costs.

A. Transaction Costs

First, and most prevalent among the many complaints regarding CERCLA's liability scheme, are those relating to the amount of transaction costs (litigation and investigation expenses) when compared to what is actually spent cleaning up a piece of

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[31] *See, e.g.*, Robert W. McGee, *Should Superfund be Wasted? The Case to Trash the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA)*, 11 GLENDALE L. REV. 120, 131-35 (1992).

property.[32] These transaction costs are born by insurance companies, potentially responsible parties, and government entities.

Insurance company expenses relating to Superfund cleanups consist almost entirely of transaction costs. Between 1986 and 1989, insurers' spending on Superfund cases rose from an annual average of $9 million per company to over $17 million per insurance company. On the average, transaction costs have been 88 percent of total expenditures. In 1989, Rand Corporation estimated that insurers spent $410 million on transaction costs.[33]

The Rand Corporation also studied transaction costs of very large industrial firms, those appearing on the Fortune 100 list. Rand Corporation estimates that transaction costs averaged 21 percent of the total outlays of each firm with respect to the sites. However, transaction costs vary significantly by site. The Rand Corporation analyzed the relationship between transaction cost shares and a particular site attribute and reached the following findings:

> Transaction-cost shares are 34 percentage points lower at single PRP sites than at multiple PRP sites when other attributes are held fixed, and the difference is statistically significant.
>
> Transaction-cost shares depend strongly on the stage in the cleanup process that the site has reached. Sites further through the process have lower shares even when other attributes are held fixed.
>
> The difference in transaction-cost shares at NPL and non-NPL sites was small and not statistically significant.[34]

These burdens are difficult for any party involved in Superfund litigation, but are particularly punishing on a small business only tangentially involved with a site.[35] For small potentially responsible parties, transaction-cost share averages 60 percent for firms having annual revenues less than $15 million, 60 percent for firms having annual revenues between $15 million and $100 million, 15 percent for firms with annual revenues between $100 million and $1 billion, and 19 percent for firms with annual

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[32] *Id.* at 131-33.

[33] JAN PAUL ACTON & LLOYD S. DIXON, SUPERFUND & TRANSACTION COSTS, THE EXPERIENCE OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS (1992).

[34] *Id.* at xiii.

[35] For a description of one business's experiences with the Superfund process, *see* E. Feldenthal, *Mass-Liability Suits Can Trap Minor Players that Prefer to Settle*, WALL ST. J., Jan. 4, 1993, at 1.

revenues between $1 billion and $20 billion.[36] Examples of the types of small businesses involved include donut shops and travel agencies.[37]

The transaction costs problem is not limited to private parties. The EPA is primarily responsible for enforcing Superfund. Over 40 percent, or nearly 1,500, of the EPA Superfund staff are lawyers or non-lawyers dedicated to implementing the Superfund's liability system.[38]

The following conclusions can be reached from this data: (1) an inequitable portion of transaction cost burden has been placed on small companies; and (2) a full analysis of transaction costs relating to cleanup of sites must include an analysis of insurance transaction costs, PRP transaction costs, and government transaction costs. Transaction costs have significantly interfered with the Superfund goal of efficient cleanup of sites.

B. Inequitable Allocation of Cleanup Costs

The second major category of complaint regarding the joint and several liability system is that it inequitably allocates cost between responsible parties. It has been frequently stated that Superfund does not result in the polluter paying for cleanup of property, but rather in the deep pocket most closely associated with the site footing the bill.[39]

Other commentators have complained about the unfairness of imposing liability for the orphan's share at any site.[40] Under the current liability scheme, since PRP's are almost uniformly held jointly and severally liable, potentially responsible parties wind up dividing liability for the orphan's share. The method for allocating this responsibility is usually through equitable factors.[41]

A third inequity with the current system is that it holds non-polluters liable for cleanup costs. For example, a current owner is

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[36] LLOYD S. DIXON ET AL., PRIVATE SECTOR CLEANUP EXPENDITURES AND TRANSACTION COSTS AT 18 SUPERFUND SITES (1993).

[37] Senator Paul Wellstone, Press Release, Wellstone Supports Bill to Protect Communities & Small Businesses, at 1 (May 17, 1993).

[38] NATIONAL ENVTL TRUST FUND, THE NETF—PUTTING CLEANUP FIRST at 2-3 (Jan. 1993) (The NETF is supported by hundreds of private citizens, businesses, and local governments seeking reform of Superfund's retroactive liability).

[39] *Superfund Transaction Costs: A Critical Perspective on Superfund Liability Scheme*, [21 News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10413, 10423 (July 1991).

[40] *See* Feldenthal, *supra* note 35.

[41] *See* Weyerhaeuser Co. v. Koppers Co., 771 F. Supp. 1420, 1426-27 (D. Md. 1991).

a responsible party under CERCLA. Absent fraud[42] or some unusual circumstance in the transaction, the current owner stands a good chance of being held liable for a significant portion of cleanup costs.

A fourth category frequently cited as an unfair example of liability is municipal liability for hazardous substances contained in municipal solid waste. Studies have concluded that municipal solid waste often contains at least some portion of hazardous substances. Lead contained in batteries or other hazardous substances found in normal household items are examples. When the solid waste is combined with industrial waste in a landfill, the municipality is often faced with a potentially large liability for a relatively small contribution to the problem.[43]

III. PROPOSED ALTERATIONS TO SUPERFUND LIABILITY SCHEME

On the eve of Superfund reauthorization, various interested parties have proposed a variety of alternatives to the current Superfund liability scheme. The Clinton administration has indicated support for an early, non-binding allocation scheme.[44] The Treasury Department and a coalition of small businesses and insurers have proposed eliminating retroactive liability and replacing that liability with a tax.[45] Environmental groups have opposed this proposal.[46]

The administration also appears to favor exemptions from liability for *de minimis* contributors to a site.[47] Other proposals relating to small contributors have included changes in EPA *de minimis* settlement policy[48] and changes in the liability scheme to allow for a pre-enforcement stay of litigation with regard to *de*

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[42] NATONAL ENVTL TRUST FUND, THE NETF—PUTTING CLEANUP FIRST at 2-3 (Jan. 1993) (*The NETF* is supported by hundreds of private citizens, businesses, and local governments seeking reform of Superfund's retroactive liability).

[43] *Superfund Reauthorization: An Opportunity to Rectify Major Problems*, *supra* note 2, at 1021-22.

[44] *Superfund Transaction Costs: A Critical Perspective on Superfund Liability Scheme*, [21 News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10413, 10423 (July 1991).

[45] See Feldenthal, *supra* note 35.

[46] *Earlier, Expanded Community Grants Urged to Increase Involvement in Cleanup Process*, 24 Env't Rep. (BNA) 1175 (Oct. 22, 1993).

[47] *Businesses Willing to Pay New Taxes, Fees to Support Liability Reform Witnesses Say*, 24 Env't Rep. (BNA) 1313 (Nov. 12, 1993).

[48] *Superfund Reauthorization: An Opportunity to Rectify Major Problems*, *supra* note 2, at 1023.

minimis contributors.[49] Still other proposals include early binding allocation procedures.[50]

IV. PROMPT CLEANUP OF SITES SHOULD TAKE PRIORITY OVER ALL OTHER SUPERFUND GOALS

Congress, in choosing between these alternatives, should keep in mind the three goals of Superfund: (1) prompt cleanup of sites; (2) equitable allocation of cleanup costs; and (3) deterrence of future conduct.[51] A careful analysis of these goals reveals that the current system works well with respect to the deterrence of future activity, but with respect to retroactive liability, the goal of prompt cleanup clashes with the goal of equitable allocation.

A. The Current Scheme Is Satisfactory with Respect to Current Liability

A positive effect of the current scheme is that it deters current improper disposal of hazardous substances. Companies have painfully learned the problems that can arise if they fail to ensure that hazardous substances are handled properly. Furthermore, investigation costs associated with allocation are not as great with respect to current activity. RCRA reporting requirements, as well as a general awareness of hazardous substance regulation, make far more information available regarding the handling of hazardous substances during that time period.

Accordingly, the goal of prompt cleanup of property is hindered much less in a case involving modern activity. The current liability scheme also serves to prevent future conduct. Thus, with respect to present and future activities, the current liability scheme is satisfactory.

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[49] *Guidances on Small Volume Contributors, Federal Liens Given to Regions by Agency*, 24 Env't Rep. (BNA) 587 (Aug. 6, 1993).

[50] *Binding Allocation System Supported By National Commission on Superfund*, 24 Env't Rep. (BNA) 1563-64 (Dec. 31, 1993).

[51] *See supra* notes 2-4 and accompanying text.

B. Prompt Cleanup of Sites Should Take Priority Over Retroactive Allocation of Liability

With respect to retroactive liability, *any* allocation scheme is fundamentally inconsistent with the goal of prompt cleanup.[52] When an allocation takes place, an attorney advising a responsible party will have to conduct an investigation by pulling together the history of the site and attributing soil conditions to past activities on the site. Experience has shown that any allocation of Superfund liability involves a painstaking, expensive, slow-moving process.

Additionally, the mere use of resources for purposes other than cleanup invites delay. If the EPA employees now involved in implementing the liability system were instead involved in cleanup, the result would be a more efficient process. Similarly, in a private action, if a party is able to clean up a property without searching for the wrongdoer, the result will be an expedited, more efficient process.

Thus, the current system has been criticized for promoting adversarial negotiating postures and litigation.[53] The current system has also been accused of discouraging voluntary cleanups and rewarding deception and stalling by potentially responsible parties.[54]

Proposals to make the Superfund allocation process more efficient either through allocation or through changes in the liability scheme will fail to alter this basic problem. The factual investigation will be required regardless, and the inadequate factual record will always exist. The result will almost always be an expensive, drawn-out process.

If one accepts the proposition that equitable allocation and prompt cleanup are fundamental opposites, the next issue is which goal should take priority. The goal of prompt cleanup of property clearly should prevail. First, cleaning up the environment is ultimately a major goal of any environmental regulation. Although allocating fault for the problem may be desirable from a "revenge" or justice standpoint, the desirability of that goal pales in

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[52] For a full discussion of this issue *see Study by Former Top Agency Official Says Fair, Efficient Cleanups Impossible*, 24 Env't Rep. (BNA) 1209 (Oct. 29, 1993)(discussing Don Clay Associates Inc., *The Superfund Liability and Settlement Structure*, (Oct. 14, 1993)).

[53] *Id.*

[54] *Id.* at 1209-10.

comparison to the fundamental importance of cleaning up property.

Second, the "polluter pays" goal has not been effectively accomplished under the current scheme. Solvent companies with partial responsibility for conditions existing at huge sites have been coerced through the specter of joint and several liability to pay in excess of their responsibility. Furthermore, the government has been forced to commit vast administrative and judicial resources to the allocation process. Finally, the complicated nature of the Superfund allocation process has strangled small businesses, causing them to pay far in excess of their fault, either to attorneys or through settlement.

Another advantage of eliminating an allocation process is that it reduces uncertainty on the part of municipalities, insurance companies, and businesses as to future Superfund liability for yet undiscovered problems.

The allegations of a "Polluters Amnesty Program" against the current system are not accurate.[65] Such allegations imply a moral basis for Superfund liability. While such allegations have a legitimate basis in certain instances, frequently parties involved with Superfund acted entirely within the bounds of the law as it existed at that time. Parties held liable are often not the polluters themselves, but parties in some way connected with the property at the time the pollution took place. The moral basis for CERCLA liability, therefore, diminishes as one goes back in time. Current loss is shifted to insurers and non-polluters. Solvency becomes as important an issue as pollution.

CONCLUSION

Because the goals of prompt cleanup of sites and equitable allocation of liability are incompatible in a retroactive CERCLA liability scheme, debates over Superfund reauthorization should include a discussion of the relative importance of these two goals. The result of such a debate should be to prioritize prompt cleanup of property over equitable allocation of liability.

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[65] *Insurance Group Backs Treasury Proposal, Is Willing to Pay $300 Million Annual Share*, 24 Env't Rep. (BNA) 1175-76 (Oct. 22, 1993).