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# EPA's New Superfund Rule

## Making the Problem Worse

**Richard L. Stroup and Bradley Townsend**

The Environmental Protection Agency's Superfund program, begun in 1980 at the end of the Carter administration, has been widely criticized by policy analysts, political figures, and environmentalists. Even President Clinton has called it a "disaster," and cited the "paralysis" of the program. Much of the criticism reflects the fact that so many sites remain untouched, with little or no cleanup even started, while the government and the "potentially responsible parties" (PRPs) quibble over the delineation of responsibility, resulting in enormous costs in attorneys' fees.

A frequently-cited study by Jan Paul Acton and Lloyd S. Dixon at the Institute for Civil Justice found that for a representative sample of insured cleanups in the late 1980s, litigation and related transaction costs averaged 88 percent of total expenses for remediation efforts. That is, for every dollar spent on remediation itself, more than seven additional dollars were spent on transaction costs! While those results were from early cases, and future cases will probably benefit from more settled case law, no one doubts that the non-cleanup or transactions costs are high in both time and money. Other

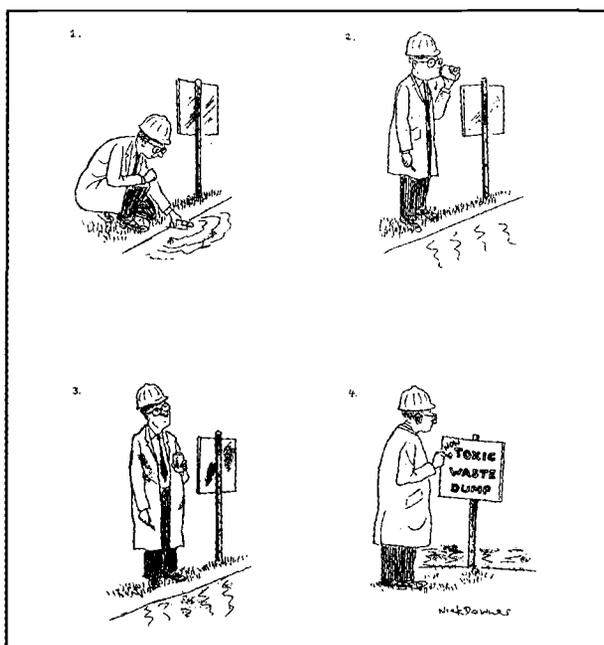
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*Richard L. Stroup is a senior associate and Bradley Townsend is a research fellow at the Political Economy Research Center in Bozeman, Montana.*

critics of the process stress that those costs are producing risk reductions that may be small or nonexistent.

Superfund received so much criticism for slowness that former EPA administrator William Reilly made speeding up cleanups a high priority, and the EPA proposed a rule change to this effect that is currently under consideration. Published in the *Federal Register* on August 6, 1992, the rule is intended to streamline the remediation process by "clarifying" the rules under which companies are held liable for charges paid to contractors by EPA for EPA-designated cleanups. The change, said EPA when issuing the proposed rule, is designed to reduce some of the time and cost burden "incurred by the United States and responsible parties in preparing for, negotiating, and litigating these cases." It would streamline the cost recovery process and thus reduce transaction costs.

This rule would, indeed, streamline the process by easing the recovery of costs expended by EPA or the designated site contractors. It would decrease the ability of those who pay to protest successfully in court. Court costs, for any given level of expenditures, would presumably fall. But expenditures would not stay the same. The new rule would in fact substantially increase the charges for which PRPs are liable. It would, as we explain below, almost surely increase the inefficiency which has plagued the Superfund program; the genius of the



rule, from the EPA's point of view, is that private companies would be charged for that inefficiency, and would have little recourse but to pay.

Officials (from both EPA and EPA-designated agencies) who oversee each site under the Superfund law favor the change because it would increase the resources available at the sites. They

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could spend more freely because they would avoid much of the scrutiny that litigation creates. The rule change would reduce the ability of those from whom costs can be recovered to protest successfully against charges that are, in EPA's words, "unnecessary or unreasonable." For officials, the rule change would be the equivalent of a larger, less restrictive budget. Embarrassing questions about outrageous expenditures would seldom be asked, because the reduced reporting rules would make detailed examination of site charges, by PRPs or by the courts, nearly impossible. Those rules also reduce the pressure on the EPA to control expenses. To the extent that incentives matter, that will lead to higher costs, defeating at least part of the

purpose of the rule change.

### The Size of the Superfund Program

There is no doubt that Superfund operates, however well or badly, on a grand scale; thus, its problems also tend to be large. When the Comprehensive Environmental Response, Compensation, and Liability Act (better known as CERCLA or Superfund) was passed in 1980, it was budgeted at \$1.6 billion. In 1986, the Superfund Amendments and Reauthorization Act (SARA) increased funding of the program to \$8.5 billion. Another \$5.1 billion was added in 1991, bringing the total authorized expenditures to \$15.2 billion. The EPA estimated in 1992 that for sites already on the National Priority List, \$27.2 billion would be needed, not including expenditures by responsible parties at the sites. A report later that year by the Government Accounting Office (GAO) to the EPA administrator indicated that total spending from the Superfund on those sites could be much larger.

Independent projections of total costs, including expenditures on all sites, both by the EPA from Superfund and by responsible parties at the sites, run still higher. Paul Portney of Resources for the Future has estimated those costs at \$96 billion. Milton Russell, E. William Colglazier, and Mary R. English, all of the University of Tennessee, in a comprehensive report on hazardous waste remediation costs in the United States, project that the cost of Superfund cleanups over the next 30 years will be between \$106 billion and \$303 billion. They place their "best guess" estimate, under current policy, at \$151 billion. They also point out, however, that a change in policy from the current emphasis on permanent site cleanup to one that would more frequently allow containment of wastes could save nearly half of this amount without significantly increasing expected risks to human health or the environment.

### Sources of Superfund Inefficiency

Why is Superfund so maligned, and why do so many analysts of every political stripe corroborate these criticisms? The answer lies in the program's incentive structure. Under usual liability rules before Superfund, site owners are accountable for damage done to neighboring people and property. They are forced to balance the cost of added waste remediation and containment measures against the increased liabilities that poten-

tially result from not spending that money. In that system, it is true that "polluter pays," once a serious threat or wrongful damage has been demonstrated. But under Superfund actual harm is irrelevant. The rules are such that cleanup of industrial sites to the standard of drinking water purity, even when there is little or no reason to do so, is frequently mandated under Superfund. The only burden of proof is to show that potentially harmful chemicals are present. A similar lack of attention to pollution damage is present on the tax side, incidentally, as Superfund taxes on petroleum and chemical producers are levied not on harm done, or pollution produced, but rather on the quantity of useful products that are manufactured.

Another problem for Superfund is that organized political interests can push for (or against) specific cleanups and specific types of cleanup. For example, local groups often oppose incineration as a way of cleaning up a Superfund site; their political clout may determine the course of remediation (or lack of it) regardless of the technical merits and costs of incineration. Others may promote complete soil and water purification, even when containment would be cost-effective in protecting human health, the primary goal of the Superfund. Such pressures can limit the choices available to Superfund program decisionmakers, as can budget constraints.

Such pressures are not unusual in federal programs. What sets Superfund apart is EPA's ability to finance a large and growing portion of its program activities by cost recovery from the PRPs. These are individuals or, more often, companies that have been linked in some way to the placement of wastes or to their management at a Superfund site. They are saddled with retroactive, strict, joint-and-several liability for remedial actions deemed necessary under Superfund. In short, each PRP at a site is potentially held responsible for all the expenditures associated with that site, regardless of degree of fault.

The EPA's Superfund reports show that cost recovery from PRPs has been growing as a proportion of costs. For example, for remedial actions that were begun between fiscal years 1980 and 1986, PRPs paid 30 percent of the costs. However, for remedial actions that began in fiscal 1991, PRPs paid over 60 percent of the costs.

The cost recovery process enables EPA to order billions of dollars in expenditures beyond those

which could be purchased with funds budgeted by Congress. With this extra cash pouring in, Superfund decisionmakers do not have to choose among alternative uses for a fixed budget, nor must they produce, as a private seller would, added value commensurate with added expenditures. They can recover virtually any amount that they spend on remediation. In fact, the EPA states (in its proposed rule) that there is "no statutory dollar limit" to the response actions that it may require. Government professionals eager to force additional risk reduction at the sites that they oversee under Superfund have little incentive to care about the costs of what they mandate.

As a result, according to many studies, such mandates have included costly cleanup at sites that

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pose little danger (often by EPA risk estimates, and even more frequently when risk estimates are recalculated using EPA numbers but removing explicit biases), and cleanup methods that provide little or no risk reduction per million dollars spent. To justify cleanup actions, Superfund decisionmakers typically estimate the risk of each site prior to remediation using strongly biased estimates and interpretations of the many variables. It is typical in Superfund risk analyses to use the 95th percentile value for each of several statistically estimated parameters in place of the mean value, a process that grossly overestimates the risks. In addition, for contractors at Superfund sites, EPA has provided so little cost control that it has been severely criticized by independent reviewers such as the GAO. One of GAO's several reports on this topic was entitled "Superfund: EPA Has Not Corrected Long-Standing Contract Management Problems."

In short, billions of dollars are being spent to investigate and clean up many sites which, by any unbiased assessment, pose minuscule risks to human health. Previous articles in *Regulation*, as well as internal documents such as EPA's report, *Unfinished Business*, verify this problem. More often than not, Superfund programs mandate remedial actions that, in terms of risk avoided (or

**EPA Indirect Cost Rates by Region**  
(Cost per hour of direct labor)

	Fiscal Year					
	1983	1984	1985	1986	1987	1988
Region 1 . . . .	\$237	\$192	\$188	\$255	\$244	\$303
Region 2 . . . .	245	232	220	256	240	361
Region 3 . . . .	228	212	217	347	318	376
Region 4 . . . .	289	286	270	330	296	374
Region 5 . . . .	171	199	180	239	251	331
Region 6 . . . .	200	187	208	271	269	320
Region 7 . . . .	185	184	157	198	197	333
Region 8 . . . .	383	162	161	176	178	295
Region 9 . . . .	148	145	138	206	211	326
Region 10 . . . .	177	178	229	308	270	269

Source: *Federal Register* Vol. 57, No. 152 (August 6, 1992): p. 34755.

human safety increased), are not worth the money.

Right now there is little check on excessive spending by the EPA on Superfund sites. The only check is in the courtroom when PRPs challenge EPA expenses. The EPA has itself said that "[t]he

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courts, rather than EPA, will make the ultimate determination of what response costs parties may recover." But even that weak spending constraint would be significantly reduced by the proposed rule change concerning "Recovery of Costs for CERCLA." Public comments have been received and the proposed rule change is still under consideration. The rule change would remove still more Superfund spending from the budget process. By reducing PRPs' access to detailed spending records, the new rule would further reduce the control of project costs.

### **Cost Effectiveness and Superfund**

The EPA's preamble to the proposed rule makes an extraordinary claim: that defendants in cost

recovery actions "cannot avoid payment of United States' costs on the grounds that such costs are 'unnecessary' or 'unreasonable.'"

Furthermore, the United States "is entitled to recover its proportionate overhead expenses, which comprise a large portion of Superfund expenditures." In its proposed rule, the EPA actually spells out what those indirect costs are (see chart). For example, in 1988, the overhead or indirect charge per employee-hour worked at the site was \$303 per hour in Region 1. In other words, the PRP would be expected to pay, in addition to the actual hourly charge incurred in cleanup (or related expense), a \$303-per-hour charge to cover the EPA's indirect expenses. That rate applies in Region 1 whether the hour of work was done by an \$8-per-hour typist or a \$30-per-hour engineer. Across EPA's 10 regions, the average of the published indirect cost rates is even higher—\$328 per hour.

Those indirect costs include the salaries of regional and national EPA officials to the extent that their time could be attributed to the Superfund program. In principle, all of EPA's Superfund costs, retroactive to 1983 and excluding federal sites, could be covered by the cost recovery from PRPs at Superfund sites. Potentially, the entire Superfund program could be off-budget. In other words, industry taxes paid into the Superfund merely amount to seed money for a program that has no statutory limits, that is controlled by the EPA, to be funded ultimately by PRPs, who would be sharply limited in their ability to challenge cost recovery assessments, even in court. Industry PRPs, understandably, are not pleased. The American Mining Congress's comment on the proposed rule stated that "Granting authority for EPA to recover a much broader range of indirect costs is tantamount to giving a blank check to Imelda Marcos before she shops in a Fifth Avenue shoe store."

Just what costs could be passed through without challenge under the new rules? Public statements during the comment period brought to light seemingly egregious expenditures claimed in cost recovery actions. For example, one comment included a deposition from a 1990 federal district court case involving DuPont and other PRPs at a Superfund site in Michigan. Cost recovery was being sought for "miscellaneous expenses" from DuPont and other PRPs in connection with the Superfund site. Among the

"miscellaneous expenses" was the price of phone calls to several 900 numbers published in *Penthouse* magazine promising, for example, the "intimate sexual pleasure of Emmanuelle X."

GAO reports corroborate the lack of EPA controls on how Superfund money is spent. In March 1992, the GAO reported on its investigation of excessive charges made by one of the EPA's largest Superfund contractors, CH2M Hill. It found that CH2M Hill had charged EPA for providing clients with tickets to sporting events, supplying alcohol at company parties, and paying social club dues. The EPA inspector general in 1992 found that CH2M Hill had received \$21.4 million in ineligible or unsupported charges between 1987 and 1988.

Less flamboyant, perhaps, but equally important are the comments of the accounting firm Price Waterhouse. Writing for that firm in response to the proposed rule, Robert J. Rock noted that in general, "the invoices paid by the EPA lack evidence that the EPA reviewed or even spot-checked the invoice for accuracy and appropriateness." He cited dubious charges for travel to the Superfund site (the travel was charged, but there was no indication that any time was spent on the site), "cut-off" errors, in which the EPA included costs outside a specified time period, and "duplicate charges from different agencies . . . for the same type of work." Rock cited a specific cost recovery matter in which, "by reviewing supporting documentation, it was discovered that the EPA charged sample analysis costs from an unrelated site, which resulted in an overcharge of \$400,000 to the wrong party." In conclusion, Rock stated: "These types of errors would not have been discovered if the EPA's proposed rules for documentation had been in place at the time of our review."

EPA Administrator William Reilly said in 1992 that inadequate cost controls were a "systemic, pervasive, systemwide problem." That situation would be exacerbated by the proposed rule. Chairman of the House Ways and Means

Committee on Oversight, Representative J. J. Pickle (D-Texas), said just six days after the proposed rule was published that if the EPA "can't make the Superfund program work efficiently and effectively to eliminate the health risks posed to the public, we ought to scrap the program and start over."

What would constitute a better policy? When a hazardous waste site presents an actual health problem, and when those responsible for the problem can be found, then the old common law liability remedies should be sufficient. If no responsible (and solvent) party can be found and held accountable, then perhaps those facing the problem should be helped through a government program. However, people facing many other problems put forth claims for public assistance also. But it should be remembered that hazardous waste problems are generally local; a role for the federal government, as opposed to local or state government, is difficult to justify. Perhaps it should be limited to the provision of technical expertise, of the sort that federal agencies commonly provide to police departments. The case for a federal Superfund is weak. Its performance to date strongly reinforces the notion that the best idea might be simply to scrap the program.

#### **Selected Readings**

Landy, Marc K., Roberts, Marc J., Thomas, Stephen R. *The Environmental Protection Agency: Asking the Wrong Questions*. New York: Oxford University Press, 1990.

Russell, Milton, Colglazier, E. William, English, Mary R. *Hazardous Waste Remediation: The Task Ahead*. Knoxville: Waste Management Research and Education Institute, University of Tennessee, 1991.