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Negotiating Superfund Settlement Agreements

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NEGOTIATING SUPERFUND SETTLEMENT AGREEMENTS

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[1] more popularly known as "Superfund,"[2] represents a new approach in environmental law. Unlike most other major pieces of environmental legislation passed in the last decade, CERCLA does not provide a statutory framework for the establishment of standards or permits to regulate industry. Rather, CERCLA provides the United States Environmental Protection Agency (EPA) with broad authority for achieving cleanup at hazardous waste sites and imposing liability for the costs of such cleanup on the responsible parties. Thus, through its liability provisions, the statute provides an incentive for greater diligence and con-

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1. 42 U.S.C. §§ 9601-9657 (1980).

2. The "Superfund" provision is formally entitled the Hazardous Substances Response Fund, 42 U.S.C. § 9631 (1980). The Act establishes a $1.6 billion Hazardous Substance Response Trust Fund for federally-financed responses at designated stites. *Id.* The Superfund is financed jointly by industry and the federal government. Over the next five years it is expected that industry will pay $1.38 billion to support the fund. Industry funds are raised via a tax on crude oil, petroleum, and approximately 42 specifically named chemical products. Pub. L. No. 96-50, § 2(a) (1980).

cern in the handling and disposal of hazardous substances as well as incentives for responsible parties to resolve their potential liabilities for environmental contamination through the negotiation of settlement agreements.

The first legislative response to the growing problem of hazardous waste disposal sites resulted in the passage of the Resource Conservation and Recovery Act (RCRA) in 1976.[3] Under RCRA the EPA was granted authority to control hazardous waste disposal by establishing a comprehensive regulatory scheme and by bringing suits to abate imminent hazards.[4] To strengthen the efforts to clean up the nation's thousands of known hazardous waste disposal sites, Congress passed CERCLA in 1980 as a supplement to RCRA. Like RCRA, CERCLA authorizes EPA to bring suit and to issue administrative orders to abate hazards.[5] The unique focus of CERCLA is in its authorization of government actions to contain, clean up, and remove hazardous wastes.[6] The Superfund provisions allow for the recovery of response costs[7] incurred in site cleanup and for damages to natural resources.[8]

Potentially, CERCLA provides a strong arsenal of legal theories for EPA to use in its pursuit against parties responsible for environmental contamination. At Superfund sites throughout the country, the EPA is pursuing its enforcement options, and in many of these cases settlement negotiations are already underway.[9] These negotiations must, of necessity, take place without the benefit of Superfund case law as there has not yet been a full trial of a Superfund case. This lack of precedent makes the negotiation of Superfund settlement agreements particularly difficult.[10]

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3. 42 U.S.C. §§ 6901-6987 (1976 & Supp. IV 1980).

4. Section 7003 of RCRA, 42 U.S.C. § 6973(a), authorizes EPA to bring suit in federal district court to obtain an injunctive relief to prevent imminent and substantial danger to health or the environment from the handling or disposal of waste. EPA may also issue administrative orders "as may be necessary to protect public health and the environment." *Id.*

5. 42 U.S.C. § 9606 (1980).

6. *Id.* § 9604.

7. *Id.* § 9612.

8. *Id.* § 9607(a)(4).

9. Section 105(8)(B) of CERCLA, 42 U.S.C. § 9605(8)(B), requires a national list of at least 400 of the highest priority facilities for remedial action. On October 23, 1981, the Administrator released an interim priority list of 115 sites; the Woburn site which is the subject of this article was listed in the top ten. EPA has proposed a list of 418 priority sites at 47 Fed. Reg. 58,476 (Dec. 30, 1982), and has pursued agreements to secure cleanup of sites. *See, e.g.*, ChemDyne Settlement, 12 ENVT'L L. REP. 30,026 (S.D. Ohio Civ. No. C1-82-840, filed Aug. 26, 1982).

10. *See* Comment, *EPA Proposes Court-Ordered Contingency Plan Revisions Under "Superfund"; Stresses "Flexible" Cleanup Standards*, 12 ENVT'L L. REP. 10040 (1982).

The following article outlines the general liability scheme of CERCLA and discusses major issues likely to arise in the course of settlement negotiations. In addition, this article will also examine how these issues were confronted and resolved in the determination of one party's liability for a hazardous waste site in Woburn, Massachusetts.

II. Liability Provisions of CERCLA

Sections 104,[11] 106,[12] and 107[13] of CERCLA provide the underpinnings for EPA's Superfund enforcement scheme. The specific language of authorization in these sections is directed to the President. With certain limited exceptions, the functions vested by CERCLA in the President were delegated to the Administrator of EPA by Executive Order 12,316 of August 14, 1981.[14] On December 28, 1981, the Administrator redelegated certain remedial and response authorities pursuant to section 104 subsections (a), (b), and (c) to the Assistant Administrator for Solid Waste and Emergency Response.

Section 104(a)(1) provides that the government is authorized to act,[15] consistent with the National Contingency Plan,[16] whenever: (A) any hazardous substance[17] is released or there is a substantial

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11. 43 U.S.C. § 9604.

12. *Id.* § 9606.

13. *Id.* § 9607.

14. Responses to Environmental Damage, Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (August 20, 1981).

15. Such acts include authorization

> to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant or contaminant at any time . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. . . .

42 U.S.C. § 9604(a)(1).

16. The National Contingency Plan (NCP) was originally established pursuant to the Federal Water Pollution Control Act Amendments of 1972, currently the Clean Water Act, 33 U.S.C. § 1321 (1976 & Supp. IV 1980), to coordinate federal action with respect to oil and hazardous substance discharges. Section 105 of CERCLA, 42 U.S.C. § 9605, ties the methods of government response, the recovery of response monies drawn from the Superfund, and the liabilities of responsible parties to the procedural and substantive requirements of the National Contingency Plan. The original NCP was prepared by the Council on Environmental Quality; revised updated versions are to be done by EPA. Section 105, 42 U.S.C. § 9605, requires the publication of a National Hazardous Substance Response Plan under the NCP to establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants. This document was published at 47 Fed. Reg. 31,180 (July 16, 1982), codified at 40 C.F.R. §§ 300.68(h), (i) & (j) (1982).

17. Hazardous substances are defined in section 101(14) of CERCLA, 42 U.S.C. § 9601(14), as all substances identified as toxic hazardous pollutants under the Clean Water Act, 33 U.S.C.

threat of such a release[18] into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant[19] which may present an imminent and substantial danger to the public health or welfare. A crucial exception to this authority to act is if the "President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party."[20] Hence, federal remedial response is predicated on the inability or unwillingness of the responsible parties to properly respond to the release or threat of release.

Section 106(a) of the Act provides that, upon determining that there may be an imminent and substantial endangerment due to an actual or threatened release of a hazardous substance, the government, EPA through the Attorney General, may secure such relief as necessary to abate the danger or threat. The government is also authorized to take other action, including the issuance of administrative orders, to compel necessary action.[21]

Section 107 sets forth four categories of parties who may be held responsible for any incurrence of response[22] costs consistent with the National Contingency Plan, including all costs of removal or remedial action incurred by the United States government. Broadly speaking, these categories consist of: (1) owners and operators of a facility (or other source of release); (2) owners or operators of the facility at the time of disposal; (3) any person who arranged for the

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§ 1321 (1976 & Supp. IV 1980), 40 C.F.R. § 116.4 (1981); pollutants under the Clean Air Act, 42 U.S.C. § 7412 (1976 & Supp. IV 1980), 40 C.F.R. § 60 (1981); and hazardous wastes under RCRA, 42 U.S.C. § 6921 (1976), 40 C.F.R. § 261.3 (1981); imminently hazardous substances under the Toxic Substances Control Act, 15 U.S.C. § 2606 (1976 & Supp. IV 1980), 40 C.F.R. § 261.3 (1981).

18. The term "release" is defined as including any "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment." 42 U.S.C. § 9601(22).

19. "Pollutant or contaminant" is defined in section 104(a)(2) of CERCLA, 42 U.S.C. § 9604(a)(2).

20. 42 U.S.C. § 9604(a)(1).

21. *Id.* § 9606(a).

22. Response is defined in section 101(25) of CERCLA, 42 U.S.C. § 9601(25). There are two general types of response action: removal and remedial actions. Removal actions largely involve cleanup activity or monitoring to prevent or minimize damages from the release of hazardous substances. Removal actions can also include short-term measures to provide alternative water supplies and otherwise protect the public and the environment. 40 C.F.R. § 300.66 (1982). Remedial actions are authorized only at sites listed on the National Priority List, *supra* note 16, and are intended to provide a permanent remedy instead of "or in addition to removal actions." 42 U.S.C. § 9601(24).

disposal or treatment of hazardous substances or arranged with a transporter for transport for disposal or treatment of hazardous substances; and (4) transporters of hazardous substances to the site at which the release or threat of release occurred.[23]

Subject only to certain dollar limits[24] and limited defenses,[25] section 107 generally imposes strict liability[26] for government response costs and damages to natural resources. A responsible party is liable for specified costs and damages resulting from a release or threat of release of hazardous substances where there has been a response action pursuant to Superfund. These costs include reasonable expenditures necessary to assess the extent of the hazard or damages. Sums recovered under Superfund for damages to natural resources can be used to restore and rehabilitate the injured resources or to acquire equivalent natural resources. This does not indicate, however, that the measure of damages is to be limited by the amount required to rehabilitate or replace injured natural resources.[27]

23. *Id.* § 9607(a). Many generators (firms which create the wastes) argue that they have little or no involvement with the actual disposal activities. Generators usually have had a simple contractual arrangement with a hauler, who usually sought to avoid high transportation and disposal costs, and had neither the expertise nor the incentive to dispose of wastes carefully. *See* Rogers, *The Generators' Dilemma in Superfund Cases*, 12 ENVT'L L. REP. 15,049 (1982). Although § 107 does not expressly impose liability on a person merely for "generating" waste, it clearly imposes liability on a generator who has selected a treatment or disposal facility "by contract, agreement, or otherwise." 42 U.S.C. § 9607(a). Section 107 also includes generators who arranged for waste to be transported for disposal by another, and thus would appear to include virtually any generator. *Id.*

In addition, section 112, 42 U.S.C. § 9612, subrogates to the federal government all claims for response costs which have been compensated for by the Superfund Trust Fund. As a result, a responsible party who does not fall within one of the four categories of § 107(a) could nevertheless be held liable for response costs. Section 112(c)(3) specifically provides that an action to recover money expended may be brought on behalf of the Fund against "any owner, operator, or guarantor, or . . . other person . . . liable . . . for the damages or costs" of the compensated cleanup. *Id.* § 9612(c)(3).

24. For example, for most facilities liability may not exceed the total of all response costs plus $50 million or some lesser amount set by regulation. 42 U.S.C. § 9607(c)(1)(D). The regulations, however, cannot set a limit below $5 million. *Id.* In addition, § 105, 42 U.S.C. § 9605, and the National Contingency Plan require that remedial cleanup actions be cost-effective.

25. *See* 42 U.S.C. § 9607(a)(4)(C) (listing defenses as: 1) an act of God; 2) an act of war; 3) an act of omission by a wholly unrelated third party; 4) any combination of the foregoing).

26. The Act does not explicitly establish a strict liability standard. Instead, § 101(32), 42 U.S.C. § 9601(32), defines "liability" as that standard which applies under § 311 of the Clean Water Act, 33 U.S.C. § 1321 (1976 & Supp. IV 1980). Recent cases have interpreted this provision of the CWA as creating strict liability. *See, e.g.*, United States v. LeBoeuf Bros. Towing Co., 621 F.2d 787, 789 (5th Cir. 1980); Steuart Transp. Co. v. Allied Towing, 596 F.2d 609, 613 (4th Cir. 1979). *See infra* text and note at note 47.

27. 42 U.S.C. § 9607(f). The term "natural resources" includes "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" federal, state, or local government, or any foreign government. *Id.* § 9601(16).

In addition, Superfund provides for punitive damages in certain circumstances. Section 107(c)(3) of CERCLA allows the United States to seek up to three times the costs incurred by the Superfund if a liable party fails, without sufficient cause, to properly provide removal or remedial action upon an order issued pursuant to sections 104 or 106 of the Act.[28]

A. Initiating the Superfund Enforcement Process

Consistent with the intent of section 104 of the Act, EPA has a policy[29] of attempting to secure cleanup by the responsible parties rather than using the Superfund trust fund established under CERCLA[30] whenever such cleanup can be accomplished properly and in a timely manner. Potentially responsible parties generally have advance notice of any proposed governmental response action at a particular site. Superfund requires that EPA prepare and up-

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28. *Id.* § 9607(c)(3).

29. Memorandum from Christopher J. Capper, Acting Ass't Administrator for Office of Solid Waste and Emergency Response, and William A. Sullivan, Jr., Enforcement Counsel, to the Regional Administrators, Hazardous Waste Compliance and Enforcement Program Guidance, at 5 (Feb. 23, 1982).

Section 104(a) of the Act provides that EPA may take appropriate response action unless it determines that "such removal and remedial action will be done properly by the owner or operator" of the facility, or by any other responsible party. 42 U.S.C. § 9604(a)(1). EPA may pursue a variety of options to achieve cleanup of a site, including private settlements, unilateral enforcement orders, and civil actions. For example, EPA need not spend federal funds if a responsible party undertakes the cleanup under an enforceable agreement, or if a party is required to do so by a court order or an administrative order.

30. 42 U.S.C. § 9631 (1980). *See supra* note 2.

The current National Contingency Plan (NCP) emphasizes a concern for preserving money in the Fund. It also contains a complex process for evaluating the cost and effectiveness of alternative remedial programs. 40 C.F.R. §§ 300.68(b), (h), (i), & (j), added by 47 Fed. Reg. 31,180 (July 16, 1982). As a result, EPA policy stresses private cleanup actions in order to conserve Fund monies. Subpart F of the NCP appears to authorize cleanup actions financed by the Fund only after a determination that the responsible parties will not adequately clean up the release or abate the hazard. *Id.* § 300.61(b).

This fund-balancing approach has been criticized on two fronts: 1) the lack of specific standards set by EPA makes it difficult to determine what constitutes adequate or proper cleanup; 2) coupled with the first point, a single-minded concern for preserving funds limits overall governmental cleanup efforts. *See* HAZARDOUS WASTE REP., vol. 3, no. 17, at 4 (March 22, 1982); ENVT'L REP. (BNA) 1475 (March, 1982). Nonetheless, EPA applies appropriate criteria to determine the cleanup level required for specific releases as they occur at a site as well as considering other relevant technological and environmental factors. The need to preserve a certain level of Fund money is made necessary by those instances where Fund money is spent and no solvent responsible party can be found to recompense the Fund. Further, the safeguarding of the Fund and the encouragement of private cleanup settlements is consistent with § 104 of CERCLA, 42 U.S.C. § 6904. *See* 47 Fed. Reg. 10,978 (March 12, 1982); 47 Fed. Reg. 31,180 (July 16, 1982).

date annually a list of priority facilities[31] and, consistent with cost-effectiveness requirements of the Act and the National Contingency Plan, the proposal of response action is usually preceded by a period of investigation and study at the site.[32] Therefore, prior to the expenditure of government funds at a Superfund site, notice will generally be sent to responsible parties.[33]

It should be noted, however, that EPA takes the position that a notice letter is not a legal precondition for a subsequent lawsuit by EPA to seek cost recovery against a responsible party if Fund money is spent.[34] There may be a number of reasons why a notice letter does not issue prior to the expenditure of Superfund fund money. For example, EPA may be involved in on-going negotiations with a responsible party, making such notice unnecessary, or, alternatively, there may be no evidence linking the responsible party to the site known to EPA at the time Superfund fund money was spent.

Implicit in the notice letter process is the concept that such a letter will set into motion an opportunity to resolve informally the problems at the site, thereby eliminating the need to initiate court action. Where an agreement is reached prior to litigation, the agreement will be reduced to writing via an enforceable agreement, preferably a judicial consent decree.[35] Hence, in most cases where responsible parties are identified, formal legal action, if any, at a site will be preceded by a period of time in which settlement negotiations will occur. The mere existence of a responsible party, however, will not prevent the agency from moving forward with the expenditure of Superfund money or from taking formal legal action if the responsible party is not willing to address the problems at the site in a proper and timely manner.[36]

B. Advantages of Settlement

Both the government and the responsible parties have much to gain if the problems at a site can be resolved through negotiations.

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31. 42 U.S.C. §§ 9605, 9607(a)(4)(C). *See supra* note 16.

32. 42 U.S.C. § 9605. Further, prior to taking any response action, EPA consults with the affected state. For response actions over six months long or costing over $1 million EPA obtains state agreement to share in the costs. *Id.* § 9604(c).

33. Memorandum, Hazardous Waste Compliance, *supra* note 29, at 5; Guidelines for Using the Imminent Hazard, Enforcement, and Emergency Response Authorities of Superfund and Other Statutes, 47 Fed. Reg. 20,664 (May, 1982).

34. Memorandum from Sullivan & Capper to Regional Administrators, et al., Coordination of Superfund Enforcement and Fund-Financed Clean-Up Activities, at 10 (Nov. 25, 1981).

35. *See* 42 U.S.C. § 9606.

36. Memorandum, Hazardous Waste Compliance, *supra* note 29, at 7.

From the government's perspective, the statutory objective is achieved if a responsible party undertakes the cleanup obligations. Superfund money is preserved for those sites which will not be addressed by a responsible party. In addition, because of the intricacies of federal contracting and the CERCLA statutory requirements relative to state participation,[37] it is likely that the site will be cleaned up more quickly if the responsible party agrees to do so voluntarily. Finally, while negotiations themselves can be very resource-intensive for EPA, resolution of a case through settlement will invariably take less time and resources than if the case were actually litigated.

There are also numerous advantages to settlement for the responsible party. CERCLA provides EPA with a broad delegation of authority as to what are appropriate actions for which the government can recover costs.[38] In addition, the potential exists for the recovery of triple the actual costs expended by virtue of the punitive damages section.[39] Further, the potential application of a strict liability standard places a significantly greater burden on the responsible party in actual litigation.[40] A responsible party avoids these problems by settling, and gains the additional benefit of participating in the decisions and final terms spelling out the scope of its involvement in the resolution of the problems at the site.[41]

Another concern to a responsible party at a Superfund site is cost; a party considering a settlement must balance the projected costs of a negotiated cleanup against the substantial legal fees necessary to

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37. For example, unless there is a continuing emergency, EPA can spend more than $1 million only if the affected state agrees to a minimum contribution sum and makes a commitment to find a place for uncovered hazardous substances. Specifically, the state must assure future maintenance of the site and assure the availability, if necesssary, of an acceptable hazardous waste disposal facility. 42 U.S.C. § 9604(c). *See* Anderton & Barto, *Stringfellow, A Case History of Closure Facilities,* 1982 NAT'L CONF. ON ENVT'L ENG'G at 466.

38. EPA promulgates regulations for the assessment of damages from a release. Consistent with the NCP, which provides the administrative framework for carrying out response actions, these regulations identify simple assessment techniques using minimal field observation as well as detailed procedures for extensive field work to be used as situations require.

39. 42 U.S.C. § 9607(c)(3). *See supra* text and note at note 28.

40. At the very least, CERCLA provides that natural resource damage assessments made pursuant to Superfund cleanup regulations shall have the force and effect of a rebuttable presumption in a judicial or administrative proceeding against a responsible party to recovery sums spent by the Fund. 42 U.S.C. § 9611(h)(2). *See* Menefee, *Recovery for Natural Resource Damage Under Superfund: The Role of the Rebuttable Presumption,* 12 ENVT'L L. REP. 15,057 (1982). *See generally,* SUPERFUND: A LEGISLATIVE HISTORY, VOL. 1 (H. Cohn Needham & M. Menefee, eds. 1982).

41. *See* Pain, *Mega-Party Superfund Negotiations,* 12 ENVT'L L. REP. 15,054 (1982).

fight and possibly lose a law suit. Even if a responsible party thinks his legal defenses will prevail in a court of law, it is necessary to take into account the enormous costs of litigating hazardous wastes cases due to the substantial time needed to prepare legal arguments and expert witnesses. The limited number of hazardous waste cases that have actually been litigated to date indicate that such trials can take months.[42]

Finally, a responsible party may find there are public relations advantages to settling. Rather than being portrayed as the irresponsible cause of a pollution problem who refused to help clean it up, a corporation has the opportunity to be the "good corporate citizen" that volunteered to rectify an environmental problem.

III. Major Issues in Settlement Negotiations

A. The Woburn Hazardous Waste Site

The Woburn hazardous waste site is known locally as either Industri-Plex 128 or the Mark-Phillips Trust property. The site is located in the northeast corner of Woburn, Massachusetts, a city approximately 12 miles north of Boston. Use of this area for heavy industrial purposes began in 1853, when a small company called the Woburn Chemical Works began manufacturing a variety of common chemical solutions such as vitiol, sodas, and gums. Following the insolvency of the Woburn Chemical Works, the area was the home for the Merrimac Chemical Company (Merrimac). Merrimac began by producing basic chemicals for the region's numerous leather, textile, and paper industries. By the early 1900's, Merrimac was one of the largest chemical manufacturers in New England. During World War I, the New England Manufacturing Company was established and operated by Merrimac for the production of war materials, including the manufacture of trinitrotoluene (TNT) and other chemical intermediates used in the production of explosives. In 1929, Monsanto Chemical Company acquired Merrimac, and approximately two years later, Monsanto transferred the Merrimac operations out of Woburn.

The area came back into industrial use in 1934 when New England Chemical Industries, a subsidiary of Consolidated Chemical Com-

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42. *E.g.*, Village of Wilsonville v. SCA Services, Inc., No. 52885 (Ill. Sup. Ct., May 22, 1981), *reprinted in* 2 CHEM. & RADIATION WASTE LIT. REP. 288 (1981) (length of trial over 100 days); State Dep't Envt'l Protection v. Ventron Corp., Nos. A-1395-79, A-1432-79, A-1446-79, A-1545-79 (N.J. Super. Ct. App. Div., Dec. 9, 1981) (length of trial 55 days).

pany (Consolidated), began a glue manufacturing operation. In the 1950's, Consolidated was acquired by Stauffer Chemical Company (Stauffer). Stauffer continued glue manufacturing activities at the site until the late 1960's, when the property was purchased by the Mark-Phillips Trust (the Trust). The Trust began immediately to transform the former chemical manufacturing site into an industrial office park and shopping center. In the course of developing this property, excavation activities uncovered buried wastes. Odor emissions from these uncovered wastes were the first indication of the environmental problems at the site. Upon greater investigation, it became clear that the scope of the environmental contamination included the pollution of wetlands and the discovery of a number of hazardous chemical wastes.[43]

B. The Settlement

On May 25, 1982, EPA, pursuant to the statutory authority of section 106 of CERCLA, issued an order on consent to the Stauffer Chemical Company for the investigative study, cleanup, and future monitoring of the Woburn site described above. This site was listed by the Administrator of EPA as one of the top ten most hazardous Superfund sites in the country.[44] The Commonwealth of Massachusetts, through its Department of Environmental Quality Engineering (DEQE), participated in the settlement negotiations and was a party to the agreement. The settlement marked the first use of CERCLA's section 106 administrative order authority at a site listed as a priority site.

The settlement negotiations presented the regulatory agencies with a number of difficult problems that had to be resolved before the parties could enter into a consent order. Many of the issues confronted are likely to arise in the context of settlement negotiations at other sites. Successful resolution of these issues requires a careful understanding and balance of various EPA policies relevant to the implementation of CERCLA, the technical needs of the site, the motivations and interests of the negotiating responsible party, and the concerns of the affected community. These issues include the ap-

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43. It should be noted that there is another Woburn site which has been listed on the priority list; specifically, this site is listed as Wells G & H. Wells G & H are two drinking water wells which were removed from service in 1979 due to contamination. Although frequently confused, these two sites on the list represent two unrelated problems in the city of Woburn.

44. On October 23, 1981, pursuant to 42 U.S.C. § 9605(8)(B) and the NCP, EPA issued an interim priority list of 115 sites, including the Woburn site. *See supra* note 9.

portionment of liability, the content and scope of any releases, the handling of indefinite commitments by agreement, citizen participation, and federal-state relations.

1. Apportionment of Liability

Joint and several liability is a legal theory which, if applicable in a given fact situation, can result in any one of a number of responsible parties being held responsible for all of the damages. The issue of joint and several liability only arises where the acts of more than one party produce a single harm.[45]

In a hazardous waste context, a simplistic scenario for the application of joint and several liability is the multiple generator situation. In such a situation a number of companies may have shipped barrels of a single type of hazardous waste to a site, little or no evidence may exist concerning the amounts of the substance shipped by each company, and some or all of the barrels may leak, releasing hazardous chemicals from the site and resulting in ground water contamination. Under these circumstances, each of the generators may be held responsible on the theory that the harm to the ground water caused by one of the generators is indistinguishable from the harm caused by any of the others in the sequence of events; therefore one or all may be held fully liable.

The concept is best summarized as follows:

> Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit.[46]

The manner in which joint and several liability will be applied by a court in the Superfund context is not fully known at this time. While EPA and the Department of Justice will argue the applicability of joint and several liability where the facts warrant,[47] industry strongly maintains that the theory is not applicable in a CERCLA lawsuit. Actual resolution of the controversy will not occur until the issue has been fully litigated, and even then case law may vary depending on the particular fact situation before the court.

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45. 74 Am. Jur. 2d § 62 (1980).
46. Landers v. East Texas Salt Water Disposal Co., 248 S.W.2d 731, 734 (Tex. 1952).
47. The Justice Department has maintained that joint and several liability is the appropriate

As a practical matter, most successful negotiations will result in some type of apportionment of liability.[48] In most cases there would be little economic incentive for a responsible party to be willing to cooperate with the federal government unless some apportionment of liability is recognized. EPA's willingness, therefore, to apportion liability in a negotiated agreement where the facts are appropriate should not be viewed as a rejection of the applicability of the joint and several liability theory to the site at hand,[49] but rather as a practical recognition that the apportioning of liability is an important aspect of encouraging settlements.

In the Woburn site settlement, even though there was more than one responsible party, Stauffer was the only responsible party participating in the settlement negotiations. As a result, apportionment of liability was a major issue in the discussions. Stauffer and companies it acquired had manufactured glue at the site; Stauffer was willing to assume responsibility for those wastes generated by the glue manufacturing process. Other wastes found at the site resulted from the manufacturing activities of the other known responsible party. Further, some of the wastes from all prior opera-

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standard under Superfund as well as under § 7003 of RCRA. *See* Superfund Liability, Memorandum from Khristine L. Hall, Att'y, Policy, Legislation and Special Litigation Section, U.S. Dep't of Justice to James W. Moorman, Ass't Att'y Gen., Land & Natural Resources Div., U.S. Dep't of Justice (March 13, 1980), *reprinted in* 1 CHEM. & RADIATION WASTE LIT. REP. 1298-305 (Jan. 1981).

Superfund does not apportion liability among responsible parties for response costs and damages. Yet, Congress deleted a provision which would have held parties jointly and severally liable. This deletion is not regarded as a rejection of joint and several liability, however. 126 CONG. REC. H11,788 (daily ed. Dec. 3, 1980) (letter from Ass't Att'y Gen. Parker); 126 CONG. REC. S14,964 (daily ed. Dec. Nov. 24, 1980) (remarks of Sen. Randolph, Floor Sponsor of the bill, Chmn. Sen. Comm. Envt'l & Pub. Works). There is significant legislative history supporting EPA's position that the joint and several liability provision was deleted from CERCLA in order to leave the issue to be resolved by the courts through the common law of torts. *See, e.g., id.*; 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1980) (remarks of Rep. Florio, Floor Sponsor of the bill). *See also* Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 U. VA. L. REV. 1157 (1982).

48. A few decided cases suggest that the courts are willing to apportion damages. *See, e.g.*, United States v. Vertac Chemical, 489 F. Supp. 870, 888 (E.D. Ark. 1980); United States v. Waste Industries, No. 80-4-CIV-7 (E.D.N.C. Apr. 7, 1981) (order denying motion to dismiss).

Actual methodologies of apportionment may vary depending on the nature and extent of hazardous substance contamination involved. A predominant method is that of volumetric calculation. To the extent that the volume of hazardous substances at a site can be attributed to a responsible party, this method provides guidance with regard to the party's ultimate maximum liability exposure. In some multi-party situations or where technological information is sparse, volumetric apportionment may be difficult to calculate and may not reflect actual relative toxicity of particular released substances.

49. *See* 42 U.S.C. § 9607(e); *supra* note 47.

tions had been commingled due to the land development activities of one of the present property owners.

The apportionment issue was resolved as follows: Stauffer agreed to undertake the full investigative study of the entire site and to participate in the cleanup of Stauffer-generated wastes. After the conclusion of the investigative study, EPA and the DEQE will determine Stauffer's proportionate responsibility for the contamination at the site by using a formula set forth in the agreement. This formula will then be the basis for apportioning the costs incurred in implementing the investigative study. Stauffer may choose whatever legal means it deems appropriate to recover those funds it expended on the study beyond its proportionate share. In addition, because the apportionment determination will be made prior to the implementation of the actual cleanup, Stauffer's participation in the cleanup and future monitoring will be limited to its determined proportionate responsibility.

2. Releases

The release provision is an issue of great concern to a party entering settlement negotiations. Most responsible parties enter negotiations with the expectation that, if the case is successfully resolved through settlement, their potential liability at that site will be ended. Unfortunately, full information regarding the nature and extent of all parties involved with and of all damages from particular releases usually will not be known at the time of settlement. Problems such as protection from third party contribution and extended, open-ended liability of a settling party may not arise until after the cleanup activities under the settlement have been completed.[50] A settlement agreement and its release provisions can be structured so as to minimize these problems.[51]

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50. Responsible parties often prefer to obtain a "total buy-out" settlement, a complete release from all liability for any and all claims both as to existing problems and future problems. Just as often, however, the government cannot be certain what ultimate soil and ground water cleanup will be required. As a result, responsible parties may also prefer that settlement negotiations split soil, surface water, and ground water problems. Under such plans a responsible party pays a sum commensurate with its volumetric share of wastes at a site in return for a release for surface cleanup only; the government may retain claims for soil and ground water pollution. *See, e.g.*, United States v. Chem-Dyne Corp., 12 ENVT'L L. REP. 30,026 (S.D. Ohio Civ. No. C1-82-840, filed Aug. 26, 1982); United States and South Carolina Dep't Health & Envt'l Control v. South Carolina Recycling & Disposal (D.S.C. No. 80-1274-6, filed March 23, 1982).

51. The agreement could incorporate all elements of relevant state statutes protecting joint

Although the scope of the release will vary with each fact situation, there are certain general principles which the negotiating parties should recognize at the outset. First, the releases run to the settlement of civil claims only; the EPA cannot settle criminal liability.[52] Second, the scope of the release should be commensurate with the scope of the cleanup; a total release should not be granted if the party is not undertaking its total share of the study and cleanup.[53] Third, the release should be conditioned upon the timely and satisfactory completion of all of the party's obligations under the agreement.[54] Fourth, EPA cannot bind other federal agencies. Therefore, EPA should not attempt to bind the "United States" or waive claims which may be asserted by other federal agencies.[55] Finally, EPA should be very careful to protect its future rights against other responsible parties who are not participating in the settlement.[56]

In the Woburn site negotiations Stauffer's release provision was conditioned on Stauffer's fulfillment of all the commitments made in the Consent Order. An important issue arose, however, as to the scope of that release; that is, under which environmental statutes Stauffer's release would be effective. EPA's position was that the release would correspond to the jurisdictional authority of the consent order. Therefore, since the consent order was issued pursuant to CERCLA and section 7003 of the Resource Conservation and Recovery Act,[57] and since Stauffer agreed to assume full responsibility for its own wastes, the release stated that fulfillment of Stauffer's commitments in the agreement constituted full satisfac-

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tortfeasors who have settled in the event that non-settling parties seek to add settling parties to a Superfund suit or otherwise seek contribution.

52. Memorandum from Sullivan to Regional Counsels, et al., Guidance on Hazardous Waste Site Settlement Negotiations, at 4 (Dec. 18, 1981).

53. *Id.* Because of the lack of full information at the settlement stage, some negotiations proceed in phases, seeking relief in stages: first, immediate action to secure the site; second, removal of any drums and/or bulk liquids; third, study, assessment, and implementation of long-term remedial action to clean soil and ground water at the site. *See infra* discussion at III.B.3.

54. Memorandum, Settlement Negotiations, *supra* note 52, at 4.

55. For example, since the Department of the Interior is the trustee of natural resources, a settlement document signed solely by the Department of Justice on behalf of EPA for response costs may not settle the issue of natural resource damages. In the Chem-Dyne settlement the Department of the Interior did not sign on behalf of all United States agencies and expressly excluded natural resource damage claims from the settlement agreement. *See* 12 ENVT'L L. REP. 30,026-27 (1982).

56. Memorandum, Settlement Negotiations, *supra* note 52, at 4.

57. *Id*; 42 U.S.C. § 6973.

tion of EPA's civil claims pursuant to CERCLA and RCRA. To protect the rights of the parties entering into the consent order against other nonsettling parties, a provision was inserted in the agreement, consistent with Massachusetts law, clearly stating that the release to Stauffer in no way affects the liability of any other responsible party.[58]

3. Handling Indefinite Commitments by Agreement

A comprehensive settlement agreement requires fully addressing at the outset the scope of the investigative study, the cleanup and subsequent monitoring commitments, and the release provision. Nonetheless, these commitments usually must be made at a time when there is frequently little information available to quantify the extent of the problem being addressed or the adequacy of the intended actions.

Because of the difficulties such a situation imposes, a responsible party may only be willing to negotiate its involvement in the investigative study, leaving its cleanup liability for resolution at a later date. Even if EPA were to be responsive to a proposal for a partial settlement, the negotiating party would obviously not be able to benefit from a release provision relative to its cleanup liability, thereby leaving unresolved a major aspect of its liability and a major motivating factor for entering into negotiations at the outset. In addition, the resolution of the total problem would remain unresolved. It seems, therefore, to be in the best interests of the responsible party and the EPA to enter into comprehensive settlements which address all aspects of the site, rather than piecemeal agreements in which only portions of the problem are resolved at a time.[59]

The Woburn agreement provides an illustration of how indefinite commitments are made relative to future actions and expenditures unknown at the time of negotiations. In general, a "checks and balances" system was developed; adequate controls were built into each commitment made by the parties such that each party had an interest in fulfilling its responsibilities. For example, with regard to the investigative study commitments, Stauffer agreed to a phased ap-

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58. The original common law rule was that the release of one or more, but less than all, joint tortfeasors was a release of all of them. Both courts and legislatures have made significant changes in this area, and parties to settlements are cautioned to be familiar with the applicable law in their state to ensure that, to the extent possible, all necessary protections are taken to ensure that all future rights are reserved against any nonsettling parties.

59. See the settlements discussed *supra* text and note at note 50.

proach: the first phase of the study is highly specific in its commitments, allowing Stauffer the opportunity to project accurately its costs for this phase of the investigation. Phase II of the study entails a more open-ended commitment which provides for additional study as needed pursuant to stated criteria. This second phase provides the flexibility needed to ensure that the site will be adequately studied. Following the full investigative study, Stauffer will propose a recommended remedial action which EPA and the state may accept or reject. A period of time for negotiation is provided. If the remedial action plan is accepted, Stauffer is obligated to participate as directed and in accordance with its determined proportionate share of liability. If the proposal is rejected, Stauffer has no further obligations under the agreement; on the other hand, neither is Stauffer released from liability. Thus, both parties have a strong interest in seeing that an acceptable remedial action is implemented: EPA wants the site cleaned up; Stauffer wants its release from liability.

4. Citizen Participation

The presence of a hazardous waste site can cause significant fear and concern in the local community. Particularly alarming for the affected citizens are the unknown health impacts such a site may have.[60] It is, therefore, important to provide as much knowledge as possible to the local community, to keep the citizenry thoroughly informed regarding the activities occurring at the site, and to ensure that the citizens understand those legal constraints and limitations which affect how the government responds in a particular situation.

The National Contingency Plan recognizes the affected locality by stating that response personnel should be "sensitive to local community concerns in accordance with applicable guidance."[61] This guidance includes the establishment of an effective community relations program at each site. The goal of this program is to set forth the various ways in which the agency in charge of the response plans will communicate with the citizens through public forums, press releases, and meetings.

When the negotiations with Stauffer began in Woburn, a local Citizens Advisory Committee (CAC) was already in existence and was meeting twice a month to participate in and track developments concerning the hazardous waste site. Federal and State regulatory offi-

60. *See* Seltzer, *Hazardous Waste Injury Litigation: A Proposal for Tort Reform*, 10 B.C. ENVT'L AFF. L. REV. ___ (1982).

61. 47 Fed. Reg. 31,214 (July 16, 1982).

cials attended most meetings of the CAC. During the lengthy period of time the group had been meeting, the members developed a comprehensive understanding of all issues surrounding the site.[62]

Throughout the course of the negotiations with Stauffer, the regulatory agencies made a substantial effort to keep the CAC informed and to seek their input. Stauffer was very cooperative in this endeavor. For example, prior to presenting an investigative study proposal, representatives of Stauffer attended a meeting of the CAC to hear the specific concerns of the citizens. They also attended other meetings of the CAC to present their study proposal and to accept comments. Because of this regular communication and the willingness of all parties to listen to each other, the original fears and suspicions of the citizens were largely overcome. In this way, the negotiations took into account the concerns of those most affected by hazardous waste problems.

5. Federal-State Relations

Although few states have a statute with the breadth of authority of CERCLA, most states have their own panoply of environmental laws which are often similar to their federal counterparts. Therefore, in addition to its federal liability, a responsible party may face the risk of being the recipient of a state enforcement action pursuant to state law. For this reason, it is in the best interests of the responsible party to attempt to resolve its liability with both EPA and the state in which the hazardous waste site is located. EPA encourages the involvement of the state in the negotiation of these agreements.

The Woburn negotiations were marked by a close working relationship between EPA and the Massachusetts DEQE. The result was the issuance of one document to which EPA, the state, and Stauffer were parties. This resulted in the most efficient use of the agencies' resources. In addition, the embodiment of the agreement in a single document offers greater assurance that consistency and uniformity in the implementation of the consent order will result.

IV. Conclusion

Resolving problems at Superfund sites through negotiated agreements is a difficult and complex undertaking. Nevertheless, there

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62. EPA recently reached a settlement with Velsicol Chemical Corp., requiring it to clean up releases of PBB from its plant in St. Louis, Michigan. The Environmental Defense Fund unsuccessfully requested that environmental and citizen groups be involved in negotiations. The

are significant benefits for both the responsible parties and the EPA in the settlement of these cases. Upon entering negotiations, the parties should be willing to consider all aspects of the issues in controversy and to develop fair and reasonable solutions that accommodate each other's concerns without sacrificing the technical needs of the site. In addition, the concerns of the local community must be addressed in a meaningful way. Finally, as with any complex negotiation, the wording of the agreement should be clear and concise to prevent any subsequent misinterpretation of its terms. Approached from this perspective, significant headway will be made in the cleanup of the nation's many hazardous waste sites.

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issue of citizen involvement in actual negotiations underscores the tension between policies which foster public input and the need for frank exchange and confidentiality in negotiations. *See* Radin, *Deep Well Was Key in PBB Contamination Settlement*, The Boston Globe, Jan. 13, 1983, at 7, col. 2.