S. HRG. 106–322

SUPERFUND PROGRAM COMPLETION ACT OF 1999

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 1090

A BILL TO REAUTHORIZE AND AMEND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, LIABILITY, AND COMPENSATION ACT OF 1980

MAY 25, 1999

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C O N T E N T S

SUPERFUND PROGRAM COMPLETION ACT OF 1999

TUESDAY, MAY 25, 1999

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m. in room 406, Senate Dirksen Building, Honorable John H. Chafee (chairman of the committee) presiding.

Present: Senators Chafee, Inhofe, Baucus, Crapo, Lautenberg, Smith and Voinovich.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. We want to welcome everyone this morning. We've got a long series of witnesses, so we're going to move right along.

Tomorrow we had the Administrator scheduled to be here plus GAO as witnesses. I think what we'll do tomorrow is not have the hearing. But because there are possibilities of working something out here, and at the suggestion of the Administrator, we'll have a meeting with the Administrator, myself, Senator Smith, Senator Lautenberg, Senator Baucus, and see if we can't work something out here. I think that would be a worthwhile proposal.

The Administrator has suggested it, Senator Baucus has mentioned it, and I think it presents possibilities of resolving this situation. We have a bill in, the Republicans do, as I understand, the Democrats on the committee have or will introduce a bill. And let's see if we can't reach some kind of a compromise and get on with this. We've spent so much time over so many years.

Senator BAUCUS. Mr. Chairman, I compliment you for that decision. I think it will help us achieve a bipartisan Superfund bill. I'm not saying that will necessarily happen, but giving us the opportunity to talk over it with the Administrator and also have a little more information before us for the next hearing, particularly with respect to cost and some other matters. I think that will be very helpful and will likely work out a lot of the various issues that are before us.

So I thank you for making that decision.

Senator CHAFEE. OK, now I have a statement which I'll put into the record, and I'll encourage others to do likewise.

[The prepared statement of Senator Chafee follows:]

STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Good morning. I am pleased to begin 2 days of hearings on S. 1090, the "Superfund Program Completion Act of 1999." I thank Senator Smith for his leadership on Superfund and his help in crafting a bill which focuses on areas where bipartisan consensus is achievable this year.

S. 1090 includes many provisions that have enjoyed widespread bipartisan support in the Senate, provisions included in bills supported by Democrats and Republicans over the past 6 years. Working together with Senators Baucus and Lautenberg, I am confident we can effect real legislative reform on some of Superfund's more immediate problems.

S. 1090 will provide $100 million in grants for State, tribal and local governments to identify, assess and redevelop Brownfields sites. It protects prospective purchasers of contaminated sites, innocent owners of properties adjacent to the source of contamination, and innocent property owners who exercised due diligence upon purchase.

Our bill exempts small businesses and contributors of very small amounts of hazardous and municipal solid waste. S. 1090 limits the liability of larger generators or transporters of municipal solid waste, as well as owners or operators of co-disposal landfills where municipal solid waste is disposed. The bill limits the liability of so-called de minimis parties, as well as municipalities and small businesses with a limited ability to pay.

Cleanup is complete or underway at over 90 percent of the sites on the current National Priorities List. While EPA is cleaning up the sites at a rate of 85 per year, only an average of 26 per year are listed. In 1998, GAO surveyed the States and EPA about the 3,000 sites identified as potential NPL sites. Of these sites, only 232 were identified as likely to be listed on the NPL. Clearly, this program will be getting smaller.

S. 1090 requires EPA to plan how it will proceed at those 3,000 sites. We know that most of these sites will be cleaned up by States, not by EPA. Under S. 1090, new NPL listings must be requested by the Governor of the affected State.

The bill allows the program to be funded from either general revenues or the Trust Fund. Senator Smith and I have said that the Superfund taxes should not be reimposed absent comprehensive Superfund reform. If EPA improves its cost recovery performance and the Trust Fund balance exceeds levels needed to fund liability relief, it can be used for Superfund cleanup.

I cannot understand why anyone would fail to support this bill. It accelerates Brownfields redevelopment and strengthens State programs. It limits or eliminates liability for many parties caught in Superfund's broad liability net, and it does not undermine the "polluter pays" principle, but instead strengthens it.

The committee will markup S. 1090 soon after returning from the Memorial Day recess. It is my hope that the bill will be ready for floor action prior to the Fourth of July. I look forward to working with committee members and the Administration as we focus on the future of the Superfund program.

Senator CHAFEE. Let me just say that I think we've got a good bill. I suppose that's not unusual, to expect somebody who's sponsoring a bill to think it's a good bill. I don't think that will make me unique.

But what our bill does is it accelerates brownfields redevelopment, strengthens State programs, limits or eliminates liability from any parties caught in Superfund's broad liability net, and doesn't undermine the polluter pays principle, but strengthens it.

So I will ask that this statement go into the record. If others have statements they'd like to put in the record, now is a good chance.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Mr. Chairman, I have a statement which is several pages which I will also put in the record. But I want to make a couple of points. First, I appreciate the provisions in your bill which are obviously intended to help move toward a compromise.

And I think we have an opportunity here to find that bipartisan compromise.

A couple of points, though, there are a couple of issues that have to be dealt with. The relationship between State voluntary cleanups and the suburban program referred to as Finality, we have to find some way to deal with that. Because it does make sense, it seems to me, not to give carte blanche wholly to States but rather have some kind of a good resolution of that issue.

Second, the Fair Share Allocation System in your bill I think has to be examined to be sure that it does not cause more problems than we already have. One is the potential cost of reimbursing parties that might affect the pace of cleanups. We'll look at the details, which are very important.

And also our funding. It looks like the bill will generate some new program costs, such as mandatory allocations and inventory special parcels. These may be good ideas, but they also make cumulatively generate some additional costs. And also the provision in the bill which reduces authorization levels quite sharply, which suggests that the pace of cleanup might be reduced. I don't think that's something that we want.

Also we have to all look at financing. Because the bill does not contemplate any reinstatement of Superfund tax that has previously been associated very definitely with the fund. Because when the Superfund law was enacted, it was enacted with very strong intent to have a fund which would pay for the program. In fact, when President Carter suggested the bill, that was very much a part of what he suggested, and also in the report language that the Congress wrote with respect to the bill, that also was very integral, as part of the program.

So essentially, we want to make sure we get the job done, that is, complete the cleanup, complete it fairly, but make sure we also have the resources to accomplish that objective. And with that, Mr. Chairman, I will conclude my remarks.

[The prepared statement of Senator Baucus follows:]

STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Thank you, Mr. Chairman. To me, S. 1090 presents both good news and bad news.

On a positive note, the bill drops several very contentious provisions that we were unable to resolve last year. I know how strongly Senator Smith feels about some of these issues.

So we recognize and appreciate the step that you and he have taken. This creates an opportunity for us to find a fresh approach to a bipartisan compromise.

If we are to do that, we also need to address the areas where the bill still needs improvement.

First, there are a number of tough issues in the bill. For example, the relationship between state voluntary cleanups and the Superfund program, which is often referred to as the question of "finality." As we know, state programs vary widely in their effectiveness. That is why I believe that a Federal safety net would assure protection of public health and the environment.

But that is an issue, like many others in the bill, that, if we make an earnest, good faith effort, with give and take on both sides, we should be able to resolve.

Second, the fair share allocation system. I agree that we should increase fairness and reduce litigation and other transaction costs. I also agree that orphan share funding is an important way to achieve this goal.

But I have some concerns. One is the cost, especially the cost of reimbursing parties. Another is the potential impact on the pace of cleanups. Finally, like many other issues, the devil is in the details. And I hope this hearing will help answer our questions.

Third, and probably most important. Funding. As we read the bill, it will generate new program costs, such as mandatory allocations, an inventory of separate parcels of land, and a review of all the 3,000 sites in the Superfund data base. These may be good ideas, but they are expensive.

At the same time, the bill reduces authorization levels, sharply. Furthermore, it contains a provision that prevents site cleanup if there is not enough money available to pay companies all of their new orphan shares.

¶These provisions, in combination, may result not in the "completion" of the Superfund program, as the bill's title suggests, but in a sharp reduction in the pace of cleanups, at the expense of thousands of people living near hazardous waste sites.

I know that is not the chairman's intent. And I appreciate the chairman's efforts to get solid data about cleanup costs, something I hope we can begin to resolve with EPA this week.

But, as we go forward, we must be very careful, to assure that this bill provides the funding necessary to get the job done.

I look forward to working with the Chairmen, Administrator Browner, and others to assure this.

That brings me to a final point. Financing the cleanup program.

As I understand it, S. 1090 does not contemplate reinstatement of the Superfund taxes that previously have gone into the Superfund trust fund. Instead, it would fund cleanups almost exclusively out of general revenues.

Some may think that this is a small matter of accounting. I disagree.

Ever since the Superfund program was established, one of its critical features has been the existence of a special trust fund, financed by earmarked taxes.

When this committee reported the first Superfund bill, back in 1980, we described our main objectives. The first was assuring that responsible parties pay for environmental damage.

We went on, and I quote:

> "Second, providing a fund to finance response action where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup and compensation."
>
> "Third, basing the fund primarily on contributions from those who have been generically associated with such problems in the past and who today profit from products and services associated with such substances."

We reaffirmed this in 1986 and 1990. The fund, and the earmarked taxes, have been an integral part of this cleanup program.

Now, we're considering reauthorizing the Superfund program—but without the Superfund. This, to my mind, is unwise and unwarranted.

With the budget pressures we face, we have to find a way to pay for this program.

Mr. Chairman, it is my hope that we can work to resolve our differences over the operation of the program. And, as the process goes on, renew our longstanding commitment to a dedicated trust fund with an assured source of revenue.

I look forward to working cooperatively with my colleagues toward those ends.

Senator CHAFEE. Does anyone else want to put a statement in the record? Senator Inhofe.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. I have a statement to go in the record, so I'll make this very brief. Mr. Chairman, I characterize it in my mind as a kind of good bill, not great. There are a lot of things I'd like to see in here, NRD, many things.

However, I think requiring the Governor's approval before listing an NPL, as a former mayor, I think that's a good idea and I'd like to get as much of that at the local level as possible. I think the fact that you did resist the reauthorization of the taxes is good.

So as it is now, I would support it, but it could sure be a lot better, and I'm hoping that we'll be able to get some amendments and work on this to make it what I consider to be a better bill. I'll submit my entire statement for the record.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JIM INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Mr. Chairman. thank you for holding this important hearing today. You and Senator Smith have done outstanding work in crafting a bill that addresses those issues that can and should be changed within the program.

I know not everyone is happy with your bill, and I too would like to see some amendments added during markup, specifically regarding NRD. But we must not loose focus of our goal. The process is broken and we must fix it in a way that will allow cleanups to take place more quickly and efficiently while continuing to provide adequate protection to the public.

I do want to briefly comment on some aspects of the bill that I think are positive. First, by requiring Governors' approval before listing a site on the NPL, we are putting control back into the hands of the local governments who have the most at stake. As a former mayor, I can appreciate that negotiating with a Governor over a particular course of action would be preferred to negotiating with the EPA. Second, I am happy that you have decided to exempt small businesses, de micromis contributors of hazardous waste, and recyclers, specifically used oil, from liability under Superfund. This helps to level the playing field for those who are least able to afford the costs of cleanups. Finally, I support you and Senator Smith in your effort to resist re-authorizing the Superfund taxes. I agree with the arguments that you laid out in your letter to Timothy Fields at EPA, specifically that many parties who have engaged in their own cleanup effort would be liable for the tax if reimposed. Without sweeping changes to the program, taxes should not be reinstated.

Mr. Chairman, I look forward to hearing from our witnesses today on both their personal experience with Superfund and their views on your bill, S. 1090. Thank you.

Senator CHAFEE. Thank you. Go ahead, Senator Crapo.

OPENING STATEMENT OF HON. MICHAEL D. CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. Thank you, Mr. Chairman. I'll be brief.

I agree that there are a lot of good elements in the bill. As the chairman knows from discussions we've had, there are things I think should be put into the bill that aren't in the bill yet. As Senator Baucus indicated, if we go on and evaluate the issues of funding and financing, namely, the reinstitution of the taxes, if those issues are brought onto the table, in addition to what is now in the bill, then I think we also have to make sure that we finish the job, as Senator Baucus said.

And that job requires that we not only do the good things that are in this bill now, but that we provide a comprehensive reform of the Superfund law, meaning we've got to look at the critical issues of liability and remedy in more detail and natural resources damages in more detail, and make sure that we do the job entirely.

I believe there are lots of good things in this bill, there's a lot that needs to be put into the bill still, especially as we now move into the arena of discussing whether the taxes should be reauthorized.

Senator CHAFEE. Thank you. Senator Lautenberg.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Mr. Chairman, I don't want to be a spoilsport. But first, let me commend you for the proposal that you put out that would have us discussing further some of the concerns or the questions that have arisen.

But also with a matter of this magnitude, I think it is important to have our statements being able to be issued and heard. Because this is a very crowded schedule, and I respect that. I know, Mr. Chairman, as do many, that you've been very anxious to keep the

program going and to make the changes that you deemed necessary.

I have a statement of, I would say not intolerable length, but that's my view. I won't challenge the committee decision to give it, but I put it in the record reluctantly. I think that statements that go in the record are often seen on their way in and never seen again. And that for me, when we're discussing a subject as important as this subject, Mr. Chairman, you and I and Senator Baucus have been working with for 5 years now, and we came very close at one point to having a resolution. It didn't work.

I am concerned about the funding ramp-down. I'm on the Budget and Appropriations Committees. And there's just not going to be enough money to carry on, the cap on the NPL concerns me, the reopening of decisions. There are several things. And because we have an illustrious witness group here, we want to hear what they have to say and we don't want to listen to ourselves, I don't think.

But the fact of the matter is that we lose an opportunity to kind of help set an environment or stage that we'd all like to operate with. There are so many successes with the program as it is that before we change the whole thing, I think we need a fair amount of review. So in respect to you, Mr. Chairman, I will not give the statement at this time. I'll put it in the record and make another opportunity to give it.

[The prepared statement of Senator Lautenberg follows:]

STATEMENT OF HON. FRANK LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Mr. Chairman, we are here again today to consider the reauthorization of Superfund. It has been a very long time since we began this process in the 103d Congress. Yet, during this time, the program has undergone major changes, and major improvements.

In fact, as just about everyone involved in the Superfund program agrees, there have been major strides made in the number and pace of the sites being cleaned up.

In fact, in the 103d Congress, the critics of Superfund raised a number of issues. They asserted that it was too slow, that not enough cleanups were taking place, that there was too much litigation.

Back then, we were seeking solutions which would make the program faster, streamline cleanups, treat parties more fairly and get the little guys out earlier, all while keeping those responsible for the problem also responsible for cleaning it up. This was all within the general goals of achieving more cleanups and therefore providing better protection of human health and the environment.

I am proud of those proposals, and many of us still on this committee, including the chairman, who voted for that bill way back in the 103d Congress should also be proud. Those proposals, although never enacted into law, were adopted administratively by EPA and radically altered the Superfund Program as we know it.

Others have been tested and been improved upon. In general the thrust of this well intentioned bill has resulted in many of the achievements of the current program.

According to a report issued by the General Accounting Office, by the end of this fiscal year all cleanup remedies will have been selected for 95 percent of non-Federal NPL sites (1,109 of 1,169 sites).

In addition, approximately 990 NPL sites have final cleanup plans approved, approximately 5,600 "emergency removal" actions have been taken at hazardous waste sites to stabilize dangerous situations and to reduce the threat to human health and the environment.

More than 30,900 sites have been removed from the Superfund inventory of potential waste sites, to help promote the economic redevelopment of these properties.

During this same time, EPA has worked to improve the fairness and efficiency of the enforcement program, even while keeping up the participation of potentially responsible parties in cleaning up their sites.

EPA has negotiated more than 400 de minimis settlements with over 10,000 small parties, which gave protection for these parties against expensive contribution suits brought by other private parties. 66 percent of these have been in the last 4 years alone. Since fiscal year 1996, EPA has offered "orphan share" compensation of over $145 million at 72 sites to responsible parties who were willing to step up and negotiate settlements of their cases. EPA is now offering this at every single settlement, to reward settlers and reduce litigation, both with the government, and with other private parties.

These are just a few highlights of the improvements made in the program, many drawn from our earlier legislative proposals. Other improvements, such as instituting the targeted review of complex and high-cost cleanups, prior to remedy selection, have reduced the cost of cleanups without delaying the pace of cleanups.

In short, EPA's administrative reforms have significantly improved the program, by speeding up cleanups and reducing senseless litigation, and making the program fairer, faster and more efficient overall.

But despite the fact that this is a program that has finally really hit its stride, we are now faced with proposals from the Majority which could undercut the progress in the program, and which are premised on a goal of closing down the program rather than a goal of cleaning up the sites.

I am deeply troubled by many of the provisions in the Republican bill, which would have the effect of ramping the program down without regard to the amount of site work left to be done.

This bill provides for lowered funding levels, a cap on the NPL, waivers of the Federal safety net, and some broad liability exemptions.

At the same time, it creates a number of new, expensive obligations which would further reduce the amount of money available for cleanup. It also shifts the costs of the program to the taxpayers and would not include an extension of the Superfund tax.

In short, while I am encouraged by the fact that the Republican bill drops some troubling provisions from prior bills, it introduces a whole set of new issues that we cause for great concern.

I think it is very clear that what we need here is a better Superfund program, not a retreat from tackling our environmental problems.

We need a bill that continues to accelerate the pace of cleanups, keeps cleanups protective, reduces litigation and transaction costs, is affordable and does not shift costs to the American taxpayer.

Yesterday, with some of my colleagues, I introduced such a bill. believe that this bill, is in some areas very close to the provisions supported by my Republican colleagues, but differs in some critical areas. It would protect cleanups, reduce litigation and not shift costs to the American taxpayer.

I hope that these are goals we can agree on. And I urge my colleagues to not throw the Superfund baby out with the bathwater.

I look forward to working with my colleagues as we move forward. Thank you, Mr. Chairman.

Senator CHAFEE. Good, fine. Thank you very much.

We've got 13 witnesses this morning, and we've obviously got to move along at a fair nonetheless brisk pace.

First we welcome the Honorable Jim Marshall, Mayor of Macon, Georgia, on behalf of the U.S. Conference of Mayors. Mayor, won't you proceed?

STATEMENT OF HON. JIM MARSHALL, MAYOR, MACON, GEORGIA

Mr. MARSHALL. Thank you, Mr. Chairman.

Mr. Chairman, I represent the United States Conference of Mayors. The conference represents more than 1,000 cities of population 30,000 and over and the total U.S. population in those cities is in excess of 119 million. Every single one of those cities suffers from the brownfield problem, Mr. Chairman.

We have a report done by the United States Conference of Mayors, I believe it's part of the record. One hundred 80 cities responded to the request for information about brownfields, and you'll find the information in the report. Nineteen thousand sites,

just the 180 cities, 19,000 sites, were identified, 178,000 acres are affected by this. Mr. Chairman, that's only 180 cities. There are some 2,000 municipalities in the United States that are not represented by this survey.

So the problem, Mr. Chairman, is enormous. I can speak of the problem from my own personal experience as the Mayor of Macon, Georgia. But Macon's experience is replicated across the United States, there's no question in my mind about that.

When the conference first made an attempt to do a survey on brownfields about 3 years ago, I received the request for information and I sent it along to the key person in the middle Georgia area responsible for economic development and said, could you help me out, could you fill this out for me. He got back in touch with me and he said, I don't think you want to be on this list.

So 3 years ago, we had the key economic development guy in the middle Georgia region saying, let's keep it quiet. We know we have these problems but we don't want to be on this list.

Last year, instead of sending the survey to our economic development guy, I sent the survey to the head of our planning and zoning commission, the executive director, the person who's been in place for the last 20 years, a key planning character in the middle Georgia region. I said, would you fill this out.

He sent it back to me. He identified one site. Again, not interested in being on somebody's list.

This year, I managed to persuade the players that would respond and we've identified seven sites with 100 acres. The reality is, in Macon and other cities, it's far more than seven sites and far more than 100 acres.

But it's a problem that everybody wants to ignore, everybody wants to keep quiet. The effect of this problem, Mr. Chairman, and I believe, I co-chair the Mayors and Bankers Task Force for the Conference. And the mayors and bankers are focusing on brownfields right now. I believe Senator Helmke, who is my co-chair, testified a couple of weeks ago.

Senator CHAFEE. He did, yes.

Mr. MARSHALL. I suspect he was very effective in trying to describe the problem. I don't want to go over ground that he's already tread.

But the problem here is one that exacerbates greatly our sprawl phenomena. You have many owners of properties that are lying fallow in the inner city, already serviced by the infrastructure that's necessary in order for them to be very productive pieces of property.

But they sit there because the owners of those properties are not interested in getting the bad news. It's kind of like, I'm not going to go see the doctor, even though something's wrong with me, because I'm worried the doctor might tell me I've got cancer. The same thing is happening with a lot of owners.

As a result of that, a lot of this land in the center of our cities is lying fallow because the owners don't even want to know. They don't want to find out that this land that might be worth current market, $5,000 an acre, is going to cost $20,000 an acre to clean up.

So an initial problem is how do you get the holders of these properties off dead center. It's easy enough for me to do where housing is concerned. I took over as mayor about three and a half years ago. We doubled our housing inspections force. I changed judges, I moved the housing inspector's unit to another department. We changed management, we gave uniforms, we went from card files to computers and digital cameras. We do systematic inspections of low-income housing in the city of Macon, distressed neighborhoods.

The effect of that has been to literally tenfold increase the number of citations that are given. We've had a dramatic improvement in the quality of substandard housing in Macon. Well over 2,000 units have been repaired, 500 units have been demolished. And it's because owners are forced to get off the dime and do something with these properties instead of simply just letting them sit there.

That description is analogous to the problem we have right now with an awful lot of underutilized or unused properties in our cities. It is simply sitting there, and there is no impetus for these owners to get off the dime.

Now, even if an owner is interested in disposing of the property, the flip side of the coin is nobody's interested in picking up the property. The concern, of course, is liability if you buy these properties and they wind up being contaminated, or you find out they're contaminated. You've purchased the property, you've purchased the contamination problems.

It would be wonderful if there would be finality. That would be a very big step forward, finality with respect to liability. And protection for innocent purchasers. Those two things would cause an awful lot of lenders and an awful lot of potential purchasers and developers to have a great deal more interest in coming into our inner cities and taking care of these underutilized properties.

The problem we have right now, Mr. Chairman, is that the land values in our inner cities, not necessarily inner city Chicago, where the economics of a particular piece of land might be such that the cleanup costs can be covered as part of the transaction, for most of the cities across the country, we're being held hostage by a legitimate interest in having these properties cleaned up. Because of that legitimate interest, buyers are not interested in buying, sellers are not interested in discovering, potential sellers are not interested in discovering the real problems with their property. The cities are being held hostage.

The effect is to cause the economics to continue to collapse. And you see sprawl phenomena like you see in the Atlanta region, I'm sure everybody here is familiar with the problems in Atlanta. That in the long run is going to exacerbate our environmental problems.

Mr. Chairman, I know that you are very well known to be very effective in crafting bipartisan efforts to solve problems like this. And I know this committee has worked for years to try to solve this problem. I would encourage the Chairman to use his talents to pull folks together on a bipartisan basis to try to at least give cities some relief.

If you can't solve all of the problems, a piece of legislation like this one, loaded down with the kinds of arguments that you all have been having with one another now for 6 years, is not going to go anywhere. If it's possible to craft some legislation that's bipar-

tisan and will meet some of the concerns that the Administration has, so that we can get something done this year, the U.S. Conference of Mayors would be very much appreciative of that.

If I could, Mr. Chairman, I'd like to address just one more issue. I might be stealing a little bit of Mayor Suozzi's thunder here. Liability for municipal landfills. Typically the problem has been caused by a former set of taxpayers. We are so mobile in the United States that you've got an old set of taxpayers who typically cause the problem and now, unless some relief is granted, the current set of municipal taxpayers are expected to deal with that problem.

Well, I can tell you, Mr. Chairman, if that means raising taxes in the inner city to deal with these old landfills, the effect is going to be to simply drive people away from the inner city. That's exactly the opposite phenomena we would all like to see happen. We shouldn't be having higher taxes in the inner parts of our metropolitan areas. It should be lower. The financial incentive should be to push to the middle, not to push to the periphery. In the long run, that's healthy for us.

To the extent that this committee can see its way to giving some relief where municipal landfill liability is concerned, what it effectively does is lessen or eliminate yet one more reason for us to spread out. I thank you very much, Mr. Chairman, for the opportunity to testify and I would be happy to respond to questions.

Senator CHAFEE. Thank you very much, Mayor.

And now Mayor Suozzi, Mayor of Glen Cove, New York.

STATEMENT OF HON. THOMAS SUOZZI, MAYOR, GLEN COVE, NEW YORK

Mr. SUOZZI. Mr. Chairman, thank you very much. Senators, thank you very much and good morning.

My name is Tom Suozzi, I'm the mayor of the city of Glen Cove, New York. It's a small city on the north shore of Long Island with about 25,000 people. We cover an area of about seven square miles. I'm pleased to be here to testify today regarding the needs of local governments for municipal Superfund liability relief, the narrow issue that Mayor Marshall referred to.

I'm a member of the U.S. Conference of Mayors and endorse everything that Mayor Marshall said. But I'm here today representing eight other national municipal organizations that worked together for many years to seek municipal Superfund liability relief, so that we can resolve our involvement at these toxic waste sites, reduce litigation and transaction costs, and get on with the business of cleaning up and recycling these blighted sites into productive redevelopment in our communities.

These organizations include the American Communities for Cleanup Equity, which was formed nearly a decade ago to address these municipal Superfund issues, as well as the American Public Works Association, the Association of Metropolitan Sewage Agencies, the International City/County Management Association, the International Municipal Lawyers Association, the National Association of Counties, the National Association of Towns and Townships, and the National League of Cities. I have never really had this much impact before.

[Laughter.]

Mr. SUOZZI. Collectively, our organizations represent thousands of cities, towns, counties and local agencies across the United States. We are responsible for the health, safety and vitality of our communities and at the same time for fulfilling a very fundamental governmental duty to provide for municipal garbage and municipal sewage collection and disposal.

We want to thank you, Senator Chafee, for your leadership and your commitment to addressing the issue of municipal liability and Superfund legislation. We also want to commend Senator Lautenberg, our neighbor in New Jersey, for championing Superfund relief for local governments for many long years.

Indeed, as you know, there has been broad bipartisan, multi-stakeholders consensus on this municipal Superfund relief issue for many years. We hope that the parties will continue to work together to get this municipal Superfund issue resolved this year. No matter what other issues of contention may stand in our way, we must pass something this year to try and get us some relief.

Local governments have a very serious problem. We've been saddled with years of delay, millions of dollars of liability and legal costs under the Superfund law, simply because we owned or operated municipal landfills or sent municipal solid waste or sewage sludge to landfills that also received industrial and hazardous waste. So a simple part of our jobs is to get rid of our garbage and sewage.

Local governments have faced costly and unwanted contribution suits from industrial Superfund polluters seeking to impose an unfair share of costs on parties that contributed no toxic wastes to these so-called co-disposal landfill sites. We estimate that as many as 750 local governments at 250 sites nationwide are affected by the co-disposal landfill issue.

The costs that our citizens bear as a result are unfair and unnecessary. Local governments are in a unique situation at these co-disposal sites. First, municipal solid waste and sewage sludge collection and disposal is a governmental duty. It is a public responsibility to our communities that we cannot ignore, and we make no profit from it.

Second, the toxicity of municipal solid waste and sewage sludge has been shown to be significantly lower than conventional hazardous waste, and as such represents only a small portion of the clean-up costs at these co-disposal landfills.

The city of Glen Cove has experienced the threat of costs and delay associated with these Superfund issues on a more broad basis. I said we're located on the north shore of Long Island. Glen Cove has 10 miles of beautiful waterfront, of which 9 miles are beautiful, pristine property with 300 acres of nature preserves, 3 public beaches and beautiful Gold Coast mansions. At one time, J.P. Morgan lived in our city, F.W. Woolworth lived in the city of Glen Cove. It cost $2 million to build his staircase in 1917.

The city of Glen Cove is of course now a very diverse city with the very wealthy, the very poor, and everyone in between, with hundreds of units of public housing, $2.8 million in Section 8 housing.

One mile of our waterfront, as I mentioned, there's ten miles of waterfront, one mile of our waterfront is the original industrial area of the city that is now home to Superfund sites, State and Federal, and several brownfield sites. The best example I give is of the LiTungsten plant, which is now home to contaminated low level radioactive waste. At one time, LiTungsten was the largest job provider in the city of Glen Cove, the largest taxpayer. They gave money to the local Little League baseball teams. They gave money to the local hospital.

Now that property sits there, abandoned and dangerous, polluted. No jobs, no taxes, no support for the local community and drawing away from the health and safety of our residents and our reputation. This contamination, including the dumping of radioactive and hazardous waste at an adjacent site, there was once a municipally owned open dump, is now part of that Superfund site.

Our objective is to recycle and reuse these properties and put them back to productive use and make it into a regional tourism destination, the main spot between Manhattan and the Hamptons. The process of resolving the city's Glen Cove municipal liability at this site has taken many years and many dollars.

In addition to the sites I have mentioned, at a different Superfund site, the Kin-Buc Landfill in New Jersey, the city of Glen Cove was sued by industrial polluters seeking an unfair share of contribution because our city had transported municipal trash to that site. The legal process was likewise lengthy and costly.

That's why Glen Cove supports legislative enactment of a municipal Superfund liability policy that will provide a simple, expedited and fair method of resolving a local government's liability associated with these co-disposal Superfund sites.

Again, the city of Glen Cove has been recognized as one of only 16 national showcase brownfields communities for its proactive effort to clean up and redevelop its contaminated waterfront, and will continue to do so. However, the cost and delay associated with the threat of Superfund co-disposal litigation has hindered communities across the Nation like Glen Cove from focusing their energy on the vital cleanup, reuse and recycling initiatives that we need to be pursuing.

Indeed, there is a broad consensus that municipalities need and merit liability relief. For nearly a decade, our coalition has worked with you and other Members of Congress and with the U.S. Environmental Protection Agency to formulate a reasonable solution to the problem. In February, 1998, with our support, the EPA finalized an administrative settlement policy to limit liability under Superfund for generators and transporters of municipal solid waste and sewage sludge and for municipal owners and operators of co-disposal landfills.

We continue to support this reasonable and fair EPA policy and commend EPA for playing a proactive role in seeking to address a very complicated problem. However, as fair and appropriate as the administrative policy is, we strongly believe that legislative action to resolve the municipal Superfund liability issue is necessary and justified.

First, the EPA policy is only a policy, non-binding on the agency and subject to change or challenge. Second, this policy has been the

subject of litigation and the real threat of future litigation involving local government remains. While we continue to defend the EPA policy in court, as we did in Federal Court in 1998, and to advocate its use by our members, we believe that a change in Superfund law to address this issue is necessary to reduce the costly litigation and delay that municipalities may continue to face at these co-disposal sites.

Third, we believe legislative enactment of the municipal Superfund liability provisions will give localities the certainty and confidence to make use of this settlement mechanism, much as the codification of lender liability Superfund provisions have provided certainty for the banking industry.

Senator CHAFEE. Mayor, I wonder if you could just summarize these last points that you've got here. Your entire statement will be in the record.

Mr. SUOZZI. Let me just say that it's very important that we get some work done this year, Senator. My comments can be submitted to the record for your reading. The main issues have to do with these co-disposal liability provisions, and second, money for brownfields assessment and remediation and identification, as Mayor Marshall pointed out earlier.

I want to thank you very much for the opportunity to testify.

Senator CHAFEE. I'm familiar with your city, my wife comes from Bayville.

Mr. SUOZZI. Really?

Senator CHAFEE. Yes.

Mr. SUOZZI. Well, come by and visit us. I'll give you some upfront testimony. Have you been back to visit at all?

Senator CHAFEE. Yes, I've been down there lots of times.

Mr. SUOZZI. Oh, please stop over and say hello. I'll give you the grand tour. We'll take you to F.W. Woolworth's mansion for lunch.

Senator CHAFEE. That must be some staircase he's got there.

[Laughter.]

Mr. SUOZZI. We're afraid to walk up it sometimes.

Senator CHAFEE. I want to thank both of you very much for your testimony. I think your points are very valid ones. Mayor, I think you're right when you say the municipalities are reluctant to list their contaminated sites. They just don't want to do it.

So what we see in reports and indeed in the material you submitted is just a cursory view of the whole thing. It's much more serious than even your statistics would show.

Mr. MARSHALL. That is certainly true, Mr. Chairman.

Senator CHAFEE. Senator Baucus, do you have a question?

Senator BAUCUS. Yes, I want to compliment Mayor Suozzi for your bipartisan tone in your statement. I appreciate it very much.

Mayor Marshall, I am curious as to how we can get at this problem. What's the solution? That is, where a city has sites and wants to clean up on its own pretty much, worried about potential NPL listing, what the EPA might do. How do we get at this? It's a very real problem, obviously, so how do we solve it?

Mr. MARSHALL. Senator, I think the problem goes well beyond the NPL issue. And our focus is on brownfields. In many instances, most, all but 1 percent of the brownfields, I'd say, don't merit NPL listing.

But you have sellers who know that given the circumstances of the land around the particular area, know that this land isn't going to command the market value that will justify the threat of potential substantial cleanup costs and litigation costs, etc. So they may not even fence it, they'll just let it sit there.

Now, how do you get past that? I don't have the answer to this. The provisions of the different bills that I have seen, and I haven't read the bills themselves, I've simply been given summaries as a mayor, and I'm the CEO, it's a strong mayor form of government, I've got a ton of things to do. So I can't claim to have the kind of expertise that you all have.

Giving innocent purchasers relief will help somewhat. Giving finality, that helps a lot. I can tell you, that helps a lot. Because at least the parties going into a transaction know that at some point, they'll understand what the exposure is and they won't have to worry about some change on down the road. So that's very helpful also.

But that doesn't address what I consider to be hundreds upon hundreds upon hundreds of thousands of acres that are simply going to sit there because the seller is not interested in finding out that he or she or it has cancer. It kind of knows, because it knows the past history of the property, knows also that the economics probably won't justify the potential cleanup costs.

So all I do is I use an analogy to what we do, where substandard housing is concerned. We do systematic code enforcement. We go block by block, we look at the exterior properties. If the exterior justifies it, we'll knock on the door, see if we can inspect. We have not yet gone to get a warrant to inspect a house, but we would do that if need be.

Once the owner of the house is cited for a violation, that starts a process that leads to the house being cleaned up and maybe being put back on the market.

Senator BAUCUS. What do you do in the exceptional cases—I think we have to at least consider this question—when the local community decides to go ahead, clean up, and under some structure where there is no liability for the landowner or the seller or the purchaser, but where, oh, my gosh, it turns out that we have another Love Canal on our hands? What do we do in those cases, where I think justifiably, the EPA would figure, this is an NPL site, or this is something that warrants Federal intervention? How do you handle those exceptional cases?

Mr. MARSHALL. If you're asking, and I'm not familiar with Love Canal in detail——

Senator BAUCUS. Something went wrong that was unanticipated at the time.

Mr. MARSHALL. At the time that finality was given.

Senator BAUCUS. Exactly.

Mr. MARSHALL. Parties didn't see, well, frankly, I think that's a risk we're going to have to take. And you might want to distinguish between old cases that have already been resolved by State environmental protection agencies or by the EPA, and say with regard to those old cases, no, we're not going to give finality. Because under the regime that existed at the time the parties dickered through this particular problem, be it Love Canal or the site in

Denver I've heard about, finality was not an issue. We could go ahead and agree and know that we could come back later and do something here.

Distinguish between the old cases and new cases. If you started effective the date of the legislation, the effective date of the legislation and went forward, and whenever State or Federal EPA-EPD cuts a deal with a potential purchaser and says, this is what you're going to be expected to do and that's all you're going to be expected to do, I would think that, take the chance, and give finality in those instances. Because the payback to all of us will be far greater than the few instances in which EPD-EPA will make a mistake and later worry about it, you know, say, oh, my gosh, we shouldn't have done it that way, really more cleanup is needed, or we capped it, we shouldn't have capped it, we should have put trees out there, whatever it is,

Knowing that finality attends the decision it seems to me will cause the administrators to be pretty careful in making that decision, and the risk is warranted, it seems to me.

Senator BAUCUS. It's an interesting question, and there's no final solution to this one, obviously.

Mr. MARSHALL. So to speak.

Senator BAUCUS. In the sense that if there were some huge exceptional case, that would not be the end of it. It would not be final. Somebody would file a lawsuit, and we'd be back in the soup again in some way or another.

So I'm just trying to find some way to achieve your objective of certainty, but at the same time, in some reasonable way, I'm not saying——

Mr. MARSHALL. Well, I guess my thought, Senator, and it's just off the top of my head, is that going forward, not going back, but going forward, administrators knowing that finality attends the decision, it seems to me, would be more careful in making the decision. And then if they made a mistake, it seems to me that there would be some cost that might wind up being borne by the Federal or State Government to do additional cleanup work, because there's nobody there to go after at that point.

Senator BAUCUS. I understand that. But I think that still there should be some criteria, some something at the front end, I don't know what it is.

Mr. MARSHALL. Before you can give finality?

Senator BAUCUS. Before there is finality.

Mr. MARSHALL. And that is well beyond my ability to do.

Senator BAUCUS. Thank you.

Senator CHAFEE. Senator Voinovich.

OPENING STATEMENT OF HON. GEORGE V. VOINOVICH, U.S. SENATOR FROM THE STATE OF OHIO

Senator VOINOVICH. First of all, I apologize for being late for the beginning of the hearing, Mr. Chairman, and I ask that the statement I was going to give be inserted into the record.

Senator CHAFEE. Without objection.

[The prepared statement of Senator Voinovich follows:]

STATEMENT OF HON. GEORGE V. VOINOVICH, U.S. SENATOR FROM THE STATE OF OHIO

Mr. Chairman, I'd like to take the opportunity to thank you for conducting this important hearing today on Superfund. I commend the leadership and work that you and Senator Smith have done on this issue.

I strongly believe that the current Superfund law is in need of commonsense reform, as it creates delays in the cleanup process and loss of available funds due to excessive litigation. I support the liability relief that your Superfund Program Completion Act provides for municipalities, small businesses, de minimis contributors, contiguous property owners and prospective purchasers.

In addition, I strongly support the intention to reduce the state cost share to 10 percent across the board for both capital costs and operations and maintenance costs at NPL sites.

Of particular importance to me are the provisions that allow states to release parties that have cleaned up sites under state laws and programs from Federal liability.

I strongly concur with your approach that there should be no requirement that U.S. EPA pre-approve state laws and programs. State brownfields programs address non-NPL sites where the Federal Government has played little or no role.

States are leading the way to cleaning up sites more efficiently and cost-effectively. States average more than 1,400 cleanups per year. And they are addressing approximately 4,700 sites at any given time.

This is helping to revitalize our downtowns, prevent urban sprawl and preserve our farmland and greenspaces. These programs are cleaning up eyesores in our inner cities, making them more desirable places to live. Because they are putting abandoned sites back into productive use, they are the key to providing jobs to inner city people and keeping them off welfare.

Ohio has implemented a private sector-based program to clean up brownfields sites. Ohio EPA, Republicans and Democrats in the Ohio Legislature and I worked hard to implement a program that we believe works for Ohio. Our program is already successful in improving Ohio's environment and economy.

Mr. Chairman, I would especially like to make one thing clear today. I understand that Ohio's voluntary cleanup program has been portrayed to Members of Congress, even to this committee, as an example of a bad state program that demonstrates the need for Federal oversight of state voluntary programs. I could not disagree more.

In almost 20 years under the Federal Superfund program, U.S. EPA has only cleaned up 15 sites in Ohio. In contrast, 77 sites have been cleaned up under Ohio's voluntary cleanup program in 4 years. And many more cleanups are underway.

States clearly have been the innovators in developing voluntary cleanup programs. And Ohio's program has been very successful in getting cleanups done more quickly and cost effectively. For example, the first cleanup conducted under our program the Kessler Products facility, near Canton was estimated to cost $2 million and take 3 to 5 years to complete if it had been cleaned under Superfund. However, under Ohio's voluntary program, the cost was $600,000 and took 6 months to complete. These cleanups are good for the environment and good for the economy.

In particular, I would like to respond to the criticism that Ohio's voluntary cleanup program does not provide adequate opportunity for public participation. This is just outright false. Ohio carefully crafted its program to balance the needs of public participation, but not allow for significant delays in the cleanup process.

The Ohio legislature drafted and debated the legislation which governs Ohio brownfields cleanup. The Ohio EPA then provided public hearings when it set the cleanup standards that "standard" sites must comply with under the law. For more complicated sites, or sites that require air or water discharge permits, the state follows the public participation procedures outlined in the Federal and state laws regulating the issuance of permits. The public is involved in setting the levels permitted to be discharged.

In addition, documents used or developed in connection with a cleanup under the program are retained for at least 10 years and are available to the public on request. Anyone may challenge the Director of Ohio EPA's decision that a site is or is not clean enough.

Mr. Chairman, these are just a few examples. I ask that a summary of the public participation opportunities under Ohio's voluntary cleanup program be submitted for the record along with a copy of my written statement.

Mr. Chairman, Ohio and other states have very successful programs that cleanup sites more efficiently and cost effectively. S. 1090 would help build on their success by providing parties assurances that when they clean up a site correctly, they will

not be held liable under Superfund further down the road. This bill creates incentives for more parties to come forward under voluntary cleanup programs to clean up sites and put them back into productive use.

I look forward to today's hearing.

Senator CHAFEE. In commenting about the question just asked, I think one of the things that is forgotten about in all of this is the enthusiasm that local governments have for cleaning up this wasteland that's out there, not only from an environmental point of view, but also from the point of view of ridding the city of blighted areas that really add nothing, that have the potential of attracting businesses to them and creating jobs, jobs that are needed, particularly in a lot of our urban areas as we try to move people off the welfare rolls to a job. The impact that it has on urban sprawl or the issue of farmland preservation.

It just seems that in the last several years, States and local communities have really got the spirit. From our perspective, or my perspective, it seems to me to be that the Federal Government, instead of trying to be a partner and moving the process along in so many instances becomes an impediment to moving forward.

I would think that in response to Senator Baucus' comment on that, that you have State legislators that have passed legislation dealing with brownfields, they've been thoroughly discussed in the assemblies of the States, the Governors have had involvement, their EPAs have had involvement, the laws are passed, the State environmental protection agency then goes about setting rules and regulations that are subject to public hearing and so forth.

Once that's done, it seems to me that you ought to be able to move forward and get on with it. I think that what we're trying to do with this legislation today is to make that possible.

Would either one of you want to comment about any difficulty that you've experienced in moving forward because of the Federal involvement?

Mr. SUOZZI. I think you're 100 percent on in your analysis, Senator, about what the importance of this issue is, that we not only want to clean up the properties, we want to attract economic development and we want to stop developing the green fields that are out there. I mean, in Long Island, every developer that wants to build a new building of some type, they look for an old potato field or something like that, or an old estate property or an old open space to build a new office building or factory or stores.

So we've got to recycle and reuse these properties. One of the first steps that we need to do, as Mayor Marshall has talked about, is to assess where these problems are and identify them and try and market them and point out that the problem may not be as bad as everybody thinks it is. And to do that, the main thing that we need is money in the form of grants to help us do brownfields assessment. That's something that's very important to us at the local level.

I've found the Administration has been trying very hard through the EPA to work with us through different programs, but we still need more help.

Mr. MARSHALL. Senator, it's interesting, I know a lot about the problem, but I can't claim to have a lot of personal experience, and I'll tell you why. It's because Macon, middle Georgia, suffers from the same sprawl problem that Atlanta and any number of other

cities suffer from. The economics associated with these inner city tracts that absolutely need to be redeveloped, they're sitting right in the middle of all kinds of neighborhoods where people need jobs, the economics simply don't justify much effort.

I used to represent banks, I'm a law professor, commercial lawyer who became a mayor. I used to represent banks. When I became the chairman of the Mayors and Bankers Task Force, one of the first things I did was call all the bankers, all the presidents of all the banks in the city together for breakfast to talk about this. Most didn't know what a brownfield was, they had never heard the term. This was only a year ago.

And it's because the market forces make it so much easier for lenders to do cookie cutter deals in office parks and what have you on the periphery than to try and deal with this problem in the heart of the city.

Now, is it the Federal, the threat of Federal involvement and Federal liability? In part, yes. And I have worked with a couple of parcels in the inner city, mostly with State environmental folks. I can tell you lenders want certainty, they want finality. They don't want to get involved in a deal where they could wind up getting stung later on or not being able to foreclose on the property because some additional cleanup work might have to be done. So they're not interested in even thinking about a complicated deal like that, let's do it on the periphery.

So I think there are other factors, there are other forces that explain this phenomena besides just this one. But this force, this factor, environmental laws that make it difficult to purchase and difficult to have certainty with regard to these inner city properties that already have all the infrastructure and people needing jobs surrounding them, those laws, yes, are a specter that hang over the entire country.

In Chicago, the economics may justify a deal. Glen Cove, you've got a staircase, if I understood you correctly, Mayor, a staircase in Glen Cove that's equal in value to the public housing in Glen Cove. We don't have anything like that in Macon.

[Laughter.]

Mr. MARSHALL. But Glen Cove, the economics may justify it there. In most of the cities, they don't. So you're going to have a lot of property that lies fallow in the heart of the city.

And here I am, I'm a typical, modern day American businessman, and I come to middle Georgia, and middle Georgia is trying to persuade me to put my office park in the old industrial district. I drive through that district, and what do I see?

Well, I don't see what you normally see in modern office parks. I don't see nicely mowed grass and buildings set back a certain distance. What I see is vacant lot after vacant lot, a crumbling structure. I'm not going to put my business down there.

So that's the problem we've got that needs to be reversed. A lot of factors, the environmental law is just one of the factors, sir.

Mr. SUOZZI. And again, the market forces themselves that the mayor refers to are the market forces created by the laws that make it so difficult to clean up these sites and reuse these sites. My property, but for the pollution that I'm talking about, is on the north shore of Long Island, 60 acres of beautiful waterfront prop-

erty. But for the pollution and the laws that go into cleaning up that pollution and the finger pointing that we must go through to get through the process, that property would be very valuable.

But it's because of the uncertainty, it's because of the difficulty of navigating the maze of legislation that makes it so invaluable. Similar to these city tracts in inner cities, these are, right as the mayor pointed out, near to centers of infrastructure, near major employment forces, very attractive properties but for the problems associated with the laws.

Senator CHAFEE. Senator Lautenberg.

Senator LAUTENBERG. I thank you, both mayors, for your testimony. I am not familiar with Macon, but I am with Glen Cove. It is truly a beautiful town, and it wasn't my grandparents who lived in those big houses, I can assure you. But it's a beautiful coast line.

New Jersey unfortunately happens to be one of the places, we have the largest number of Superfund sites in the country. At the same time, New Jersey has the second highest per capita income in the country. It's kind of a paradox, we have some very poor and we have some very successful people.

But the cleanup of brownfield sites has had a dramatic effect in the communities in which it's worked. I have witnessed it personally.

I would mention to both of you, though, that we're looking at a Superfund bill in its totality here. While the focus, I think from each of you, has really come to the brownfields area, Mayor Marshall, I couldn't help but notice in your testimony that you had a general concern, serious concern about the proposed termination of the Superfund program at this juncture and the absence of a plan to reinstate the feed stock taxes.

I recall that simply to remind everybody that there's a much larger picture here. How do you feel, for instance, about ramping down the number of sites, slowing down the cleanup of Superfund sites generally? Is that something that you would say is an appropriate way to conduct the environmental requirements of your community, of our country?

Mr. MARSHALL. Senator, we have in Macon a, it's either an NPL site or it's a Superfund site, it's an old naval ammunition manufacturing facility that is now held by an authority of the city. I think ultimately the Corps of Engineers is responsible for cleanup, but no funds have been allocated to take care of the problem, so the site simply sits there.

I don't know that that site is causing us a great deal of grief. It's located in the heart of an older industrial park. It's not near neighborhoods and etc.

Do I want the site cleaned up? Obviously. If funding, if changing the Superfund law means that there won't be funds to clean up this site, then obviously I'm interested in not changing the law and having the funds.

But the question you asked us to comment on is one that's way beyond our scope of expertise and our perspective. I would comment, though, sir, that to say that what we're talking about is a small part of a bigger problem, may understate the size of the part that we're talking about. I think you have the problem I described,

and Mayor Suozzi described, affecting literally hundreds of millions of people int eh United States in a very negative way.

You do have significant national priority Superfund sites scattered around the country, and we know some of the names, Love Canal, etc. I'm familiar with one that may be that kind of site in my community. But I can tell you, that site doesn't have as dramatically a negative impact upon the economics of the community as all these brownfield sites do. And if you accumulate the negative economic impact of having all this land lie fallow inside our center cities, I think you'll conclude that it's a huge problem, not a small problem.

It may be necessary for the two to be separated, and for somehow, in a bipartisan way, Mr. Chairman, for this committee to move forward with some brownfields relief, if it can't do the Superfund part of this. I don't know. I just don't know enough about this stuff. But I can tell you, it's not a small problem.

Senator LAUTENBERG. I don't think I used the word small in any way, because I am an original author going back to the 103d Congress of separate brownfields legislation. I've brought it up every year, and every year it's been said to me, Frank, don't do that here, let's tie that into the Superfund program at large. And maybe that will help pull Superfund along.

I'll ask you, Mayor Suozzi, should we have a separate brownfields bill to take care of the kinds of problems that you've both talked about that would have an immediate impact on the way our communities are functioning?

Mr. SUOZZI. Let me just say that it's not important to me whether it's separate or not separate. What's important is that it gets done this year. We need some work done on brownfields right away, because it's affecting us very dramatically. We think it's something that everybody can agree on. It's not a controversial area, it's something that there is bipartisan consensus on, and it's important that we get it done as soon as possible, because it's affecting us very seriously.

Senator LAUTENBERG. Well, you've described it in terms, well, it's a simpler problem to digest, it looks like a simpler one to solve. Then I think you confirm the fact that we ought to get on with, regardless of what we do with Superfund, and I frankly am one of those who doesn't think that we ought to cap the number of sites we're going to do, I don't think that we ought to slow down the pace.

Superfund has been a very successful program. It took a long while to get developed and to get started, but it's been successful. Ninety-five percent of the sites have either had cleanup starts or remedy solutions produced. And so I want to work cooperatively with my friends on the other side to try and get something done. But what I get from both of you is get on with the brownfields.

Mr. SUOZZI. And with co-disposal landfill relief.

Senator LAUTENBERG. I heard that. I'm with that. It's a universal problem as well.

Senator CHAFEE. OK, Senator Crapo.

Senator CRAPO. Thank you, Mr. Chairman. I have no questions.

Senator CHAFEE. Fine. We want to thank the panel very much.

Senator SMITH. Mr. Chairman?

Senator CHAFEE. Oh, excuse me.
[Laughter.]
Senator CHAFEE. I apologize, Senator Smith.

OPENING STATEMENT OF HON. ROBERT SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator SMITH. Sorry I was late. I know you have other panels. Just a couple of points.

Senator Lautenberg, I wasn't here when you spoke, but I know that you mentioned that reopening old settlements creates problems. In S. 8, that was in the old S. 8 Superfund bill last year. That was a serious problem and difference between us.

But I think you'll find if you look at S. 1090 that we have addressed that. It's not in our bill, there's no language on reopening old sites. So I might ask you to just take a look at that.

Another comment, you know, as I read your testimony, Mayor Marshall, and you talk about State finality, which is really where I'm coming from. You testified "This issue continues to be driven by seemingly abstract debates about unreasonable constraints on EPA's role. Under existing law we know that EPA has rarely, if at all, intruded upon State decisions on non-NPL or non-NPL caliber sites. The price of keeping EPA over-empowered in this area is simply too high."

I agree, and we're not going to be able to deal with brownfields, Superfund or anything else without State finality. Just reviewing, I'm going to ask a question here, but just in reviewing, if you think of the bill, when it passed in 1981, the so-called Superfund law, I will grant to you that there have been some successes, very costly successes, $35 billion or $40 billion over the last 15 years in the program. I don't think the bang for the buck has been there, to put it mildly.

But when you think about why you ride down that street and see those deserted locations where your businesses don't want to go, it's no wonder when we had lender liability, when somebody wanted to go clean up that site, the lender was held liable. We had contractor liability, so if anybody in there tried to clean it up, they were held liable.

We also had abutter liabilities, so if any of this stuff moved over to the next door neighbor, he was liable. We also had every purchaser in the chain of title liable. We had joint and several liability, so that if you only owned 10 percent of the site, you had to pay 100 percent of the site if they couldn't find the other guys.

And we wonder why these things, I mean, the reason these sites have not been cleaned up is because of Superfund, period. That's why we need to change this all, and that's why we need to link, with all due respect, Senator Lautenberg, that's why we have to link brownfields with Superfund reform. Because it doesn't make any sense to move in one area and not in another. Because brownfields could at least have the potential to be "Superfund sites,"and that's what we're trying to stop.

That's why we have spent a lot of time trying to reach accommodation here where the differences are, but at the same time, keeping fairness, fairness, as the major yard stick here, not to be unfair to one and fair to somebody else, but fairness and orphan shares

is the only way to bring fairness into the system and to deal with these other liability problems.

Let me just ask a specific question, and we'll move on. In our bill, in this bill, 1090, we do four things as it relates to the State. I would just ask each of you to comment on the four. I'll just read the four and you can go back and comment. It allows EPA to act at a State site in the following situations. In other words, EPA can step in in your State under the following situations in this bill, and only under these situations.

No. 1, in an emergency. Something happens, we don't know, we can't predict, there's an emergency. It can act second only at the request of a State if there's no emergency. Third, if the State's remedy fails and the State is unwilling or unable to respond, EPA can act. And finally, if contamination has crossed a State line which gets into interstate matters. That's it.

Do either of you have any problems with any of those four points in the legislation at hand?

Mr. MARSHALL. You asked a very narrow question, do I have a problem with that. I don't know enough to know whether I should have a problem with that.

I can say that my opinion is, having the State EPD have the authority to give final determination in many, many instances, is something that would be very helpful. And right now, when you talk with, and I've had very limited personal experience doing this, but I have done it, when you talk with the principally responsible agency for dealing with brownfield cleanup problems in the city of Macon, it's the State. You say to the State, OK, we worked this out, is that it.

The State can't bind EPA. And you can't get, you can get a comfort letter, I think is what it's referred to, from EPA, that this probably won't be a national priority site. But you can't get the kind of comfort that lenders would like to have. It seems to me if there is a way to limit EPA's role or at least give States the freedom to give finality to a certain matter and that's it, that would be a big step forward as far as dealing with a lot of these problems are concerned.

Mayors feel that the brownfield problem is by far the larger, more significant economic problem, long term environmental problem, facing the United States right now, even though brownfields typically don't have the level of contamination, they don't come even close to the kind of contamination that the more specific Superfund sites look at.

Senator SMITH. But the issues are the same, finality, liability.

Mr. MARSHALL. Right. If there's a way to separate the two and give finality readily in a brownfields setting, and then if later on you find out that you made a mistake and finality was a bad idea, it was a mistake to have granted finality, maybe somebody at the State or Federal level is going to have to bear some additional cost.

It just seems to me that the economic value of being able to provide finality to thousands and thousands and thousands of deals and the effect on the economics of a city is so positive that you take a chance on making a mistake. You go ahead and give the State actors the opportunity to make some of those mistakes. And you move forward and you make decisions. And then you go on.

Now, exactly how you do that, I don't know. I can tell you that cities across the country, mayors across the country, sort of feel like they're being held hostage in this debate. It would be nice if a bipartisan group would come together and we could get something done this year that would give some brownfields relief.

[The prepared statement of Senator Smith follows:]

STATEMENT OF HON. BOB SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Thank you, Mr. Chairman. I'd like to welcome the witnesses here today, particularly those who traveled some distance to be here. Several of you are taking time from pressing duties in state or local government. Others have taken valuable days off from their businesses. We appreciate your presence here today. Mr. Chairman, we do have a large number of witnesses who have important testimony to provide, so I will keep my comments brief.

This committee is now in the seventh year of serious work on Superfund reauthorization. During the 4 years of my tenure as chairman of the Superfund Subcommittee, we and our staffs have spent hundreds of hours negotiating issues and identifying areas of agreement with our Democratic colleagues on the committee and with EPA Administrator Carol Browner. In the markup of S. 8 in the last Congress, we succeeded in eliminating many areas of controversy, but were still left with several major disagreements over remedy selection and fair liability reform, among others.

At the beginning of this Congress, Administrator Browner and Acting Assistant Administrator Tim Fields testified that EPA was interested in pursuing legislative reform only in some narrow property owner areas and in brownfields. They still seek the Superfund taxes, but have abandoned efforts at the comprehensive reform that would justify those taxes. Their message was that the Superfund program was ramping down and that major reforms would impede that process.

At the same time, several of our colleagues expressed strong concerns about how much we would have to give up in remedy, liability, and natural resource damage reforms in order to win the support of the Administration. They share my view that taxes should not be reimposed on American businesses to support a fundamentally unfair program.

In the face of those legitimate concerns on our side, and confronted with EPA's change of position on the other, Mr. Chafee and I decided to try a different course. With the introduction of the Superfund Program Completion Act last week, we have taken off the table reforms in natural resource damages, remedy selection, and full fairness in liability—along with the taxes. Instead, we focus on major reforms in six areas.

Specifically, the Superfund Program Completion Act:

- Directs EPA to finish the job that was started nearly two decades ago by completing the evaluation of the remaining sites on the CERCLA Information System (CERCLIS).
- Clearly allocates responsibility between states and EPA for future cleanups.
- Protects municipalities, small business, recyclers, and other parties from unfair liability—while making the system fairer for everyone else.
- Provides states $100 million per year and full authority for their own cleanup programs.
- Revitalizes communities with $100 million in annual brownfields redevelopment grants.
- Requires fiscal responsibility by EPA and saves taxpayers money.

Our legislation will result in more hazardous waste sites being cleaned up—and in fewer dollars being wasted on litigation. It will give much-needed and much-deserved liability relief to innocent landowners, contiguous property owners, prospective purchasers, municipalities, small businesses and recyclers. Unlike EPA's administrative reforms, this bill does not shift costs from politically popular parties to those left holding the bag. Instead, it requires payment of a statutory orphan share and authorizes the use of the Superfund Trust Fund for those shares.

Unfortunately, EPA wants to have it both ways on the issues of substantial reform and taxes. On the one hand, they tell us that substantial reform is not needed because the program is ramping down. At the same time, they claim they must have taxes reimposed. Worse yet, according to the testimony Acting Assistant Administrator Fields gave last month, EPA intends to use those taxes to continue its ventures into the commercial real estate business—building golf courses with Jack

Nicklaus. Let me be clear on this: I will never support requiring taxpayers to pay even one penny for an EPA golf course.

The only way I will support reimposing taxes is if the funds are used to pay for full reform of the Superfund program. I pledge to continue working for full reform of the program, but I firmly believe we must do what we can in this Congress. The Superfund Program Completion Act is achievable, strong reform.

Thank you, Mr. Chairman.

Senator CHAFEE. We've got to move on. Mayor Suozzi.

Mr. SUOZZI. I just want to echo that again. I'm here about brownfields, and I'm here about co-disposal landfill relief. The issues you point to are very important, Senator. One big problem that small municipalities like mine, as well as large municipalities, is having to navigate the maze of so many overlapping jurisdictions on different issues.

It's very difficult, I'm a city of 25,000 people, we're busy picking up the garbage and making sure the cops do their jobs and paving the roads. These are big, complex issues for us that are really overwhelming at times, which is one of the reasons we need help with funding. Private parties just aren't going to do it. It's just too much of a headache for them to get involved.

We've got to take a leadership role, and we don't have the resources to do it. We need help on something we know is clearly definable right away, which is the brownfields issue. It would provide tremendous economic and environmental benefit to a lot of people.

On the issue that you talk about specifically, it would be great if we could get the States and the Federal Government together, and it would be great if we could get the Democrats and the Republicans together with a solution on this issue. But if it's going to hold up everything else, then I'm not in a position to comment on it, because I'm not educated well enough on the issue.

But we're having a hard time out here. We just want to do the right thing, we want to do our jobs as government, which is provide the infrastructure, provide the opportunity for people to make private investment. We need your help to get that done.

Senator LAUTENBERG. Mr. Chairman?

Senator CHAFEE. Frank, you can make a quick comment, but we've spent 1 hour on two witnesses. We have 11 witnesses to come.

Senator BAUCUS. Mr. Chairman, that's true, but the Senators have not spoken nearly as long as have the witnesses.

Senator LAUTENBERG. And I've been on especially good behavior.

Senator CHAFEE. I'm not sure I'd mark that, but I guess I would give you a high——

Senator LAUTENBERG. I'm listening.

[Laughter.]

Senator CHAFEE. All right, go ahead, quickly, please.

Senator LAUTENBERG. I just want to respond to Senator Smith's comment about not reopening. As a matter of fact, if the bill does require allocations that would be, that EPA might have already made, and not taken care of some unaddressed costs, which would allow the subject to be reopened and reallocated if that's a determination. Is that not true?

Senator SMITH. I'd like to see the reference on that.

Senator LAUTENBERG. Section——

Senator SMITH. You're talking about unaddressed costs. If they're not addressed, they're not reopened.

Senator LAUTENBERG. Page 77. Well, it says, shall include, list facility not addressed in the settlement or before the date of enactment, not later than 180 days.

Senator SMITH. Not addressed, etc.

Senator LAUTENBERG. But EPA has to do an allocation at all sites. Go back and look at any unaddressed costs.

Senator SMITH. Well, they're addressed. If they're allocated, they're addressed. This is not addressed. That's what we're saying. I think you're misreading it.

Senator LAUTENBERG. Well, at least we know that there's an open question.

Thanks very much, Mr. Chairman.

Senator CHAFEE. All right, gentlemen, thank you very much for coming. We appreciate it, and safe journey home, both of you.

Mr. SUOZZI. Senator, again, I want to invite you and Mrs. Chafee down to Glen Cove, come down to her old home ground some time and see our redevelopment project.

Senator CHAFEE. We were married in Oyster Bay, how's that?

Mr. SUOZZI. Great. Come down and I'll re-perform the ceremony. [Laughter.]

Senator CHAFEE. OK, thank you very much.

Now let's have the next panel step right forward, please. Mr. Tom Curtis of the National Resources Governors' Association; Claudia Kerbawy; Gordon Johnson; and Vernice Miller.

Mr. Curtis, go ahead.

STATEMENT OF TOM CURTIS, DIRECTOR, NATURAL RESOURCES GROUP, NATIONAL GOVERNORS' ASSOCIATION

Mr. CURTIS. Thank you, Senator Chafee. Good morning, Senators, Senator Baucus, other members of the committee.

My name is Tom Curtis, I'm here representing NGA this morning. I'll introduce my statement for the record and summarize very succinctly for you.

I would like to start by saying that the National Governors' Association wholeheartedly agrees with the sentiments expressed by the mayors on the first panel about the importance of finality as a tool for returning brownfield sites into productive use. There are thousands upon thousands and thousands of such sites, probably hundreds of thousands of acres of property around the Nation that is essentially mothballed, because the owners have a pervasive fear of liability under the Superfund program.

Under the current liability system, if such a property were addressed even to the satisfaction of a State, EPA could nonetheless apply the Federal liability scheme to the party who is owning or attempting to return that site into use. The fear of such liability without question hinders the redevelopment and reuse of such sites. It is very important that the Congress address that issue.

We think that your bill does so appropriately. You include reopeners that we believe are appropriate for the case in which there may be new information or a change of conditions at that site, or the case in which a State requests EPA to come back in to a site. Those reopeners, we think, are important and appropriate.

But clearly, that is a significant issue of national interest that the Congress has to address.

I would also like to speak to the provision in your bill that requires an invitation by a Governor before a site can be listed on the national priorities list. We believe that is a very important provision. The States have matured enormously in their programs. The State programs are now just as sophisticated as EPA's program is, in many respects. EPA, by the way, deserves a lot of credit for that. The EPA has supported States over the years and helped States mature.

While EPA has probably made cleanup decisions or even initiated construction at 90 to 95 percent of the sites on the NPL, tens of thousands of sites lie off the NPL that are being addressed by these very good State programs. It does not make sense to have two masters at any of those sites. We believe that where there's a Federal interest in a site, it should be listed on the NPL. But if a State had the capability and the desire to address any site, it should have the first choice, and EPA should only add a site to the NPL with a clear concurrence by the State.

Finally, I would close my remarks by commenting on a couple of other provisions in your bill. We very much appreciate the financial support for site assessment and for addressing sites and for State brownfield and cleanup programs. We very much appreciate the important provisions you have here to change the State share of operating and maintenance costs to 10 percent. We think that too is a very important piece of this bill, and we urge you to maintain that.

I guess finally we would simply urge you to try to get the bill done this year. As you know, Senator, the Governor's Association is a bipartisan organization. Our policies can only be adopted by a vote of two-thirds of the Governors and typically are adopted by a much more impressive majority. Our Superfund policy is such as policy, it was overwhelmingly approved by the Governors. They don't come at this as a partisan issue.

We urge all Members of the Congress, both sides of the Congress, and certainly both sides of the aisle here, to reach across the aisle in a spirit of bipartisanship, try to get the bill done. We need you to send a bill to the President this year that he can sign. Let's please work together.

The Governors stand willing to help you in any way that they can to try to get that job done this year. Thank you.

Senator CHAFEE. Thank you, Mr. Curtis.

Ms. Kerbawy?

STATEMENT OF CLAUDIA KERBAWY, CHIEF, MICHIGAN SUPERFUND PROGRAM; SPOKESPERSON, ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS

Ms. KERBAWY. Good morning, chairman and members of the committee. My name is Claudia Kerbawy and I am Chief of the Michigan Superfund Program and the primary spokesperson on reauthorization of the Association of State and Territorial Solid Waste Management Officials. I am here today representing ASTSWMO.

As the day to day implementers of the State and Federal cleanup programs, we think we offer a unique perspective to this dialog, and we thank you for inviting us here.

ASTSWMO and individual States have participated in the Superfund reauthorization debate for the past three Congresses. I would like to dedicate the first part of my testimony to speaking on the accomplishments of State programs which have had 18 years to grow and mature into the leaders in remediation today.

ASTSWMO recently conducted a study on removal and remedial actions performed by States between January 1993 and September 1997. NPL sites, RCRA corrective actionsites, storage tank and other petroleum sites were not included in the study. The Association received information on 27,235 sites from 33 responding States. Information had to be site specific and had to be accompanied by background data. Estimates were not accepted or counted in the survey.

Results of the survey showed that those 33 States are completing an average of 1,475 sites per year, for a total of 6,768 completions. They are completing an average of 485 removals per year, and are addressing on average approximately 4,700 sites at any given time. Only 8.9 percent of the sites identified in the survey were classified as inactive.

Although this study does not capture the complete site universe either on a national or individual State level, it does confirm that on a national level, States are addressing and completing response action at the bulk of the sites.

The next part of my testimony will be devoted to analyzing key aspects of S. 1090 from a State program manager's perspective. We support the provision for Governors' concurrence with NPL listing as outlined in S. 1090. Most identified sites in the State that could qualify for listing on an NPL are already being addressed by the States.

While there may be 40 plus States that have Superfund programs and voluntary cleanup programs, there will always be sites which due to either technical or legal complexity or cost, a State either cannot address or may prefer to have the Federal Government address. The NPL is no longer reserved for the worst of the worst sites, rather, the NPL has shifted to a venue for remediating sites which require Federal resources.

The NPL should be reserved for those sites which both the State and Federal Government agree warrant expenditure of Federal resources as provided for in S. 1090.

States are responsible for remediating the vast majority of sites in the country and must be allowed to determine when a site is fully remediated. CERCLA technically applies to any site where release occurs. However, the reality today is that States are responsible for ensuring the remediation of all sites which do not score high enough for listing on the NPL. The EPA removal program is able to address some sites which are not listed on the NPL, but the program is designed to stabilize a site, not ensure that the site reaches full remediation.

EPA does not have the authority to expend fund money or to require other parties to fund remediation at a site not listed on the NPL. Although the majority of these typically brownfield sites will

never be placed on the NPL, they are still subject to circle of liability, even after the site has met State requirements.

We can no longer afford to foster the illusion that State authorized cleanups may somehow not be adequate to meet Federal requirements. The potential for EPA over-file and for third party lawsuits under CERCLA inhibits brownfield cleanup and redevelopment. States should be able to release both Federal and State liability once a site has been cleaned up to State standards. Legislation which addresses these issues, as does S. 1090, is critical.

We are also very pleased that S. 1090 seeks to streamline the program by providing a fixed 10 percent cost share across the board. Under the status quo, the financial incentive for EPA and the States are diametrically opposed when considering final remedies for a site. State waste officials believe that S. 1090 presents a fair and well reasoned approach to this issue.

Clearly, implementation of CERCLA over the years has identified a level of unfairness in its liability system. However, we will leave the analysis of the liability reforms in S. 1090 to other State experts.

In conclusion, while our membership has not yet conducted an in-depth review of S. 1090, or reached consensus on the bill's language, the initial impressions and reaction from our members is favorable. We are very encouraged and look forward to working with the committee as the process continues.

Senator CHAFEE. Thank you very much, Ms. Kerbawy.

Mr. Johnson?

STATEMENT OF GORDON J. JOHNSON, ASSISTANT ATTORNEY GENERAL, NEW YORK

Mr. JOHNSON. Good morning. My name is Gordon Johnson, and I'm a Deputy Bureau Chief of the Environmental Protect Bureau of the New York Attorney General's Office. I'm appearing today on behalf of Attorney General Elliott Spitzer and on behalf of the National Association of Attorneys General, NAAG. We very much appreciate the opportunity to appear before the committee, and we thank the chairman and staff of the committee for the consideration and assistance.

NAAG has been deeply involved in the Superfund reauthorization process for many years. At its summer meeting in 1997, the sole resolution adopted by the Attorneys General addressed Superfund reauthorization. A copy is submitted with our written statement.

While the State agencies that administer cleanup programs are very knowledgeable about the engineering issues involved in selecting remedies in the cleanup process, it is the State Attorneys General who can best evaluate the legal consequences of changes to the current statutory scheme, such as how amendments are likely to be interpreted by the courts and their effect on enforcement, settlement and cleanup. We are pleased that we will be able to bring to this committee our insight and experience.

Although there were significant problems in the Federal implementation of CERCLA during the 1980's, the current statute is now getting the job done. In New York, because of the powers provided in CERCLA, the State has obtained cleanups at over 600

hazardous waste sites. Responsible parties have contributed more than $2 billion to site cleanups and two-thirds of the sites are being cleaned by private parties.

Most States have had similar results. On a Federal level, some $10 billion of public money has been saved because 70 percent of all remedial actions at Federal Superfund sites are being performed by responsible parties. A major reason for this success in the cleanup is that the cleanup liability under CERCLA is now clearly understood.

It wasn't always this way. In the 1980's, there was resistance and contentious litigation that caused delays in cleanups, imposed substantial burdens on government programs and increased everybody's transaction and cleanup costs. Now, most PRPs understand the statute and are ready to settle their liability with government.

EPA's practices also have evolved, resulting in early settlements and the quicker implementation of remedial decisions. State Superfund programs have matured, many of which are modeled on the Federal program and use the Federal statute to get appropriate cleanups at minimal taxpayer expense.

The message to us is clear. We must avoid changes to CERCLA that will reignite the courtroom battles over the meaning, scope and implications of the law. At the same time, we must not lose sight of our primary goal, cleanup of sites and protection of the public and future generations.

We are pleased to note that S. 1090 is a departure from earlier bills. The bill contains some of the revisions that have been sought by the States for years, such as the cap at 10 percent for the State share of remedy operation and maintenance costs. S. 1090 is also selective in its reforms and does not amend the remedy selection and natural resource damages provisions of CERCLA to any great extent.

As a result, the defense bar will have fewer opportunities for legal challenges than under earlier bills. We are pleased that the bill includes a brownfields revitalization program and allows States to give cooperating PRPs protection from liability under certain circumstances, measures that will assist States in implementing their voluntary and brownfields cleanup programs.

Unfortunately, other needed revisions we have been seeking for many years are absent, including, one, clarification of the waiver of sovereign immunity regarding Federal facilities. Federal agencies need to be treated the same as any other liable party, and they still are not. Two, natural resource trustees should be able to utilize the fund to perform natural resource damage assessments. Three, the statute should make clear that remedies selected by States are reviewed on the administrative record.

There are still serious problems, nonetheless, with S. 1090's revisions to the liability and allocation provisions of CERCLA. While NAAG supports limited exemptions from liability for truly de micromis parties, and a reasonable limitation on liability for municipal solid waste disposal, many of the provisions of S. 1090 are unclear or go too far.

The proposed mandatory allocation process is unwise and rather than making settlement easier and quicker, will complicate and

delay settlements and cleanups. Cleanups should come first, not arguments.

Most critical, however, is the apparent de-funding of the Superfund program which necessarily will shift hundreds, if not billions of dollars in costs to the States. We all wish there was no need for CERCLA and the Superfund program. But there is, and there will be for many years. When EPA lacks the funds to perform, the burden will shift to the States. There are enough unfunded mandates for us already.

Finally, the new liability exceptions and the limits on listing new sites will seriously erode the operation of the Superfund program inevitably shifting the cleanup costs to the States. Thank you for your attention.

Senator CHAFEE. Thank you.

Ms. Subra, we've pulled you up from a later panel. You're from New Iberia, Louisiana, representing a company.

Ms. SUBRA. Yes, sir.

Senator CHAFEE. Why don't you go ahead?

STATEMENT OF WILMA SUBRA, SUBRA COMPANY, NEW IBERIA, LOUISIANA

Ms. SUBRA. Thank you. My name is Wilma Subra, and I work with grass roots groups across the United States dealing with Superfund issues. I have also served as the technical advisor to the National Superfund Commission.

The Superfund Completion Act, as is presented here today, would limit and weaken the Superfund program and result in continued environmental damage and human health impacts from sites that would not be allowed to be addressed by this program. The bill limits the number of new NPL sites, it reduces the level of funding for the program. It encourages State programs to assume program responsibility in States that lack the financial and technical resources as well as the political will to carry out the program.

It also limits and in some cases eliminates entirely public participation in the process. It discourages voluntary cleanups by potentially responsible parties at sites prior to them being listed on the NPL. It places at risk communities that live on or new fund led sites where the remedies would only be containment.

A containment remedy is currently being implemented by EPA at the Agriculture Street Landfill Superfund Site in New Orleans, Louisiana. The remedy is being paid for totally by fund money. The landfill is 95 acres and was operated by the City of Orleans from 1909 to 1965. Then the city, in conjunction with HUD, developed 47 acres of that landfill as private and public housing, a recreation facility and an elementary school.

The containment remedy consists of removal and replacement of two feet of soil and waste in only 10 percent of the residential area. Only the exposed soil and waste areas will be addressed, not that under the structures, under the streets and under the sidewalks. When the remedy fails, and it will fail, due to subsidence, shallow ground water and the area being located below sea level, resources from the fund would not be available under the proposed bill to finance the measures necessary to fix the containment remedy.

This is just one example of the many sites where containment was utilized at fund led sites, where the citizens will lose in the long run when the containment remedy fails and fund resources are not available to go back in and repair the remedy. Those citizens are actually here in Washington right now, trying to get relocated. They will be speaking with the Appropriations Committee to see if they can come up with some money.

The requirement that a Governor request a site be listed will severely limit the sites proposed for NPL. Governors will be reluctant to request that the EPA add sites to the NPL when the potentially responsible parties at those sites are his financial campaign contribution. The only sites a Governor may request be added to the NPL are sites that are 100 percent orphan. In States that lack financial resources or political will, such orphan sites already fall to EPA to fund the cleanup.

The requirement that a Governor request a site be added to the NPL completely eliminates the ability of citizens to petition to have sites listed. In the State of Louisiana, the majority of the NPL sites were listed as a result of citizen involvement. The elimination of the citizen petition process is not appropriate. Allowing the State Governors to have the ultimate authority over the listing of sites prolongs the exposure of citizens living and working on or near the site and citizens consuming aquatic and terrestrial organisms that are contaminated by the site.

To States again that lack the financial resources to address the site, they lack the responsible parties, the limits again will be a burden that they will not be able to address. The burden will continue to be borne by the citizens living on and adjacent to these sites.

CERCLA is being required to be all the CERCLA sites addressed in 2 years. Those sites then will become a problem for the States. It is doubtful that the EPA has the financial and technical resources to investigate the more than 10,000 CERCLA sites, and the States definitely do not have that ability to address these issues.

State response programs, as you have it there, lack elements of a minimum standard for a State program and a mechanism by which EPA is required to evaluate and approve a State program. States could basically isolate the public and the impacted communities from participating in the State program.

I have other issues included which you can read in the testimony. And in conclusion, the Environmental Protection Agency must retain the regulatory authority and financial resources necessary to address all the sites that qualify for Superfund designation. The authority is also necessary in order to encourage involuntary cleanups by PRPs. The EPA further must have the authority and resources necessary to address these hazardous waste Superfund problems in States that cannot address the problem.

In order to protect human health and the environment, the Superfund program must not be completed, but must be allowed to continue to address the remaining problem sites, as well as the new sites that are being created. One of the issues at the military basis has been prochlorate. I spent last week in Texas with EPA, and this has opened up a whole new area that will have to be ad-

dressed under the Superfund regulation. So there will be new sites and new issues developed.

Thank you.

Senator CHAFEE. Well, thank you, Ms. Subra. I'll put you down as lacking enthusiasm for our bill.

[Laughter.]

Ms. SUBRA. We're willing to work with you.

Senator CHAFEE. I see. I just have one question, Mr. Curtis, you've heard the testimony from the prior panel about finality. I think finality is going to be a key element here as we try to move ahead and work out some kind of a compromise. What finality means is that a Governor, under our legislation, would be able to say, we're going to clean this up and this is, we believe this is clean now.

But one of the arguments against that is that the Governors will be easy on this and there will be sort of a race to the bottom in connection with the control over the sites, the creation of pollution havens by the Governors. I find that argument difficult to follow. Any Governor is responsible to his citizens. Could you give me some thoughts from the Governors' association representing the Governors? We've got a former Governor here from Ohio. I can only believe that he was very conscious of his citizens' desires, and he's not going to, I presume, not going to——

Senator BAUCUS. You have a former Governor from Rhode Island, too.

Senator CHAFEE. Yes, he's a very thoughtful fellow, also.

[Laughter.]

Senator CHAFEE. He's just not going to willy nilly approve something just to get it approved if the consequences are potentially dangerous or harmful to his citizens. Could you give me an answer from the Governors' Association?

Mr. CURTIS. Yes, sir, I'd like to second what you just said, actually. There's no reason to believe that Governors would be easy on this problem, for a number of reasons. First of all, there is no constituency for pollution. You don't get votes in any election by hiding sites and sweeping these problems under the rug.

Governors run in State-wide elections and have to appeal to large numbers of voters. You simply don't present yourself as appealing in today's body politic if you are associated with hiding these problems, being soft on these problems. So there's nothing to gain by any Governor for hiding these sites.

Moreover, every State that has adopted a cleanup program, and there are 45 or 47, I believe, States that have adopted programs, have actual cleanup standards that apply. In every State, those standards apply both at NPL cleanups and at State-led cleanups, cleanups that are conducted by the State under its authorities, or sites that are cleaned up under a voluntary cleanup program. We're not proposing that that would change, and your bill doesn't change that. So those standards would very much apply at these sites.

Senator CHAFEE. Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Johnson, I have two questions. One is, your point that this legislation before us would create an unfunded mandate, in effect,

I guess so much of the pace of cleanups, and the second question is with respect to caps, the NPL cap.

On the first, the question really is, why do you think it's an unfunded mandate? I think you have a point insofar as an analysis of the bill. It seems to indicate that the pace of cleanup will slow down because of the combination of spending cuts and cost increases. That is, the bill reduces authorization of the cleanup program by about 25 to 30 percent from current authorization levels, and also creates new requirements that would increase costs, at least by some estimates, up to $100 million a year. And it creates a large new orphan share that could displace cleanup spending.

Would you indicate again why you think this bill will create an unfunded mandate, and why cleanups will be left to the States, in some respect?

Mr. JOHNSON. Yes, Senator. Under the bill, there are new exceptions for liability at NPL sites, in particular, as well as some of the other sites. If EPA does not have sufficient moneys to fund those particular shares, cleanup will stop. If cleanup stops at sites, quite simply, the States are going to have to step in.

We can't afford to have a cleanup stop, because we have an obligation to protect our citizens. So States will go in and spend their money.

But they will be subject to the restraints on recovery against various types of formerly liable parties because of the new exemptions for liability at NPL sites.

Senator BAUCUS. And combined with the authorization decrease.

Mr. JOHNSON. Particularly combined with the authorization decrease. We have a very significant fear there. While there have been some good changes in the bill, for instance, our O&M costs now are capped at 10 percent, we're still going to end up paying that 10 percent. If there isn't enough funding, we're going to pick up more. And we're still going to have to pay our share, our 10 percent share of those orphan shares, and the other costs that are now going to be picked up by the fund. Quite simply, not every State has the money to do that.

Senator BAUCUS. Mr. Curtis, what do you think about that? You said Governors want to be responsible, want to clean up sites. But if the Federal money isn't there, does that mean the States will have to pay the bill to clean up the sites?

Mr. CURTIS. Senator, I can't comment specifically on the bill in that regard, because we have not yet completed our review of it. I would say that the Governors have been concerned about a shift in costs to the States as a consequence of any liability reform. So we would want to make sure there is not a cost shift.

Senator BAUCUS. Back to you, Mr. Johnson, on the NPL cap. Essentially, as you probably know, GAO asked EPA as well as States where they thought, the number of sites they thought would be added to the NPL in the foreseeable future. EPA said there would be about 126. States thought there would be about 132 listed. They agreed in only about 26, which is interesting in and of itself.

But the point is that there are quite a few additional sites that are not yet on the list. The bill has a cap of 30 per year.

Now, does that make sense? I'm concerned about the arbitrariness of caps. I can remember in the Safe Drinking Water Act not

too many years ago, we required EPA to name 25 new contaminants, standards for 25 new contaminants a year, irrespective of the science. Of course, that's dumb. We've changed that. We went back to EPA and said, well, find out which contaminants exist and which ones should we create standards for.

At some time, we also put a cap on new endangered species. We realized that was a little bit silly.

So if we want sound science, and many of us do, does it make sense to have a cap where sound science might indicate that there should be a thiry-first site, that is, a site more than 30 that meet the criteria of 28.5 and should be on the list?

Mr. JOHNSON. As we detail in our written testimony, we think the idea of a cap is a very bad idea. No. 1, for the reason that you just elaborated, it's bad science. If a site needs to be listed, it should be listed. And it shouldn't be, there shouldn't be an arbitrary cap.

The second reason that it's important, though, is that by having the ability to list sites, people come in and agree to clean them up, because they don't want to be put on the NPL. If you remove that so to speak gorilla in the closet, that fear of listing, people are going to stop cooperating with State programs to a certain degree, and we're not going to be able to get the same number of cleanups. What that means, of course, is that the States are going to pick up those costs, another element of the bill that concerns us particularly, because it's going to shift costs to the States.

Senator BAUCUS. Right. And I might say, 30 is in the ball park of what EPA estimates it will put on the list. EPA estimates it will the list between 25 and 40 sites a year. That's an estimate, they don't know for sure. The average over the years has been about 20. One year I think there were 300.

But the point really is, if EPA's estimate is pretty close, doesn't it make sense to let there be some flexibility rather than an arbitrary number, because 1 year it might make sense, and in another year, it might not make sense.

Mr. JOHNSON. We think that if you put a cap on it, you're going to have a need to list more sites. Because we think that when States and EPA estimate how many sites are likely to be listed, they take into consideration how many sites are going to be cleaned up voluntarily or through settlement and aren't going to need to be on the NPL and won't need Federal moneys.

If you remove that ability to list a site by arbitrarily setting an upper limit, I think there's going to be less settlements and more likely you're going to have PRPs say, well, list the site. We don't care. We're not interested in cleaning it up, because they know that the site has less of a chance of being listed because there's a cap on the number of sites that are being listed.

Senator BAUCUS. Thank you.

Senator CHAFEE. Senator Crapo.

Senator CRAPO. Thank you, Mr. Chairman.

Mr. Curtis, in the legislation we're considering here, are there any proposed limitations on the EPA using Section 106 orders to complete cleanup actions? What I'm getting at is this. If the EPA found that the NPL cap was too restrictive and began to use 106 orders to circumvent the restriction, would the public and State

participation be increased or reduced, or what would the impact be?

Mr. CURTIS. I'm not aware of any restrictions on 106 order authority in this bill. I'm happy to look at it more carefully and respond to your question in writing. But I am not aware of any restrictions on 106 authorities in this bill. I don't think that EPA's authorities are limited in that sense under this bill.

Senator CRAPO. I don't think there are restrictions on 106 authority in the bill, and if that's correct, what would the impact of that be on the ability of us, of the EPA to essentially avoid the NPL cap restrictions and basically order cleanup outside of the whole process that the bill contemplates?

Mr. CURTIS. Well, EPA could use its 106 authorities to order cleanups. Whether or not that authority would be as effective without an ability to threaten, at least, a listing on the NPL than a fund financed cleanup and a cost recovery action, I think we'd have to analyze and think about whether or not there might be some secondary effects of that kind.

Senator CRAPO. You've also heard today in some of the discussion the fact that one of the concerns that some raise is that the bill does not reauthorize the Superfund taxes. Do you or do the Governors have a position on that issue?

Mr. Curtis, Senator, we do not have a view on that issue at this time.

Senator CRAPO. All right, thank you.

Ms. Kerbawy, I'd like to get your reaction to the same questions. What do you think of the fact that the bill does not limit what Section 106 authority does in terms of achieving the kinds of reforms that are necessary?

Ms. KERBAWY. Well, there are a couple of things there I think we need to consider. One is that most of the responsible party work that's been done under Superfund has been as a result of EPA's ability to actually fund and cost recover for response actions rather than moving forward into enforcing an order that's been issued.

So I think although EPA does certainly issue orders, I think the primary impetus to make responsible parties move forward has been their ability to go ahead and fund a remedy if a responsible party refuses to implement the remedy. I think probably they could issue the 106 orders, but the effectiveness of being able to move forward without have a site on the NPL and the ability for EPA to then fund a remedy will limit their ability to move remedies forward with 106 order authority.

The other thing I see happens there is if there is the ability to have State finality onsites, if they are not on the NPL, that will allow work to proceed at the State level to get the sites cleaned up.

There is in this bill also the provisions that emergency actions certainly can be taken by EPA or could be ordered by EPA if there is a critical need, environmental or human health need to get work done. So I think that work should be able to proceed that needs to proceed, either under State authority or Federal authority, but there won't be the overlap that we currently have now.

Senator CRAPO. Does ASTSWMO have a position on the reauthorization of taxes?

Ms. KERBAWY. Our primary concern is that the work can be funded that needs to be done either at the Federal or the State level. Whether that is through tax reauthorization of whether that is through some other funding mechanism will be left to Congress and to the Governors to deal with those positions.

Senator CRAPO. I take it then that if the taxes were to be reauthorized, that would not then cause ASTSWMO to oppose this bill? In other words, if a reauthorization of taxes was added to this legislation, would ASTSWMO still support the bill?

Ms. KERBAWY. I don't think that would cause us to not support the bill.

Senator CRAPO. Mr. Curtis, that's what I understood from your answer as well, is that correct?

Mr. CURTIS. That's correct.

Senator CRAPO. Mr. Johnson, same questions. On 106 authority, does that cause you any concern, the fact that 106 authority is not addressed in the bill?

Mr. JOHNSON. I don't think we've looked at it that closely with respect to that particular issue. So we'd be happy to answer any questions and get back to you on that. We think, though, it's important that EPA retain authority to issue 106 orders.

We did in our written testimony note that during the allocation process, there are restraints on EPA's ability to issue 106 orders. We think that is a serious problem. We don't think that Superfund should be an argue first and then clean up program. But it should be clean up first, and then argue.

If you have restraints on EPA's ability to issue 106 orders, particularly during the allocation process, we don't think that's a very good idea.

With respect to taxes, the Attorneys General are concerned that there be a consistent revenue stream, so that we don't run into a problem during the appropriations process or at other times, and EPA lacks sufficient funds to do what it's required to do under this statute. So I don't see any problem from an Attorney General's perspective with respect to an authorization of the tax.

Senator CRAPO. Thank you.

Senator CHAFEE. Thank you, Senator. Senator Lautenberg.

Senator LAUTENBERG. Thanks very much.

Mr. Curtis, just to clarify, does the Governors' Association favor a cap on the NPL?

Mr. CURTIS. No, sir. We understand there have been a lot of concerns and a lot of discussions about ramping down the Superfund program, as EPA comes near the end of the work at the sites currently listed on the NPL. We believe that the appropriate way to address the concern about the future of the program is by giving the Governor the right of concurrence on new sites on the NPL. We think that would take care of that problem.

Senator LAUTENBERG. Concurrence or initiation?

Mr. CURTIS. Our policy actually asks for a Governor's concurrence. The bill before the committee addresses that recommendation by requiring a Governor to invite a listing.

Senator LAUTENBERG. Right. So that's not a position favored by the NGA?

Mr. CURTIS. A strict reading of our policy would suggest a Governor's right of concurrence with a new listing on the NPL.

Senator LAUTENBERG. That's quite different. Do you think, Mr. Curtis, that we ought to maintain the pace of the cleanups?

Mr. CURTIS. Well, Senator, again, I believe that there will be a natural change in the pace of cleanups as EPA comes to the end of the work at the sites currently on the NPL. I don't know what the pace will be in the future. I think that goes to the question on the cap, whether there are 20 sites or 50 sites or 100 sites that may be listed on the NPL in the future, that would be the appropriate pace we would say.

Again, urging you to give the Governor the right of concurrence with those new listings, so that there is not duplicative work, nobody benefits when EPA and the State both have the resources to address a site, and in that case, one level of government should address the site.

Senator LAUTENBERG. But you wouldn't, your organization wouldn't necessarily favor a slowdown in the pace of cleanups?

Mr. CURTIS. Well, again, we believe that there will be a natural change in the pace of the Superfund program.

Senator LAUTENBERG. As sites are cleaned up.

Mr. CURTIS. As sites are cleaned up. We do not have a position specifically recommending that Congress legislate the shape of the program or the shape of the curve as the program ramps down in the future.

Senator LAUTENBERG. So do you think there will be a natural decline in the pace based on cleanups, or do we have a few more sites that ought to be paid attention to?

Ms. SUBRA. There are a number of sites that need attention. I think if the financial resources are there, the level of effort should be the same. Because I think overall, the level of effort is being driven by the financial resources. But we have a lot more sites to be addressed.

Senator LAUTENBERG. There's a November 1998 GAO study that stated, officials of about half the States told us that their State's financial capability to clean up potentially eligible sites if necessary is poor or very poor.

Ms. Kerbawy, are you familiar with that?

Ms. KERBAWY. Yes, I am. I think that certainly funding for Superfund type of remedies, if States were to have to bear all of the costs of sites that were on the NPL, that would be an unfunded mandate similar to what Mr. Johnson said. But right now, we don't see that that information, as far as the States that don't currently have funding, actually correlates to where the sites exist.

There are States where we have a number of sites. I'll give Michigan as the example. We have had up to 84 sites that have been listed on the NPL. And we have thousands of State sites. Obviously we have to deal with those issues, and we do fund the program that needs to be funded.

So I think that where the problem exists, and where the public has recognized that the States have an issue that needs to be addressed, then the States rise to the occasion and do fund those programs.

Senator LAUTENBERG. Well, I'll ask you the same question that I asked Mr. Curtis in terms of the number of sites that listed. Do you think that a cap is appropriate? I don't know whether Senator Baucus asked that question before of you. Do you think we ought to cap the number of sites listed?

Ms. KERBAWY. An NPL cap is not something that we're looking for. The way that it's crafted in this bill, I'm not sure that it creates problems for us. Right now, EPA is listing approximately 20 sites a year. The cap lays out about 30 sites a year. It still provides the ability for the gorilla in the closet that people are using today.

After the first 5 years, I believe it's 100 sites could be added. It's not something we're looking for, it's not something that we're excited about. But it doesn't appear, the way it's crafted, that it's a problem.

Senator LAUTENBERG. Last question. Do you think that the EPA ought to wait until the request comes from the Governor, or do you agree with Mr. Curtis that a Governor's concurrence would be the best approach?

Ms. KERBAWY. It's very important to the States that there be a Governor's concurrence. I think the ability to influence what sites go onto the NPL is very critical to us. A Governor's concurrence would be very helpful.

Senator LAUTENBERG. But you don't think it's necessary that the Governors initiate the request in order for a site to get listed?

Ms. KERBAWY. The key point is that there be Governor's control over whether a site moves forward or not.

Senator CHAFEE. Senator Voinovich.

Senator VOINOVICH. Ms. Kerbawy, first of all, I'd like to congratulate Michigan on the great program that you have on brownfields.

Ms. KERBAWY. Thank you.

Senator VOINOVICH. Specifically, I think the fact you've got, what, a $400 million bond issue you've passed that can act as kind of a guarantee that if something is discovered later on, that the State will pick up the cost has been a real reassurance to some of your business people to go forward with cleaning up their brownfield sites. We're envious of you in Ohio for having that.

I am a strong supporter of waiving Federal liability at sites that have met the cleanup requirements under State laws and programs. However, I'm concerned that this legislation does provide a hindrance to expediting State cleanups by requiring all sites to be listed on the CERCLIS for 2 years in order to receive the Federal liability waiver.

In our State, about 25 percent of the known contaminated sites are not on CERCLIS. I think this potentially has the effect of slowing down cleanups at these sites. I would like to know, do you believe it's necessary for all sites to be included in CERCLIS in order to receive the exemption from Federal enforcement as specified in the bill?

Ms. KERBAWY. That is one of the provisions in the bill that we have some concerns about, particularly with regard to brownfields. I think that listing on CERCLIS is an unnecessary step and one that can create problems for brownfield redevelopment. I think that one of the things that just recently happened was the archiving of

25,000 sites from CERCLIS to help in promotion of brownfield development.

I think that was a recognition by the Federal Government that a listing on CERCLIS was a specter on those sites that was inhibiting brownfield redevelopment. I think that would also be the case if we had to list a site on CERCLIS for a couple of years before it moved forward.

We have thousands and thousands and thousands of sites across the country that need to move forward under State programs and are not going to be addressed by the Federal Government. To have to have them be listed on CERCLIS in order to move them forward will create more problems.

Senator VOINOVICH. Thank you.

Senator CHAFEE. Senator Smith.

Senator SMITH. Thank you, Mr. Chairman.

Mr. Johnson, you did identify some areas in the bill That you felt could be clearer, and as you know, my staff has been working with you on that and will continue to do that to try to clarify your concerns. But you state that the NAAG favors affording appropriate legal finality to cleanup decisions of qualified State voluntary cleanup programs and brownfields redevelopment programs. So I think in that respect, is it fair to say that you do agree with the mayors and the Governors and the State waste management officials on that issue?

Mr. JOHNSON. Yes, we generally agree with them. I think that we would like to continue to work with you and the other Senators no the precise language in the bill and how the reopeners would work and whether a program has to be qualified and how that might take place. But we think basically the concept is important, the concept should be followed through, we support the concept and we'd be happy to work with everyone in making sure that the legal language works and does not pose a hindrance or have a bad effect on the environment or the pace of cleanups.

Senator SMITH. Ms. Subra, in your testimony, you stated that even though EPA and GAO tell us that the Superfund program is ramping down that we should not reduce funding. How do you justify that, if we're ramping down the program?

Ms. SUBRA. In the State of Louisiana, we have approximately 500 sites that haven't been addressed. In addition, we have 50 sites that have been identified needing cleanup. We as a State do not have the money. Every time a new site is identified or an emergency occurs, we have to look to EPA to come in and do the work.

The sites that are being put on NPL right now in Louisiana are all fund led sites. So we have been sort of slow in the process, we have less than 20 Superfund sites that are on the NPL list, a number of which are completing cleanup. But if there isn't financial resources at the Federal level, then the sites in Louisiana will not be addressed. We're looking to the Feds to help us clean those sites up.

Senator SMITH. Do you support State finality?

Ms. SUBRA. In the State of Louisiana, no. Because what happens in the State of Louisiana is the legislature can suddenly decide to just gut the program, a new industry can come in and hire away all the experts at the State level. And if you have State finality,

that comes under the jurisdiction of legislative mandates. The political will is not there to have State sites in Louisiana appropriately cleaned up.

Senator SMITH. Well, as I indicated to the previous panel on a question, our legislation specifically says that the State allows EPA, EPA is allowed to come into a State, one, in an emergency, two, at the request of the State, three, if the State's remedy fails and the State is unwilling or unable to respond, and where the contamination has migrated across the State line. Why do you object to that language?

Ms. SUBRA. Also you have to have criteria in there where citizens can petition to have EPA come in. Because that's what's happening right now. It's over and over again in the State of Louisiana, the citizens are asking EPA to come in and address the problems. The State isn't asking EPA to come in in all cases.

Senator SMITH. So it's more than just the State's ability or inability to perform? You want more citizen participation? There is citizen participation now, you know.

Ms. SUBRA. But in your criteria that you listed, you didn't have one that says, the citizens can petition EPA to come in and address a problem.

Senator SMITH. Even if the State doesn't want them in, or need them?

Ms. SUBRA. If the citizens feel that the State is not doing an adequate job, they need to be able to petition EPA, and then EPA comes in and addresses the issue on whether or not the problem is bad enough for them to step in.

Senator SMITH. Ms. Kerbawy, let me ask you one question. You stated in your testimony that you found that the States have completed about seven times as many sites per year in recent years as they have in the first 12 years in the program, so that the State accomplishments are increasing. Yet we hear a lot about the need to recognize these changes in the Superfund program.

What I continue to hear and witness after witness at some of the sites that I've visited around the country, it seems to indicate that although the law provides a role for EPA at NPL sites in theory, in practice it's not happening as much as it should. Is that fair? Does that represent your view?

Ms. KERBAWY. I'm not sure I understood the question. You were wondering at EPA's role at NPL or non-NPL sites?

Senator SMITH. Non-NPL. The law provides a role for EPA at non-NPL sites in theory, that in practice is probably not exercised. Is that a fair statement?

Ms. KERBAWY. Yes, I think that is a fair statement. EPA generally does not get involved in non-NPL sites, except for removal actions. We very rarely see them get involved in those sites.

But the liability extends across all sites where there is a release. What we see really happening and having the most impact is that people are afraid that the Federal Government will come in and exercise the liability issue.

The other thing is that there is cause of action for third party contribution suits, things like that. So people are afraid that they will get brought in for compensation, cost recovery by others that have performed cleanup work.

So the specter of the liability issue, even though EPA generally does not get involved in the non-NPL sites, is still there. It's still a problem for the brownfield sites.

Senator CHAFEE. I want to thank everybody in the panel. We appreciate your being here.

Now, if the next panel will come right up. Let's take all six at one time.

Mr. Bernie Reilly, from Du Pont; Karen Florini, from EDF; Mark Gregor, from the city of Rochester; Mr. Nobis; and Mr. Red Cavaney, the President of American Petroleum Institute; and Mike Ford. If you could all take your seats.

Mr. Reilly, why don't you proceed.

STATEMENT OF BERNARD J. REILLY, CORPORATE COUNSEL, DU PONT DE NEMOURS E.I. AND COMPANY

Mr. REILLY. Good afternoon, Chairman Chafee, Chairman Smith and members of the committee. My name is Bernard Reilly. I'm corporate counsel for the Du Pont Company, and I'm here representing the Chemical Manufacturers Association.

CMA has worked on Superfund reform since the early 1990's with the Members of Congress, the Administration, environmental groups, States, cities and other business organizations. In addition, we have worked with EPA to improve the Superfund program through administrative reforms.

I would like to commend Chairmen Chafee and Smith for their leadership over the years in trying to reform the Superfund law and for their introduction of S. 1090, the Superfund Program Cleanup Act. CMA recognizes the Senators' accomplishments in producing this bill. It is a good bill.

As long participants in the efforts to reform Superfund, CMA understands that this is not an easy task, and looks forward to working with both the Republican and Democratic members of the committee and the Senate on this bill.

CMA has completed a preliminary review of the recently introduced bill. We'd like to spend the next few minutes highlighting what is especially noteworthy, touching on a number of strong areas and following with some areas that we believe could be improved.

Clearly the most important issue facing Congress at this time is the future direction of the program. As we've previously noted, after 17 years of existence, there's more of Superfund behind us than ahead of us. According to EPA, nearly 90 percent of all non-Federal sites in the NPL are undergoing cleanup.

Congress needs to determine what remains to be done under Superfund, how long it will take and how much it will cost. We strongly commend the co-sponsors of S. 1090 for recognizing these critical issues and taking appropriate steps to address them.

CMA has prepared estimates of the funding required to complete the job at hand. These indicate that Superfund funding could be dramatically reduced and there still would be sufficient funds to pay for both the remaining sites that GAO and EPA have concluded will be added to the NPL in the future.

Program spending levels should be adjusted according to fit the future needs of the program in order to ensure that more funds

than necessary are not appropriated. S. 1090 does exactly that. Congress should take the next step and direct an independent study of funding needs.

In addition to recognizing that Superfund is moving toward completing the job of cleaning up existing sites and that funding levels need to be adjusted accordingly, S. 1090 contains other important provisions. These include finality for State cleanups, an integral Governors' role in the process of listing sites on the NPL, liability relief to ensure that brownfields are redeveloped, and a recognition of the State's primary role in cleanup. We strongly commend the chairman for these provisions as well.

Another aspect of this bill deserves credit, and at the same time it raises some concerns about its implementation. This particular aspect has to do with exemptions that are provided for certain parties and the allocation system that is set up to pay for those parties' shares.

The bill deserves credit for recognizing that it would be wholly unfair to pass exempt party shares to the remaining parties at the site. The allocation system that is set up to determine these shares, however, appeared to be flawed. Under this system, industrial parties at these sites not only will continue to pay more than their fair share of liability, they likely will have to pay for shares attributed to exempt parties.

As we all know only too well, it is not easy to develop fair, defensible and acceptable liability allocations. CMA has advocated a streamlined system for several years calling for the inclusion of certain basic elements, but not overburdening the system with details.

The single most important element of any streamlined process is that it be administered by third party neutrals who do not have a vested stake in the outcome. S. 1090 does not include this element. Instead, the bill designates EPA as the allocator. This is not appropriate, given EPA's demonstrated vested interest in preserving the trust fund and the culture of assigning liability only to the financial viable parties.

Fundamental reform to ensure a successful, cost-effective future of the Superfund program also requires changes to areas including natural resource damages, remedy selection, and cost recovery programs.

In conclusion, Chairman Chafee and Chairman Smith and members of the committee, we would like to thank you for undertaking the hard work necessary to produce the Superfund Program Completion Act. As I have said, the future direction of the program is the most critical issue facing us in reforming Superfund. We see that future as one in which sites currently listed on the NPL are cleaned up and the remaining sites are addressed under a reduced program with reduced spending levels. We strongly commend you for taking an innovative look at these issues and addressing them in S. 1090.

We appreciate the opportunity to provide this input, and I would be delighted to answer any questions.

Senator CHAFEE. Thank you very much, Mr. Reilly.

Ms. Florini?

STATEMENT OF KAREN FLORINI, SENIOR ATTORNEY, ENVIRONMENTAL DEFENSE FUND

Ms. FLORINI. Thank you, Mr. Chairman.

My name is Karen Florini, I'm a senior attorney with the Environmental Defense Fund.

I think this is the fourth or fifth time I've appeared before this committee to discuss Superfund reauthorization in the last few years, and personally, I would be just as happy if this were the last such occasion that came along. I was very pleased to hear that you will be in discussions shortly with the Administration in the hopes of developing a bipartisan and widely supported bill that addresses the issues that are in S. 1090, and I wish you all Godspeed.

There is no question but that the Superfund program has changed dramatically in the half dozen years since we all started these discussions about Superfund reauthorization. While Superfund still has its critics, myself among them, the real question at this point is whether S. 1090 as it stands now would make things better. We recognize and applaud the fact that this bill is considerable narrower than Superfund reauthorization bills that have been introduced in prior Congresses. Unfortunately, however, we conclude that S. 1090, as it stands, would not generally make things better and therefore we oppose the bill.

I will describe a couple of my major objections in a moment but first, I do want to note that we do continue to believe that reimposition of the Superfund polluter pays taxes continues to be important. Fundamentally, we think it's time for the industry's $4 million a day tax holiday to end.

With respect to the specific provisions of S. 1090, one of the major concerns involves the bill's reductions in authorized funding levels over the next 5 years. It is far from clear that EPA in fact is going to need less money. It is true that there have been 600 construction completions, but there are another 700 already listed sites still on the Superfund list.

It is my understanding from informal discussions with EPA that the agency expects to continue construction completions at about the same pace, as has been the case in very recent years, about 85 per year, which of course they will not be able to do if funding is curtailed. For years, critics of the Superfund program have bemoaned the slow pace of cleanups. Now that the pace has increased, it is not appropriate to choke it off through inadequate authorizations.

While it's true that the shape of the Superfund pipeline is different now than it has recently been, the bill simply ignores the fact that correspondingly, there are a lot more sites that are now in the operation and maintenance phase. To date, EPA has done a miserable job of keeping up with their statutory obligation to conduct 5 year reviews at sites where some contamination has been left in place. I have an article attached to my written testimony that details the 5-year review program and how little progress has been made in implementing it, and some of the serious problems that have been found in sites where, the few sites where EPA has gone back and taken a look.

Only by that kind of active oversight can we hope to know where remedies are not working and actually to take action to protect

health and the environment at those sites. In other words, even if EPA were to need fewer resources for the construction completions in the years ahead, an assumption that I do not believe is warranted at this time, the agency is going to need more resources to conduct the 5-year reviews and the followup actions associated with the results of those reviews.

To add insult to injury, S. 1090 provides that funds for liability relief get preferential treatment and that an ability to finance liability relief at a site limits EPA's ability to order final cleanup steps at the site. Doubtless, it will not come as a particular surprise for me to tell you that we strongly oppose those provisions.

Turning to the fair share allocation process, generally although that sounds innocuous, we think there are some serious problems in the bill as it stands. My written statement provides additional details on that.

Finally, I want to mention that we oppose numerous provisions in S. 1090 that would cut holes in the Federal safety net for cleanups. I want to talk specifically about the finality issue that has been much discussed this morning. There is already in law provisions for lender liability relief. This bill contains, and we support, provisions for prospective purchaser liability relief.

What we are really talking about with finality is giving a windfall liability relief to current sellers. We strongly oppose that. We do not think it is necessary or appropriate to tell a seller of a contaminated property who is and has for the last 20 years been liable under Superfund that if the State comes in, oversees a cleanup that by definition is ineffectual, that when EPA comes to want to take additional action and recover its costs, that the agency has restrictions on its ability to do so. That just does not compute in our calculus.

Finally, we have some concerns, we strongly oppose the cap on the number of NPL sites, for reasons that Senator Baucus laid out. It's not sound science. The number of sites that should be listed is the number of sites that need to be listed.

We also oppose the Governors' concurrence. While we agree that it's appropriate for there to be an orderly mechanism and for States to have first dibs onsite where they can and will proceed expeditiously to handle the site, that is far different than telling the Governors that they have a veto over the listing of the sites.

We have some concerns about over-breadth of some of the liability carve-outs. But I do want to mention, to close on a positive note, by saying that we agree that the pull-back mechanism that exists for some of the liability relief provisions is indeed appropriately crafted. We think it is very important to have a pull-back provision that says that if some of these rough rules that are embodied in the liability provisions turn out not to be appropriate to apply in particular cases, it will be possible to utilize the pull-back provisions so that you don't end up with an anomalous result as would otherwise occur.

Thank you.

Senator CHAFEE. Thank you, Ms. Florini. Now, Mr. Mark Gregor from the city of Rochester, on behalf of Local Government Environmental Professionals.

Mr. Gregor?

STATEMENT OF MARK GREGOR, MANAGER, DIVISION OF ENVIRONMENTAL QUALITY, CITY OF ROCHESTER, NEW YORK

Mr. GREGOR. Thank you and good afternoon, Mr. Chairman and other members of the committee. My name is Mark Gregor, and I'm the Manager of the city of Rochester's Division of Environmental Quality. One of my primary responsibilities is to actually conduct the investigation and cleanup work at brownfields sites and some State Superfund sites.

I'm pleased to have the opportunity to testify here today in behalf of the National Association of Local Government Environmental Professionals, or NALGEP. We represent city and county environmental managers and more than 100 local governmental entities across the country. Our members include many of the Nation's leading brownfield communities, including Dallas, Chicago, Portland, Baltimore and Glen Cove that you heard from earlier today.

NALGEP has been working actively with local governments on brownfields since 1995, when we began a project which led to the publication of our first report, Building A Brownfields Partnership From The Ground Up, with local government view on the value and promise of national brownfields initiatives. We continue to coordinate work groups to address critical brownfield issues, such as revolving loan funds, voluntary cleanup programs, smart growth and the implementation of EPA's showcase program.

Brownfields are undoubtedly one of the most significant issues for urban areas, including Rochester, New York. The cleanup and redevelopment of brownfields is one of the most exciting and challenging opportunities that we have facing the Nation. And I would compliment the members of the committee on their leadership in promoting legislative solutions to this issue. Virtually every community faces brownfield challenges.

Brownfield revitalization provides important environmental and economic benefits, including the cleanup, of course, of sites, the renewal of local economies by stimulating redevelopment and job growth and job retention and enhancing the vitality of communities, as well as limiting sprawl and its associated environmental problems of traffic and air quality problems and over-development of rapidly disappearing green spaces.

During the last 5 years, the city of Rochester has completed the remediation of more than 50 acres of brownfields, including the site of Bausch and Lomb Corporation's new corporate headquarters, a site of a new Federal Aviation Administration funded aircraft rescue and firefighting facility, and a site of a state-of-the-art 911 office of emergency communications.

The city was selected as one of the first rounds of EPA's pilot brownfield cities, and Rochester was also awarded one of the brownfield cleanup revolving loan grants from EPA. Using the first grant from EPA, the city investigated 15 and a half acres of junk yards and scrap yards, fuel depots and a rail yard. That 15 and a half acres now is part of the city's Erie Canal Industrial Park.

Rochester is also in the process of establishing a site investigation fund to provide private sector funds for investigation of sites.

The Federal Government, particularly U.S. EPA, has played an important role in helping Rochester develop the capacity and infra-

structure of our brownfield program. Critical funding has enabled us to institutionalize some of these programs, technical assistance and other resources that have helped us learn from other communities has been extremely important. The connections with other Federal agencies through EPA's efforts have been very helpful.

Most importantly, it's been able to provide critical leadership to the various stakeholders in our community to help understand the problem a little bit better.

NALGEP is interested in legislative action in three areas. Additional funding in the form of grant and loan programs is especially important for many cities, including Rochester. Rochester has a declining tax base now and falling assessed property values. So budgetary and financial issues are crucial to us.

New Federal legislation to further clarify and provide some limits on the liability of non-responsible new owners of brownfield sites that voluntarily complete cleanups is very important. The need to facilitate and encourage the participation of other Federal agencies in brownfield revitalization continues to be important and will become more important for us.

With respect to the first item, with regard to funding, continued Federal investment is critical to the cleanup and development of brownfields. Funding is needed for site assessment, remediation and redevelopment. Costs for site assessment and remediation can often be significant initial barriers to getting projects and site work underway.

The EPA pilot grant, grant programs focused onsite assessments, have enabled many communities to initiate this work and have begun to give developers and lenders some additional confidence that local governments, State governments and Federal Government are taking the brownfield issue seriously.

Congress should build on this success.

Senator CHAFEE. Mr. Gregor, do you want to summarize your points here?

Mr. GREGOR. Sure. Basically, there are three areas that we look toward our grants, grants for cleanup, grants for investigation, capitalization of revolving loan funds that are not exhibited by or encumbered by national contingency plan administrative requirements.

In addition, we are looking for additional clarification of liability on the part of new owners in particular. And Congress should also further clarify and limit liability for non-responsible parties, as I mentioned earlier.

Finally, with respect to the finality question, NALGEP has found that one of the most significant things that the Federal Government can do is to facilitate brownfields re-use by EPA delegating the authority to limit liability and issue no further action decisions for non-NPL caliber sites to the States. NALGEP has proposed that there be some initial entry criteria for those States and they are indicated in the testimony, the written testimony.

Finally, with respect to the finality question, NALGEP is of the opinion that EPA should provide that it will not plan or anticipate further action at any sites unless at a particular site there is an imminent or substantial threat to public health or the environ-

ment, and either the State response is not adequate or the State requests EPA assistance.

Finally, with respect to other agencies and other Federal agencies' involvement, the Congressional action to clarify the use of community development block grant funds for cleanup purposes has been very helpful. By their actions, many of these Federal agencies have significant impact on our ability to reuse brownfields, as well as to prevent the concerns of sprawl in green field areas.

Thank you.

Senator CHAFEE. Thank you very much, Mr. Gregor.

Mr. Nobis?

STATEMENT OF MIKE NOBIS, GENERAL MANAGER, JK CREATIVE PRINTERS, QUINCY, ILLINOIS

Mr. NOBIS. Thank you, sir.

Mr. Chairman and distinguished members of this committee, my name is Mike Nobis, and I am from Quincy, Illinois. I'd like to thank you for allowing me this opportunity to speak to you today, to share my hometown's experiences with a landfill that became a Superfund site. It's my hope and my goal this morning to bring a different perspective on what the effects are of a Superfund site and the Superfund law.

I'm the general manager and a part owner of JK Creative Printers. My company, which my family has owned for over 30 years, employs 43 employees. We are very proud members of the National Federation of Independent Businesses, the NFIB. I'm very honored here today to present this testimony on behalf of the 600,000 business owners who are members of the NFIB.

If you don't know where Quincy, Illinois is, Quincy is just a small community of 42,000 people. We're located on the banks of the Mississippi River, just 150 miles north of St. Louis, Missouri. If you don't know where that is, if you recognize the stomach of Illinois, we're the belly button.

[Laughter.]

Mr. NOBIS. Our town is a great place to live in and to raise a family. We do believe that we've enjoyed many years of good economic growth, good schools, strong community involvement and very good city leadership.

Of all the expectations we do have of our community, having our landfill declared a Superfund site was definitely not one of them. In 1993, you might remember when the Mississippi River reached its highest stages of flood stages in history, this prompted our community to rally together and beat back the floods, and the effects of it. Now my community again is being forced to band together to fight the unfairness of a Superfund law that is punishing us for legally disposing of our trash.

Companies that once worked together to fight back this flood are now suing each other because of the Superfund landfill. Companies who once worked together to sell and buy to each other are now suing one another.

For my company, it started on February 10th, 1999, this year, when we received in the mail from the EPA a letter that stated that six local corporations and the EPA and the city were looking

to recover some of the costs For cleaning up our local landfill. Even though what we had hauled there was only trash and totally legal, the EPA said that because we sent our trash there that we were potentially liable and responsible For paying our proportional share of the cleanup.

When you get a letter like this, as when I got this letter, I felt very sick, needless to say. For me and the 148 other companies that received this letter, it was totally unexpected and without warning. At first, we had no idea what this letter was really even telling us. We soon found out that it was asking us as small companies to contribute $3.1 million.

I had to laugh at that language, because they used the word contribute. They weren't asking us to contribute anything. They were threatening us to pay.

My company's designed amount was $42,000. I really consider myself lucky. Because there were other companies and other individuals being asked to pay $70,000, $85,000, and there were some small companies being asked to pay over $100,000. As I read through the list, you could see things like Catholic grade schools, our local university, bowling alleys, small mom and pop hauling companies, furniture stores, and yes, even our own McDonald's was listed to pay.

Most of the companies named only generated waste like plain office trash or food scraps. In the mid-1970's, when our company's trash began to be put in that landfill, I was in college. We have other owners, in another company, a person who owned the company was only seven when the landfill was in use. Yet we are being held responsible.

The document made it sound as though we were major hazardous waste dumpers. Yet nowhere in the document did it list what waste we were accused of dumping.

Senator CHAFEE. You have a long way to go here, Mr. Nobis. If you will summarize, see the light here.

Mr. NOBIS. I'll get through this. The important part of this is, when the EPA came into our community and tried to explain to us the application of the law, we had found out that the law was really unfair to us. Our community found it as un-American as possible. We found ourselves in a very difficult position. We were being asked to contribute funds of money that we weren't responsible For in any of the waste that went to the landfill.

It is important For us to try to communicate today to this committee that small businesses need to be removed from the liability of contribution to these sites. Because the effects of these funds that we're being asked to pay For the landfills are devastating our Companies. We don't have the funds or resources to help pay For the cleanup of these sites.

Thank you.

Senator CHAFEE. I think that's very good testimony, Mr. Nobis.

All right, Mr. Cavaney, from API?

STATEMENT OF RED CAVANEY, PRESIDENT AND CEO, AMERICAN PETROLEUM INSTITUTE

Mr. CAVANEY. Mr. Chairman, members of the committee, my name is Red Cavaney. I am President and CEO of the American

Petroleum Institute, which represents over 400 U.S. companies from all segments of the oil and natural gas industry, including exploration and production, transportation, refining and marketing.

It's a pleasure for me to be here today to speak in support of yours and Senator Smith's Superfund reform legislation, the Superfund Program Completion Act of 1999. I request that the written statement I have submitted be inserted into the hearing record.

Senator CHAFEE. Without objection, so ordered.

Mr. CAVANEY. API supports your efforts and applauds you for moving the Superfund debate a giant step forward. Your legislation addresses the difficult and complex issue of liability reform, one of the central problems that has plagued the program. It moves the Federal program toward completion by capping the number of sites on the National Priority List and by increasing the responsibility of States For administering cleanup activity.

It addresses the emerging issue of brownfields rehabilitation and it appropriately recognizes that the Superfund program should be funded with general revenues. To be sure, the Superfund program needs additional repairs. But as you and Senator Smith so correctly note, Congress and the Administration have been unable to find acceptable compromises on many issues. The lack of agreement on those issues should not prevent Congress from making important changes included in the Chafee-Smith bill.

The petroleum industry has a unique perspective with regard to Superfund. Oil and gas Companies have paid more than 57 percent of all the taxes collected for the program. Let me emphasize, the oil and gas industry's tax payments far exceed its responsibility For Superfund cleanups, which the U.S. Environmental Protection Agency has estimated at less than 10 percent.

The Superfund Trust Fund was created to pay for the cleanup of abandoned or orphaned hazardous waste sites. However, only 11 percent of its funds have been expended for that purpose. According to the General Accounting Office, about half the program's funds have paid the cleanup costs for non-orphan sites, and only a small percentage of these dollars have been recovered. If EPA improves its recovery of cleanup costs from known responsible parties, the program will need less funding from general revenues in the future.

Those who contributed to a hazardous waste site should continue to be held responsible to pay for their share of the cleanup. Let me assure you, Mr. Chairman, that authorizing general revenues for Superfund is consistent with the basic principle. Even though the dedicated taxes expired in 1995, responsible parties have continued to pay their share of hazardous waste site cleanup costs. For example, from 1996 forward, we estimate that oil and gas companies will pay a total of $1.2 billion in direct Superfund cleanup costs.

Despite the many shortcomings of the Superfund program, 89 percent of the sites on the National Priority List are in some stage of cleanup. Superfund in its current form is moving toward completing its mission. Revenues from the general fund, fines, penalties, interest on the fund balance, and de-obligated funds, assure funding for the program well into fiscal year 2001.

According to reports by GAO and the Congressional Budget Office, there are no legal impediments to the use of general revenues to fund the Superfund program. It makes sense for Congress to use general revenues to pay for orphan shares and administrative costs in the remaining years of the program as the bill proposes.

This is an appropriate use of general revenues, since every segment of society has some responsibility for handling the problem of solid waste sites. Your legislation also moves a number of non-EPA Superfund activities outside EPA's Superfund budget and eliminates EPA's practice of transferring funds to other Federal agencies for ''Superfund support.'' API strongly supports this move.

If EPA focuses on completing the program's original mission of cleaning up those remaining sites on the NPL, and if it fully implements the GAO management recommendations, Superfund expenditures can be reduced. That will further limit the amount of general revenues required.

With Superfund's mission nearly complete, now is the time to plan for the future. We agree with you and Senator Smith that this is the time to begin ramping down Federal programs. Your bill moves in that direction by proposing to limit the number of sites that will be added to the NPL during the next few years, and by transferring administration of cleanup activities to the States for final disposition.

Once again, we appreciate the opportunity to testify in support of the Superfund reform proposal, and we commend you for your steadfast efforts dedicated to improving the Superfund program.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you very much, Mr. Cavaney.

Mr. Mike Ford, on behalf of the National Association of Realtors?

STATEMENT OF MIKE FORD, NATIONAL ASSOCIATION OF REALTORS

Mr. FORD. Mr. Chairman, thank you for the opportunity to present the views of the National Association of Realtors on S. 1090, the Superfund Program Completion Act of 1999. I wish to thank Chairman Chafee and Chairman Smith for their continued and determined leadership in building bipartisan consensus on this very important issue. Senator Lautenberg is from our area, I know he's not on the bill, but he's been very involved in the environment in New Jersey over the years.

My name is Mike Ford. I own a full service residential and commercial real estate company in Clark, New Jersey. I've been a real estate broker for 25 years.

It is often said, and I agree, that realtors don't sell homes, we sell communities. The more than 730,000 members of the National Association of Realtors, real estate professionals involved in all aspects of the real estate industry, are concerned and active members of our communities. We want clean air, clean water, clean soil. We want to see properties affected by historic pollution cleaned up and returned to the marketplace. We care about health, quality of life, as well as a vibrant economy. We are willing to do our part to maintain the important balance.

However, we also expect some fairness, certainty and predictability from government regulators that our customers expect from us. In this respect, Superfund has clearly failed.

Superfund began with laudable goals of cleaning up hazardous waste sites to protect human health and the environment. Progress has been achieved, and for that, the EPA deserves credit. Unfortunately, progress has come at a high price. While serving as a mechanism for hazardous waste cleanups, Superfund has also served as an engine for massive litigation.

Deep pocket parties targeted by EPA have turned around and sued smaller parties. Many of these smaller parties are small business owners who did nothing more than dispose of common garbage, recyclers who tried to be environmentally conscious and innocent property owners who have not caused or contributed to hazardous waste contamination, have been drawn into years of costly litigation defending against the threat of huge cleanup liability.

As a first step, these parties should be provided with the maximum degree of liability relief so that resources can be targeted toward cleanup rather than litigation. When it comes to Superfund cleanup, we must ensure the real polluters pay, so that the hazardous waste sites are returned to productive use as soon as possible. From the perspective of taxpaying citizens, it is the right thing to do to ensure that Superfund is administered in a fair and effective manner. From the perspective of businessmen, it also provides the certainty needed in order to move forward in developing sites that are known or suspected to be contaminated.

As a second step, the Federal Government should recognize and support hazardous waste cleanup efforts underway at the State level. In an effort to revitalize urban centers, most of the States, including my home State of New Jersey, are creatively attacking the hazardous waste problems by providing incentives to voluntary cleanup programs.

One common incentive provided by the program is liability relief. Typically, the State will provide some sort of relief once it has approved the cleanup. In New Jersey, the relief comes in the form of a no further action letter from the DEP. Unfortunately, there is no guarantee that the Federal EPA will not assert authority at a future date and require additional cleanup. Without the certainty of knowing that they are protected from Federal as well as State liability, property owners and developers are very reluctant to undertake development of a site that may be contaminated.

In New Jersey, we have our fair share of hazardous waste sites. However, you see what we can accomplish when local, State and Federal Government work together. In my home town of Clark, General Motors cleaned up a contaminated site and funded construction of a golf course. The local government now runs the golf course and makes a healthy profit on it.

If these reforms are achieved, hazardous waste sites throughout the country will be returned to productive use, revitalizing communities by increasing their tax base, creating jobs and rejuvenating neighborhoods. Otherwise, it will remain barren, contributing to nothing but economic ruin.

S. 1090 presents a win-win opportunity for everyone by achieving cleanup of hazardous waste sites, encouraging property use and en-

hancing community growth. Now is the time for Congress to assert bipartisan leadership and reinforce our nationwide effort to turn brownfields into green fields. The National Association of Realtors supports S. 1090. We encourage the 106th Congress to act now on Superfund reform.

Thank you again for the opportunity to present the views of the National Association of Realtors.

Senator CHAFEE. Well, thank you very much, Mr. Ford.

Ms. Florini, you've heard this testimony that seems to be a constant drum beat here about the brownfields problem. It's a very serious one, and it seems to me the witnesses have wisely pointed out that this is an environmental issue, it isn't just a safety or health issue. Because if we can use these lands within the city, then they don't go outside in these lovely fields and develop industrial parks and gobble up the land, so-called urban sprawl.

But you've also heard that what they seek, I think Mr. Ford touched on it, others have touched on it, is some finality in this thing, somehow have it done with, that a site is clean and then the potential purchasers can proceed with some sense of security that they're not going to be second guessed by EPA coming in later on.

Could you give me your thoughts on all that?

Ms. FLORINI. First of all, yes, obviously we strongly support brownfields redevelopment. As I tried to allude to in my oral statement, we do in fact strongly support the prospective purchaser liability relief. I think I've been on record supporting that for several years now.

I think the rhetoric of the finality issue is confusing two different issues. The one relates to relief for purchasers. But as I just said, we support relief for purchasers. What I do not support is the further step of providing what I believe is windfall liability relief for sellers, sellers who have been liable for 20 years under Superfund and who under the provisions of this bill as I read it would be allowed to have States waive their future liability.

I don't believe that is in fact necessary. I don't think that most of the people who have focused on the need for finality as an incentive for additional brownfields development have differentiated between the two different parts of it. I think that is in fact something that does and should be taken into consideration.

Senator CHAFEE. Do you have any thoughts on that, Mr. Ford?

Mr. FORD. Finality is an important issue. When you're cleaning up in New Jersey, under the DEP auspices, and if you're constantly worried that the EPA is going to come in and reevaluate the site, give you more cleanups, not agree with what the DEP has agreed to, no one wants to clean up under those auspices. It's not a practical consideration. You're digging into a deep well, and then the EPA is going to come in and make it a deeper well to clean up.

Senator CHAFEE. Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Ms. Florini, I wonder if you could comment a bit on whether or not it makes sense to extend the Superfund tax, either or both of its two components, as we look toward eventual completion of cleanup.

Ms. FLORINI. Yes, I think it does make sense to reimpose the Superfund taxes at this time to provide an assured and specific funding source for the program.

Senator BAUCUS. Why do you say that, even though as you know, under our very arcane and nobody understands them budget rules here that a dollar is a dollar, whether it's Superfund tax or whether it's general revenue or what-not, why is that necessary?

Ms. FLORINI. Well, Senator Baucus, if you don't understand the budget process, I''m certainly not going to lay claim to do so.

[Laughter.]

Senator BAUCUS. But you know what I'm talking about.

Ms. FLORINI. Yes. The original concept behind creation of a trust fund supported by dedicated taxes was that it would both create an incentive for appropriators to be more likely to actually go ahead and appropriate the funds, and also establish the polluter pays principle in two ways, not just in the liability provisions of the statute, but also by tying the taxes to a group that is at least more connected to the creation of the Superfund sites than the general public is. So to the extent that there are expenses associated with the Superfund program that are not feasibly cost recoverable, then the taxes are there to provide the funding to pick up that burden.

Senator BAUCUS. What do you think the chances are that the money will be there to pay for the cleanup if there is no extension of the tax?

Ms. FLORINI. I think I need to go back to my original response to your question, Senator. I honestly don't know the response to that question.

Senator BAUCUS. Well, as many know, there is a problem here. One of the problems is relying exclusively on general revenue. The problem there is that we have at this point anyway budget caps. As a practical matter, the total number of dollars that will be available under the Appropriations Subcommittee will be about $12 billion in current spending, $12 billion less than current spending. So that Appropriation Subcommittee is going to have to figure out where it is going to cut the money.

In addition, the bill itself authorizes levels at about 25 to 30 percent lower than current. If the Superfund tax is not extended, even though technically those dollars are not necessary for Superfund, although psychologically, the more that it's there, the more than it helps, there's going to be a problem, it seems to me, on whether or not this program is going to become even close to being funded at the levels most people in the country expect it to be. Do you agree with that statement or not?

Ms. FLORINI. Yes, that does in fact reflect, I think, where things stand, which is why we do indeed believe that the taxes ought to be reimposed. Certainly one of the things we find most objectionable in the bill is the ramp-down on authorizations.

Senator BAUCUS. And the caps on new listings?

Ms. FLORINI. Yes, definitely oppose that as well.

Senator BAUCUS. How do we get to completion? Obviously there are lots of complaints about the current program. You heard a lot of the discussion about finality and how there is a chilling effect on local communities to develop sites for fear that there will be some liability here and so on and so forth. Obviously, we're all basi-

cally working toward the same solution here, to complete cleanup as reasonably as possible, complete it, but complete it reasonably but do it well. How do we get just generally there? Do you have an overall thought about that?

Ms. FLORINI. We stay the course. I think at this point it's very clear that the pace of cleanup has accelerated dramatically over the last few years. In fact, the environmental community is having some concerns that in some instances, at least, quick may be being now traded off by EPA for good. That's just a general footnote.

But clearly, we do not reduce the resources being made available to the program in a way that would curtail the pace of progress. And we do not make a number of, we do not fiddle with the law, we do not change the fundamental liability and the fundamental cleanup.

Senator BAUCUS. Mr. Reilly, I will give you a chance to answer that one.

Mr. REILLY. Would you repeat the question, Senator?

Senator BAUCUS. Any one of the questions.

[Laughter.]

Senator BAUCUS. Basically, from your perspective, obviously it's the tax.

Mr. REILLY. The issue of the tax is near and dear to our heart. It hits industry widely, disparately. But for those who feel as though the polluters are not paying right now, I guess I'll take the occasion to remind you that every single site where Du Pont is involved and any other company is involved, and that's over 70 percent of the NPL sites, we're paying our fair share probably by a factor of 3. We pay for whatever the heck our liability is at the site, based on the neutral that we bring in, or the courts. There's generally a large number of orphan parties, the owner or operator is defunct. We pay for that share.

And then we also pay for the oversight costs that EPA engages, basically spending our money from the fund to oversee us. We have to pay that money back. So we're paying by a factor of three as it is. If you want to reimpose the Superfund taxes, then we overpay by a factor of four. I think that's a fair way to characterize it.

Senator BAUCUS. CMA did support the tax, though, previously, like in 1984 for example? Or in 1994, it supported the tax?

Mr. REILLY. In the context of a comprehensive reform of Superfund and in the context of taking a look, especially now that we're toward the end of the pipeline, Senator, we want to make sure the program is funded adequately. If in the end that requires some contribution by the companies, you can count on us.

Senator BAUCUS. It's also true that if the only contribution to pollution is petroleum, that petroleum is exempt, oil and gas is exempt.

Mr. REILLY. I'd rather you ask that to the petroleum industry, Senator, we're a chemical company and we have no exemptions.

Senator BAUCUS. So I understand, but is there another way to recast this tax? My staff will hate me asking this question. Can we revise it in some way or deal with it in some way, so that the funds are there to pay for the cleanup?

Mr. CAVANEY. First of all, people talk about the tax, the concept of polluter pays. I want to reinforce what Mr. Reilly said, it is that

in the large, large, large majority of the Superfund sites where remediation is underway, there is a responsible party. So you do in fact have a connection. The taxes were originally put forth to be able to fund orphan or abandoned sites, for which are only 7 percent of the remaining sites.

It appears to me that if you're going to look at a comprehensive reform package, then you could also look at taxes from that perspective. But in the current environment, there are very few people who think a very comprehensive package will be able to get through Congress and be signed.

So we strongly support making gains where we can. We think the gains included here in the Chafee-Smith bill go in the right direction and establish a lot of precedence.

Senator BAUCUS. When we enacted Superfund in the Congress, in 1980, the committee report language basically said we in the Congress want to provide a fund to finance response action for liable party non-cleanup. Then we said, third, base the fund primarily on contributions from those who have been generically associated with such problems in the past and who today profit from products and services associated with such substances.

I understand what you're saying and you make a very good point, it's well taken. But it is true also, isn't it, that if the only contribution is petroleum or petroleum feed stocks that the petroleum industry is not liable?

Mr. CAVANEY. Under the current view, EPA says we are responsible for far less than 10 percent of the sites. Yet historically we've paid 57 percent of the taxes. That's over $8 billion since the fund started, and that's in addition to the $8 billion we've paid in cleanup under Superfund and under the State cleanup and other Federal statutes.

Senator CHAFEE. Senator Crapo.

Senator CRAPO. Thank you, Mr. Chairman. I'll followup a little bit on that question, but maybe with some other members of the panel. In response to some of my earlier questions, it turns out that the Governors' Association, the Attorney Generals Association and ASTSWMO do not really have strong objections to reimposition of the taxes in the context of this discussion. I can take it that Mr. Reilly and the Petroleum Institute do have a strong opposition to that. Ms. Florini would support the reimposition of the taxes.

I'd like to know where the other members of the panel come down on that. Mr. Gregor, do you have a position on that? Would your support for the bill be impacted by whether the taxes were reimposed?

Mr. GREGOR. I think from the standpoint of local government, we're probably a little more neutral on the revenue source and more concerned that there be adequate funding to meet the demand of site work that needs to be done.

Senator CRAPO. I take that to mean, then, that if a decision to reauthorize the taxes were made, that would not cause you to withdraw support for the bill?

Mr. GREGOR. That's correct.

Senator CRAPO. Mr. Nobis?

Mr. NOBIS. Usually in the case of a small business like ourselves, dealing with a Superfund site, usually what they are trying to re-

cover in costs from us is pretty small. To me it would seem that a lot more money would be saved if they really wouldn't come after the small businesses. In my community, they spent millions of dollars just trying to collect the millions they were trying to get from us. I would think there would be more money available to clean up these sites if the small businesses were eliminated from having to pay for the cleanups. They could use that money for the attorneys to go to the cleanup of the sites.

Senator CRAPO. What about the question of reauthorization of taxes, however? Do you have a position on whether the taxes should or should not be reauthorized?

Mr. NOBIS. I would think for a small business like ourselves, we really don't understand much about reauthorization of the taxes. To us, it's just that we really need to have relief from this. It seems like so much money is spent on trying to collect the small amounts from the small businesses that that money could be used for the cleanup of the landfill. In our case, most of all the money that was actually used or collected from us didn't go to the cleanup of the landfill at all, it went to just the attorneys.

Senator CRAPO. Mr. Ford?

Mr. FORD. Since the National Association of Realtors, we broker property, the tax issue wouldn't really affect us either way. Our sole purpose is, we want the properties cleaned up, put back on the marketplace so we can market them again. But the tax issue would really not make a difference to us either way.

Senator CRAPO. So in other words, your support for the bill would not be lost if the taxes were in there?

Mr. FORD. Definitely not.

Senator CRAPO. Mr. Reilly, obviously there is a question of the taxes and the reauthorization. A question that I raised earlier also is whether the EPA can get around the caps on the NPL listings as well as some of the other efforts to try to bring the States more into involvement through the use of 106 orders or other aspects of EPA authority.

Do you think that the legislation we see right now does provide the necessary protections?

Mr. REILLY. We very much support the recognition that the States have got the capacity to work their brownfields issues, work their voluntary cleanup programs. We very much support the issues in the bill where the States can give finality. Now, we take a look at the relief valves that are in the bill, and to us they appear more than adequate if there is an emergency, or if the State decides it wants to bring EPA back in. Those relief valves are there.

Then implicitly, Senator Crapo, the agency has full authority under 106 orders to come in and order parties to clean up the site. I think one of the earlier panels made it sound as thought a company might just blow off a 106 order. Well, 106 orders carry a penalty of $25,000 a day. I'm not sure many companies would disregard an order like that.

Senator CRAPO. Does CMA have a position on this bill?

Mr. REILLY. We consider it an excellent, we consider it a very good bill. And we really haven't had to take a firm position on it. We were delighted to hear at the beginning of the day that the Chair and the rest of the panel are going to talk to EPA, so maybe

we don't have to take a firm position one way or the other, because the ground is shifting as we speak. We think it's a good bill.

Senator CRAPO. So at this point, there is not a stated position of CMA on the bill?

Mr. REILLY. That's correct, Senator.

Senator CRAPO. I have no further questions.

Senator CHAFEE. Thank you, Senator.

I want to thank the panel. I'm sorry that Ms. Miller was not able to be here in time. Where is Ms. Miller? Apparently she arrived late, and as I understand, if she has a statement, we will put that in the record.

As I announced earlier, tomorrow's hearing will be postponed, at the request of Ms. Browner, and we're going to have a chance to meet on the bill. If anybody has anything further they wish to put into the record, they will have until June 1st to do so.

Thank you all very, very much for coming. We appreciate it.

[Whereupon, at 12:50 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF HON. BOB GRAHAM, U.S. SENATOR FROM THE STATE OF FLORIDA

Mr. Chairman, members of the committee, thank you for the opportunity to speak on an issue that is very important to the State of Florida: Superfund reauthorization.

Florida currently has 46 active sites on the National Priorities List. An additional 19 sites are being cleaned up by the Florida Department of Environmental Protection under their State cleanup program. The General Accounting Office's November 1998 report identifies 269 sites in Florida that are classified as awaiting an NPL decision. Florida therefore has a vested interest in the future of the Superfund cleanup program.

The State of Florida has also initiated a brownfields cleanup program to address underutilized industrial properties across the State. These sites may have low levels of contamination present as a result of previous industrial activity, but do not qualify for the NPL. However, many property owners are concerned that even after a site is cleaned up to the State's satisfaction, the EPA may require additional action. This lack of certainty about future Federal liability can inhibit development of the property, contributing to urban blight and suburban sprawl.

I look forward to working with my colleagues to find a way to revise existing Superfund law to encourage cleanup of brownfields. In addition, we need to revise Superfund's liability provisions to treat contributors of small quantities of waste fairly and to encourage recycling of materials to conserve our natural resources. Administrator Browner has initiated a variety of administrative reforms at the Environmental Protection Agency over the years to address these issues, and I look forward to discussing where we go from here.

STATEMENT OF THE HONORABLE JIM MARSHALL, MAYOR OF MACON, GA, ON BEHALF OF THE U.S. CONFERENCE OF MAYORS

Mr. Chairman and members of the committee, I am Mayor Jim Marshall of Macon.

I am pleased to appear today on behalf The U.S. Conference of Mayors, a national organization that represents more than 1,050 U.S. cities with a population of 30,000 or more.

I presently serve as a co-chair of the Conference's Mayors and Bankers Task Force, a role that I share with Mayor Paul Helmke of Fort Wayne.

Mr. Chairman, the Conference's statement addresses a number of areas pertaining to the legislation before this committee today.

It addresses key issues for mayors in this debate, noting particularly the need for liability relief and "finality" to promote brownfields redevelopment.

It discusses why Congress needs to act on legislation to further the efforts of cities and other communities in recycling brownfield properties. It presents new information on the scope of the brownfields problem and benefits of positive policy reforms,

a discussion which largely focuses on the results of the Conference's Second Annual Brownfields Survey that was released last month.

It offers our perspectives on the status of lender support of brownfields redevelopment, particularly how legislative reforms can help stimulate additional private sector investment in these sites.

Finally, it reviews how your legislation, "Superfund Program Completion Act of 1999" (S. 1090), responds to key issues raised by mayors on brownfields and selected Superfund reforms.

Key Issues for Mayors

Mr. Chairman and members of this committee, you are well aware of the mayors' continuing interest in securing legislative reforms to Superfund, particularly issues pertaining to brownfields redevelopment.

My colleague, Fort Wayne Mayor Paul Helmke, recently appeared before you to talk about the challenges of urban growth and the preservation of open space. His comments added to the substantial record of this committee on the need for legislative reforms to Superfund and other actions supporting the recycling of brownfields.

As we review the legislation—"The Superfund Program Completion Act of 1999 "—before this committee today, the Conference believes you have crafted a series of reforms that will help move brownfields redevelopment forward in assisting local efforts to recover these sites and return them to more productive use. These reforms, we believe, will help us move to the next level, beyond simply "comfort letters" on liability and limited grant commitments for assessments and cleanups.

Most mayors will tell you that the major impediment in securing private capital for the clean up and redevelopment of brownfields is Superfund's liability regime.

We believe that:

1. It is time to free innocent parties, both public and private entities, from Superfund's unfair liability strictures. Parties that had no part in causing the contamination at individual sites should no longer be held liable under Federal law.

2. It is time to create more certainty for the current owners of contaminated properties—the hundred of thousands of sites in every place in America that are likely to be brownfields at some time in the future—by providing them certainty in their cleanup costs and liability exposure. Owners of non-Federal interest sites need certainty about the rules that apply to them, certainty about the costs to remediate these sites and certainty that their actions terminate the risk of future liability.

Mr. Chairman, your legislation reflects your understanding of these issues and the need to deal specifically with the challenges before us in addressing the many thousands of brownfields that already exist and to take steps now to reduce our predisposition toward creating more brownfields in the future.

In explaining our views on innocent parties, let me provide some further perspectives from our vantage point as mayors. We have been living under a Federal statute and its strict liability regime—although well-intended and largely aimed at more contaminated properties posing greater threats to the public—that has dramatically slowed progress by all parties in coming to terms with lesser contaminated properties, sites we generally describe as brownfields.

It has produced a legacy of inaction by property owners, be they innocent or responsible parties, which we now measure in terms of thousands of properties and millions of acres. In our National Survey, which I discuss later, 180 cities provided estimates of the acreage of brownfields in their communities. The total acreage exceeds the combined land area of the cities of Seattle, San Francisco and Atlanta.

And, we don't believe that continuing charges of who is or who is not more protective of the environment, etc. is in tune with the reality of what is happening in America. The nation will continue to warehouse acre upon acre of contaminated soils and materials for the foreseeable future, until we respect the scale of this problem and the many complicated dimensions associated with our current liability regimes.

Rhetoric and political advantage will not cleanup one brownfield, but bipartisan legislative action will. We all need to put aside political posturing and confront the challenge before us.

I would note, however, that have serious concerns about the proposed termination of the Superfund program at this juncture and the absence of a plan to reinstate the feedstock taxes. We believe that continued dialog on these issues and forward progress on the legislation are the best way to bring these issues to closure on a bipartisan basis.

As a mayor and a sometime expert on real estate law, we are taking on a daunting task as we seek to enact reforms and policies to undo the substantial "liability fear" which is now part of our investment and development psyche.

Mr. Chairman, your legislation moves the process forward, and we support your efforts in this regard.

Today, I want to focus on two key issues in this debate.

First, acting on the innocent party liability relief is a threshold issue.

Your legislation offers new standards for absolving innocent parties of liability under Superfund. When mayors talk about this issue, they are most often focusing on brownfields. The Conference strongly believes that innocent party-relief is the crucial first step, legislatively, in encouraging more private sector attention to and investment in the clean up and redevelopment of brownfields.

As a mayor and a representative of local governments, I encourage you to revisit these provisions to grant further relief to cities and counties who already hold, in public ownership, substantial inventories of these sites. The relief you have provided doesn't fully account for the many properties that have already been acquired by cities and other public agencies. For example, many sites now owned by cities were acquired in the normal course of performing local government functions, and many of these were acquired involuntarily. This is not the same thing as a private party acquisition, and as such, should be treated differently.

We believe that innocent party relief, including further consideration of -existing local government holdings, will move private investment forward on many sites, particularly in cases where the property is abandoned or substantially underutilized and where the parties who caused the contamination are long gone. But, this is only one part of the equation.

Second, "finality" must be provided to prompt current owners to move forward and cleanup contaminated properties.

The issues surrounding what some might call "active brownfields" is perhaps the biggest challenge before us. Active properties—those now in use and underutilized and those that are inactive due to concerns about liability—remain the most difficult challenge for mayors and other public officials, and most certainly for the Congress.

First, we support efforts to delineate among classes of properties and to allocate authority for final disposition of these properties between U.S. EPA and State governments. The Conference endorses reforms that respect State authority to administer their voluntary cleanup programs for non-NPL properties, without Federal intervention except under very limited and extraordinary circumstances.

I would note that your legislation has provided a narrower range of EPA authority than what is provided in the bipartisan legislation (H.R. 1300) offered by Representative Sherwood Boehlert.

On a related issue, I would also note that have not fully vetted your proposal on vesting the States with broader authority on NPL listings.

This balance between State autonomy to act and make final decisions affecting these properties versus the limited or no Federal interest in these properties needs to be brought to closure. Clearly, we have proven by the vast inventories of existing brownfields and those in progress that current law doesn't work.

This issue continues to be driven by seemingly abstract debates about unreasonable constraints on EPA's role in this area. Under existing law, we know that EPA has rarely, if at all, intruded upon State decisions on non-NPL or non-NPL caliber sites. The price of keeping EPA over-empowered in this area is simply too high. At the end of the day, all of us need to keep our eye on the goal—it is about creating a more efficient and effective way of getting responsible parties, who are often the current owners of these sites, and prospective purchasers engaged in cleaning up these properties and returning them to more productive use.

Closure on the issue of finality is the larger problem for brownfields and properties in active use where contamination exists. The threat of Federal liability and Federal enforcement action, albeit limited in practice, strongly influences private and public behavior, be it current owners or potential developers, of these sites.

In my own community, we have many properties, which are likely contaminated and are essentially "mothballed." Owners wait out the system, dragging down neighborhoods and hurting the broader community's effort to improve conditions in the city. Meanwhile, sprawl is continuing unabated, extracting more life from our existing neighborhoods and communities. This is the life cycle that the current liability regime sustains.

The practical effects of this policy are not felt here in Washington or at the EPA offices, but rather by the citizens in individual neighborhoods and the communities where these properties are located. Today, we generally have to live with the decisions by owners and their choices in managing their properties, behavior that is strongly influenced by the punitive nature of the current Federal liability regime. We see property after property that is contaminated and fenced off in every commu-

nity in this nation, producing what are in effect the "gated communities" of industrial America.

Mr. Chairman, we know that your proposals are intended to break through this impasse. We don't believe there is one right answer to this problem, but we believe that you have offered a viable solution to this problem. Broader State empowerment, at this juncture, is so much better than the current system. The Conference would be pleased to work with you on these provisions as you work toward bipartisan consensus on these issues.

Why Congress Needs to Act on Legislation

Mr. Chairman, we would like to begin by acknowledging your efforts, and those of others on this committee, to seek legislative reforms to help communities address brownfields and other burdens under Superfund.

Securing consensus on legislative reforms to the Superfund law, with a particular emphasis on brownfields, is a top priority for the Conference of Mayors. The Conference believes the time has come to act decisively and promptly on brownfields and selected Superfund reforms.

Mr. Chairman, the Conference also acknowledges and appreciates the many efforts by the Administration, particularly U.S. EPA Administrator Carol Browner, and others in Congress who have supported policies and initiatives, such as funding for local brownfields programs, to further our efforts to recycle America's land. These programs and policies have certainly helped, and again let us underscore that we are very appreciative of these efforts. But as a nation, we are not making progress at a rate that is quick enough or substantial enough given other considerations, which we discuss further in this statement.

The problem of not redeveloping brownfields and our appetite for using open space is of epidemic proportions and we believe that, to date, our collective actions fail to match the challenge before the nation.

Anyone who examines the brownfields issue acknowledges the importance of adopting broader strategies to promote the redevelopment of these sites. And, they also share a sense of urgency in acting promptly to address this national problem.

For our part, we have tried to articulate why action and leadership by the Congress is needed. We have also directed our efforts in support of bipartisan efforts to move legislation forward. We also believe that taking on the substantial challenge of brownfields requires broad consensus among Democrats and Republicans, on many fronts. And, such consensus needs to be enduring over time, because the nature of this problem does not lend itself to a one-time legislative correction.

We anticipate working with you and future Congress' on redirecting the tax code, infrastructure investment patterns particularly in transportation, and other policies in the environmental arena and in housing, to make recycling our nation's land part of the nation's development life cycle.

We envision a broader commitment by Congress to challenge investment practices and public, private and individual decisionmaking that unnecessarily consumes our precious greenfields, as brownfields are discarded.

We also believe that the Congress and the Administration must answer this challenge through bi-partisanship, which explains why the Conference has been steadfast in urging bipartisan action. To underscore our commitment to this principle, the Conference leaders recently wrote to the President, urging him to work with you, Mr. Chairman, and others in Congress on these issues.

We also believe that mayors and many others have helped established a record on the need for Federal policy reforms and other actions to deal with brownfields in a more comprehensive manner.

Mr. Chairman, when Mayor Helmke testified before you, he talked about many of these issues during your recent hearings on urban growth and open space. We commend you and others on this committee for dedicating the time to these issues.

Your legislation responds to many of the key issues he talked about relative to helping us recycle these properties and putting them back into productive use. And, he explained, and mayors agree, that brownfields redevelopment is one of the most effective strategies we have in slowing the rate of consumption of open space and farmlands in proximity to urbanized areas.

These reasons explain why the nation's mayors are strongly supporting bipartisan legislative efforts to redirect Federal policies and further engage with our communities in tackling the brownfields problem.

New Information on Scope of Brownfields Problem and Benefits of Positive Policy Reforms

Mr. Chairman, we are pleased to provide you and this committee with the findings of the Conference's Second Annual Brownfields Survey. Information from this

report supports many of our statements about why legislation is needed. It also substantiates many of the key provisions in your legislation.

We have provided you with a copy of the full report. In this statement, we provide some of the key findings to simply amplify what we believe are key issues before the committee today as you prepare for action on pending legislation.

First, the findings confirm that brownfields are a national problem, which is—very broad in scope. Our results are drawn from more than 220 cities, a sample of cities, both large and small, in 39 States and Puerto Rico.

In our survey, 180 cities reported that, collectively, their more than 19,000 brownfields sites represent more than 178,000 acres, a land area which I already noted is larger than the cities of Seattle, San Francisco and Atlanta combined. This sample size represents a relatively small universe of the nation's more than 20,000 municipalities, suggesting a scale to the problem that is disturbing at best.

Cities were asked to identify the obstacles to redeveloping brownfields in their communities. Of the top three responses, the need for cleanup funds were identified as the No. 1 obstacle, followed by liability issues and the need for environmental assessments. The ranking of these obstacles is the same as last year's survey of about 140 cities.

Mr. Chairman, we note that your legislation deals directly with the top three issues that were identified in our survey. S. 1090 addresses liability issues affecting innocent public and private parties for prospective purchasers and contiguous landowners. Your legislation also specifically authorizes funding for assessments of these sites and funding to clean them up.

We also found that three out of every four cities expressed the view that their communities will need additional resources beyond cleanup funds and assessment funds to help them redevelop brownfields. This finding underscores earlier points in this testimony about the need to look at the tax code and other incentives as well as how infrastructure investment dollars are being deployed.

The survey also documented the substantial benefits that can be realized for cities and the Nation through the redevelopment of these sites. About two-thirds of the respondents provided estimates of local revenue gains which could be realized through redevelopment of brownfields. Collectively, they estimated the potential local revenue gains of nearly $1 billion annually under a conservative estimate and about $2.7 billion annually under an optimistic estimate.

In a related area of inquiry, we asked cities to provide us with estimates of how many new people they could absorb without adding appreciably to their existing infrastructure. While 180 of the respondents indicated they could -absorb more people, only 115 could provide actual numbers.

Astoundingly, these 1 15 cities reported that they could absorb more than 3.4 million without adding appreciably to their infrastructure, a population about equal to the City of Los Angeles, our nation's second largest city. To put these numbers in another context, this capacity is equal to about 16 months of the nation's population growth.

In a relatively small sample of municipalities nationwide, albeit generally larger ones, the survey provides clear evidence of the substantial, incumbent carrying capacity of existing communities. If we can find ways to tap these capacities, it offers the potential for substantial savings to all of the nation's taxpayers. Consider the potential savings to the Nation if we can minimize the public and private costs of building the equivalent of one new Los Angeles City every 16 months over the next decade.

Consider the implications in terms of our consumption of land. If we pursue broad policy initiatives, like an expanded commitment to brownfields and other means to reinforce existing communities, we could slow consumption of our farmlands and open spaces as well. As one example of such supportive policies, the Conference has previously indicated the mayors' support for Congressional action on the "Better America Bonds" proposal.

In the area of job creation, 168 cities estimated that reuse of these brownfields could generate more than 675,000 jobs. This supports our claims that there are vast opportunities to develop jobs in existing urban areas and neighborhoods, a particularly important finding as we continue to implement welfare reforms emphasizing welfare to work.

Finally, in our findings on the status of State voluntary cleanup programs, cities reported that where such programs were in effect, a sizable majority indicated that these programs were at least satisfactory, if not better. Alternatively, you can describe these results more negatively by combining cities that indicated the questions on State voluntary programs were not applicable with those giving their State a "not very good" or "poor" ranking. Under this method, more than one-half of the respondents indicated that voluntary cleanup programs didn't apply or they were

ranked poorly. This assessment suggests the need for further investment in State voluntary cleanup -programs, as you have provided in S. 1090.

Overall, we believe that these findings strongly support the thrust and intent of key provisions in S. 1090 in advancing local efforts to assess, cleanup and redevelop brownfields in communities all across the nation.

Status of Lender Support of Brownfields Redevelopment

Mr. Chairman, as you know, the Conference has been working extensively with bankers and other financial interests to explore ways to increase investment in brownfields redevelopment.

Last year we formed the Mayors and Bankers Task Force to work with representatives of the Federal Home Bank System to examine ways to facilitate investment by FHBS member banks in brownfields.

We have learned that liability under Superfund is their dominant concern. Despite progress in securing "comfort letters" at many sites and growing confidence in State program efforts, there is real anxiety, and we would wish otherwise, among bankers and other lenders on these issues. The specter of Superfund liability severely limits their ability to increase the flow of private capital into these projects.

We have heard repeatedly—in our work with members of the Federal Home Loan Bank System and in our other activities with financial interests—that lenders are not willing to move aggressively on brownfields until there are legislative reforms to Superfund.They have told us that the private sector is prepared to substantially increase capital flows to projects on brownfield sites as soon as Congress enacts legislation that explicitly shields innocent parties from Superfund's liability scheme.

Today, we are enjoying the benefits of one of the longest economic expansions in our nation's history. If there is a time to enact changes to stimulate private sector investment in these sites, it is now. This is the time to demonstrate to investors and others—when private capital is plentiful and available for new investment opportunities—that brownfields redevelopment can be successful. Such successes will help carry future efforts to attract investment in brownfields during the leaner times which will inevitable come as the economy moves to other cycles.

Mr. Chairman, when mayors talk about brownfields, our Federal partners sometimes only hear us asking for Federal partnership resources in support of brownfields redevelopment, as if mayors are suggesting that public resources alone will solve the brownfields problem. As you know, mayors are fairly attuned to the realities of our market economy. We know that the private sector is the dominant investor and the pivotal actor in determining how successful we, as a nation, will be in recycling brownfields.

It also explains the particular priority we place on ensuring that any legislation include liability protections for innocent third parties.

However, conversely, we also know that a market economy, fueled by liability reforms, doesn't respond fully to the problem either. There are many types of brownfields in all circumstances and locations. For these reasons, we also know that public investment is crucial in defining our success in recycling these sites.

Again, Mr. Chairman, your legislation accounts for these realities by providing resources directly to communities to help us assess and clean up these sites, providing us with added resources and capacities to partner with the private sector.

"Superfund Program Completion Act of 1999"

Mr. Chairman, finally, let me amplify further some of our views on specific provisions of the legislation before this committee.

First, I want to again note the liability reforms provided in your legislation, an area that was just discussed earlier in my statement. These provisions need to more fully address the many circumstances where cities and other public agencies unfairly find themselves subject potentially to Superfund's strict liability standards.

The legislation makes important changes to relieve cities and other local governments of liability exposure in their ownership or management of brownfield properties acquired after this legislation become law. As I noted earlier, the Conference urges you to include additional liability relief to account the many circumstances where local governments, in their operations and activities, have previously acquired such properties. We believe that H.R. 1300 provides an excellent model for the provisions that would address these issues.

S. 1090 authorizes funding for both assessment efforts and local cleanup programs, providing criteria to help U.S. EPA determine how to deliver these resources in support of local programs. We are pleased that the bill expressly authorizes these commitments to site assessment and cleanup. We also urge you to provide Congressional appropriators with more flexibility in future years to increase commitments to these activities.

We are pleased that the legislation provides some resources to help States further strengthen their voluntary cleanup programs. We hope that States will use these funds to place some priority, where needed, on efforts to bolster their States programs in support of brownfields cleanups.

Considering the many thousands of such sites all across the country, we would certainly encourage the committee to explore how these funds could help State programs, particularly those focused largely on NPL-caliber sites, to address brownfields more responsively.

We would also encourage you to consider ways to incentivize States to deliver simplification of the cross-cutting rules which are applicable at brownfield sites, such as how to rationalize the rules and program requirements under RCRA and LUST with provisions under this legislation.

We are also pleased that this legislation clarifies the balance between State and Federal program authority, as I discussed earlier. Without more certainty about State authority and decisionmaking, we can't hope ever to provide the necessary assurances sought by responsible parties and potential investors in developing brownfield sites.

In addition to these brownfields-related provisions, we also wanted to underscore our support for liability reforms that limit municipal liability at Superfund sites where municipal solid waste was disposed. We support the provisions you have provided to limit the liability of cities and counties at such sites and offer them more certainty on their liability costs.

We do not believe it was Congressional intent to have municipal solid waste and municipal sewage sludge considered as a hazardous waste under CERCLA. Various studies have documented that municipal solid waste has been found to contain less than one-half of one-percent (.5 percent) toxic materials. We therefore support the provisions that exempt generators and transporters of MSW from liability and limit liability for municipal owners and operators of co-disposal landfills.

Mr. Chairman, the Conference supports extension of the Superfund taxes. While we understand your rationale for not including the tax extension in your pending legislation, we also believe that it is very important to secure legislative agreement to reinstate these taxes as soon as possible.

Closing Comments

Mr. Chairman, we want to express again our thanks to you and members of this committee for holding this hearing today and for your continuing efforts to move this important legislation forward in the 106th Congress. The nation's mayors believe that the time has come for bipartisan Congressional action on brownfields and selected Superfund reforms.

On behalf of The U.S. Conference of Mayors, we appreciate this opportunity to share the view of the nation's mayors on these important issues.

STATEMENT OF MAYOR THOMAS SUOZZI, CITY OF GLEN COVE, NEW YORK

Chairman Chafee, Senator Baucus, and distinguished members of the committee, thank you and good morning. My name is Tom Suozzi. I am the Mayor of the City of Glen Cove, New York a small city on the Northem Shore of Long Island with a population of 25,000 and a land area of seven square miles. I am pleased to be here today to testify regarding the needs of local governments for municipal Superfund liability relief.

I am here representing eight national municipal organizations that have worked together for many years to seek municipal Superfund liability relief so that we can resolve our involvement at these toxic waste sites, reduce litigation and transaction costs, and get on with the business of cleaning up and recycling these blighted sites into productive redevelopments in our communities. These organizations include American Communities for Cleanup Equity, which was formed nearly a decade ago to address these municipal Superfund issues, as well as the American Public Works Association, the Association of Metropolitan Sewerage Agencies, the International City/County Management Association, the International Municipal Lawyers Association, the National Association of Counties, the National Association of Towns and Townships, and the National League of Cities. Collectively, our organizations represent thousands of cities, towns, counties, and local agencies across the United States. We are responsible for the health, safety and vitality of our communities and, at the same time, for fulfilling the governmental duty to provide for municipal garbage and municipal sewage collection and disposal.

First and foremost, we thank you, Senator Chafee, for your leadership and your commitment to addressing the issue of municipal liability in Superfund legislation.

We also commend Senator Lautenberg for championing Superfund relief for local governments for many long years. Indeed, as you know, there has been broad, bipartisan, multi-stakeholder consensus on this municipal Superfund relief issue for many years. We hope that the parties will continue to work to get this municipal Superfund issue resolved, this year, no matter what other issues may stand in the way.

Local governments have a very serious problem. We have been saddled with years of delay, and millions of dollars of liability and legal costs under the Superfund law simply because we owned or operated municipal landfills or sent municipal solid waste or sewage sludge to landfills that also received industrial and hazardous wastes. Local governments have faced costly and unwarranted contribution suits from industrial Superfund polluters seeking to impose an unfair share of costs on parties that contributed no toxic wastes to these so-called "co-disposal landfill" sites. We estimate that as many as 750 local governments at 250 sites nationwide are affected by the co-disposal landfill issue. The costs that our citizens bear as a result are unfair and unnecessary.

Local governments are in a unique situation at these co-disposal sites. First, municipal solid waste and sewage sludge collection and disposal is a governmental duty. It is a public responsibility to our communities that we cannot ignore, and we make no profit from it. Second, the toxicity of municipal solid waste and sewage sludge has been shown to be significantly lower than conventional hazardous wastes and, as such, represents only a small portion of the cleanup costs at co-disposal landfills.

The City of Glen Cove has experienced the threat of costs and delay associated with this Superfund issue. Located on the north shore of Long Island, Glen Cove has ten miles of beautiful waterfront, three public beaches, 300 square miles of nature preserves, and historical mansions built by some of America's wealthiest business leaders. One mile of that waterfront is a toxic Superfund dump and brownfield site. A World War II era munitions plant, the Li Tungsten plant, contaminated the site with low-level radioactive waste. This contamination included the dumping of radioactive and hazardous waste at an adjacent site that once was a municipally owned open dump, which is now part of the Superfund site. For many years, the Li Tungsten plant was a productive part of our community and economy. It was our largest job provider, the biggest contributor to the tax base, the supporter of community activities like the Little League team. Today, Li Tungsten has no jobs, provides no taxes, it no longer contributes to community activities like the baseball team. The site stands dangerous, polluted, and abandoned.

The process of resolving the City of Glen Cove's municipal liability at this site has taken many years, and many dollars. In addition, at a different Superfund site, the Kin-Buc landfill in New Jersey, the City of Glen Cove was sued by industrial polluters seeking an unfair share of contribution because our city had transported municipal trash to that site. That legal process was likewise lengthy and costly. That's why Glen Cove supports legislative enactment of a municipal Superfund liability policy that will provide a simple, expedited, and fair method for resolving local government liability associated with these co-disposal Superfund sites. Glen Cove has been recognized as one of 16 national Brownfields Showcase Communities for its pro-active efforts to cleanup and redevelop its contaminated waterfront, and we will continue to do so. However, the costs and delay associated with the threat of Superfund co-disposal litigation has hindered communities across the nation, like Glen Cove, from focusing their energy on the vital cleanup and reuse initiatives that we need to be pursuing.

Indeed, there is broad consensus that municipalities need and merit liability relief. For nearly a decade, our coalition has worked with you and other Members of Congress, and with the U. S. Environmental Protection Agency, to formulate a reasonable solution to the problem. In February 1998, with our support, the EPA finalized an administrative settlement policy to limit liability under Superfund for generators and transporters of municipal solid waste and sewage sludge, and for municipal owners and operators of co-disposal landfills. We continue to support this reasonable and fair EPA policy, and commend EPA for playing a pro-active role in seeking to address a very complicated problem.

However, as fair and appropriate as the administrative policy is, we strongly believe that legislative action to resolve the municipal Superfund liability issue is necessary and justified. First, the EPA policy is only a policy, non-binding on the Agency and subject to change or challenge. Second, this policy has already been the subject of litigation, and the real threat of further litigation involving local governments remains. While we will continue to defend the EPA policy in court, as we did in Federal court in 1998, and to advocate its use by our members, we believe a change in the Superfund law to address this issue is necessary to reduce the costly litiga-

tion and delay that municipalities may continue to face at co-disposal sites. Third, we believe that legislative enactment of municipal Superfund liability provisions will give localities the certainty and confidence to make use of this settlement mechanism—much as the codification of lender liability Superfund provisions has provided certainty for the banking industry.

For these reasons, we support a legislative resolution of the municipal co-disposal liability problem. We believe the provisions of the Superfund Completion Act, and the bill introduced yesterday by the Senate Democrats, generally would accomplish that objective, and we welcome any legislative proposals that will effectively address our specific concerns with this issue.

Specifically, we have following remarks about the need for municipal Superfund liability clarification:

We support liability caps for generators and transporters of municipal solid waste and sewage sludge, based on a per ton assessment. We believe that local governments who delivered municipal solid waste or sewage sludge to a landfill in good faith should have the option to settle out their liability at a reasonable and fair rate. The $5.30 per ton assessment in the Superfund Completion Act, also found in the EPA settlement policy, was determined based on an analysis of post-closure costs at RCRA Subtitle D landfills—in other words, the best estimate for what it would have cost the local government to close the facility if the facility were not a Superfund site contaminated with other parties' toxic waste.

We support liability caps for local government owners and operators of co-disposal landfills, based on a percentage apportionment of liability. We believe that local governments generally should have the option to settle out their liability for 20 percent or less of the total cost of site cleanup. In addition, we believe that the liability share borne by local governments should be aggregated when two or more local governments, who owned or operated the facility either concurrently or sequentially, are identified as potentially responsible parties.

We agree that the Environmental Protection Agency should be required to notify municipalities if they are eligible for the municipal solid waste and sewage sludge settlement mechanisms outlined above. Likewise, we support the approach of providing expedited settlement mechanisms to eligible municipalities. Finally, we support the approach of precluding third-party contribution suits or administrative Superfund orders against eligible municipal parties prior to their opportunity to settle their liability, or after they have settled their liability.

We believe the ability-to-pay provisions of the law should apply to local government parties utilizing the municipal liability caps.

We support the legislative language that protects from liability those owners and operators of publicly owned treatment works or "POTWs" that, at the time of a release or threatened release, were in compliance with their Clean Water Act pretreatment standards under Section 307 and were not otherwise negligent in operating or maintaining their sewer system. Without specific protection from liability, otherwise innocent POTWs can be exposed to Superfund liability from industrial discharges into the public sewer system.

We believe that there will be no orphan shares created by municipal co-disposal settlements, because the liability caps provided in both EPA's policy and the Superfund Completion Act represent municipalities' fair share of liability associated with trash and sewage sludge, based on long-standing and comprehensive analysis of the effect of such MSW and MSS at co-disposal landfill sites. However, if a "statutory orphan shares" provision is enacted as proposed in the Superfund Completion Act, we wish to emphasize that the requirement for an EPA assessment of such orphan shares should not have any effect of delaying the settlement of municipal liability under the co-disposal provisions.

In summary, the local government organizations on whose behalf I am testifying today believe a legislative resolution of municipal co-disposal Superfund liability is of critical importance. We believe the Superfund Completion Act, and the Senate Democrats' proposal, generally would achieve that objective.

I also wish to comment on behalf of these municipal organizations on the importance of enacting brownfields funding and liability clarification law in this Congress. There is widespread consensus among local governments, business, and environmental and community groups that we need to put our brownfields back into productive reuse. Localities have had difficulty obtaining the resources necessary to assess, remediate and clean up the thousands of brownfields sites that impact nearly every American community. And the continuing uncertainty regarding the clarification of potential liability issues at brownfield sites has hindered the redevelopment of these areas. Local governments therefore support legislative approaches that provide liability clarification, brownfields remediation grants and loans to local governments and private parties, and continued assessment dollars. We commend the sen-

ators for addressing this topic, and urge you to carry it through into the enactment of a new brownfields law.

Thank you, Mr. Chairman, for the opportunity to testify. I would be happy to answer any questions you or other members of the committee might have.

STATEMENT OF TOM CURTIS, DIRECTOR OF THE NATURAL RESOURCES GROUP, NATIONAL GOVERNORS' ASSOCIATION

Good morning, Chairman Chafee, Senator Baucus, Senator Smith, Senator Lautenberg, and members of the committee. My name is Tom Curtis and I am Director of the Natural Resources Group at the National Governors' Association. I am pleased to be able to appear today on behalf of the National Governors' Association (NGA) concerning a subject that is a perfect example of how environmental and economic development issues crosscut: brownfields revitalization and the Superfund.

As you know, NGA is a bipartisan organization. Our policy recommendations on Superfund and other issues can only be adopted by a vote of at least two-thirds of the nation's Governors and are generally supported by far more impressive majorities. We have certainly found that to be the case with Superfund. Our policy for the reform of this program is based on the States' experience as managers of thousands of site cleanups under State programs and as partners with EPA in many other cleanups at National Priority List (NPL) sites. That is to say, our views on this matter have been shaped not by politics, but by a common commitment: the Nation needs hazardous waste cleanup programs that are workable and efficient. Superfund reform has not been a partisan issue among Governors, and we hope sincerely that it will not become one in this Congress.

As you know, the States have a strong interest in Superfund reform and believe that a few critical changes are needed to improve the Superfund program's ability to clean up the nation's worst hazardous waste sites quickly and efficiently. We know that there remain important differences between some of the key players in the Superfund debate, but we see the Superfund Program Completion Act of 1999 (S. 1()9()) as a significant step toward resolving those differences. Clearly, Important compromises have been made in the development of this legislation, and we hope the spirit of compromise will continue on a bipartisan basis.

We are committed to doing everything within our power to assist you in your efforts moving this bill through the legislative process. We hope to continue working cooperatively with both the majority and the minority to develop a final bill that enjoys broad bipartisan support and can be signed by the President.

I will focus my remarks this morning on the two key provisions of the legislation that the Governors strongly support: brownfields revitalization and voluntary cleanup programs, and the Governor's right of concurrence with new additions to the MPL. In both of these areas, the bill provides for flexibility and certainty, which States need to ensure quick and successful cleanups.

Brownfields Revitalization and Voluntary Cleanup Programs

The Governors believe that brownfields revitalization is critical to the successful redevelopment of many contaminated former industrial properties, and we commend you, Mr. Chairman, for making the brownfields issue a critical piece of this legislation.

In considering how to restore brownfields sites to productive use, please remember the importance of State voluntary cleanup programs in contributing to the nation's hazardous waste cleanup goals. States are responsible for cleanup at the tens of thousands of sites that are not on the National Priorities List. A survey completed by the Association of State and Territorial Solid Waste Management Officials reported that 33 responding States currently have 27,235 sites in State cleanup programs. To address these sites, many States have developed highly successful voluntary cleanup programs that have enabled sites to be remediated quickly and with minimal governmental involvement. For each of the past 5 years, States have completed work on an average of 1,475 sites and have completed roughly 485 removals. It is important that any legislation supports and encourages these successful programs by providing the clear incentives and flexibility States need to continue them.

The Governors believe that this bill provides clear incentives and flexibility to carry out State voluntary cleanup programs. There is no question that voluntary cleanup programs and brownfields redevelopment are currently hindered by the pervasive fear of Federal liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980. Many potential developers of brownfields sites have been deterred because even if a State is completely satisfied that the site has been properly addressed, and even if the site is not on the NPL,

there is the potential for EPA to take action against the cooperating party under the CERCLA liability scheme. The bill addresses this problem by precluding enforcement by anyone at sites where cleanup has occurred or is being conducted under stale programs and by providing needed liability protections for innocent owners and owners of property contiguous to contaminated sites. In the instance where a State is unable or unwilling to take action at a site, there are reasonable exceptions to this preclusion of enforcement.

The Governors believe that it is appropriate for EPA to take action at a site if a State makes such a request. We also commend you for including provisions that would allow EPA to come into a site only after EPA has given the Governor notice and an opportunity to cure. Without this very important provision, EPA would have the authority to take action at a site for virtually any reason. However, if the State has the opportunity to cure, the EPA will only be allowed into the site if the State cannot cure and not because EPA happened to discover new evidence before the State takes action.

The nation's Governors believe that the provisions in your title on State voluntary cleanup programs would greatly encourage voluntary cleanup and thus increase the number of cleanups completed. All Governors are vitally interested in cleaning up hazardous waste sites in their States so that we can provide a cleaner environment for future generations. These provisions will enable States to cleanup hazardous waste quickly and safely and that is good for our environment.

Governors Concurrence in New NPL Listings

Another provision that is important to the nation's Governors concerns the requirement for a Governor to request the listing of a site before a State's site may be added to the NPL. The nation's Governors believe such a provision is vital.

There has been a great deal of discussion in recent years about the future of the Superfund program, and this legislation anticipates and plans for the completion of the Superfund program. EPA has told us that remedy decisions have been made at eighty-five to 90 percent of all NPL sites and that construction is underway. We believe that with the growth and maturity in State programs since the inception of the Superfund program, there will be a natural process of relying more and more on States to do most of the cleanups.

Because of differences in capacities among States, the complexity and cost of some cleanups, the availability of responsible parties. enforcement considerations, and other factors, there needs to be a continuing Federal commitment to clean up sites under some circumstances. However, because States are currently overseeing most cleanups, listing a site on the NPL when the State is prepared to apply its own programs and authorities is not only wasteful of Federal resources, it is very often counterproductive. resulting in increased delays and greater costs. The Governors fear a case where there will be "two masters" of the cleanup process. This is confusing to the remediating party and to the general public and an inefficient use of remediation resources.

To avoid this, we advocate that Governors should be given the statutory right to concur with the listing of any new NPL sites in their States. The bill accomplishes this by providing for the request of a Governor before a site can be added to the NPL. In the event EPA discovers an imminent and substantial threat to human health and the environment, of course, it could continue to use its emergency removal authority, but any assignment of liability must then be consistent with liability assigned under State cleanup laws. We very much appreciate your recognition of this important provision.

However, we are concerned with the provision that places a cap on additions to the NPL at 30 sites per year. Our position has been that the statutory right of Governors to concur with listing serves as an effective limitation on NPL listings. We fear an unforeseen scenario where a catastrophe occurs and more than 30 sites are in legitimate need of being listed and receiving Federal resources. We ask that you remove this provision from the bill and rely on the Governor's concurrence provision to provide an effective limitation on unnecessary NPL listings.

Before I conclude my remarks, I would like to comment on several other provisions that we believe are necessary. S. 1090 provides for much-needed brownfields funding for site assessment and remediation, and we applaud you for this provision. We believe that financial assistance is a critical Federal responsibility and this provision will assist in the identification and cleanup of contaminated property. The bill provides for a State cost share of 10 percent for remedial action and the costs operations and maintenance. The provision is important to many States that would otherwise feel the financial burden of paying for 1()() percent of operations and maintenance.

Conclusion

Mr. Chairman, I would like to thank you for your hard work on this important reform legislation and for providing me with the opportunity to communicate the views of the nation's Governors on Superfund reform. I have attached a copy of the NGA policy statement on Superfund reform and ask that it be included in the record of this hearings along with my statement.

The nation's Governors appreciate your hard work in developing this proposal, and they believe that passing Superfund legislation in the 106th Congress is critical. S. 1090 is an effective bill that we urge members of both parties to support. We hope that members of both parties will roll up their sleeves to pass Superfund reform legislation. The Governors look forward to working with both the majority and minority to bridge any differences and assist in crafting legislation that can be signed into law.

I will be happy to answer any questions you may have.

RESPONSES OF TOM CURTIS TO ADDITIONAL QUESTIONS FROM SENATOR VOINOVICH

Question 1: What is the appropriate Federal role, if any, at sites that are considered "state interest"?

Response. The nation's Governors believe that the appropriate Federal role for the Federal Government at "state interest" sites is financial assistance. The Governors believe that Federal dollars that go to states for program assistance are critical. In addition, the Governors are very supportive of the grant program in S. 1090 that would give moneys to states for brownfield assessment and remediation.

The Governors' have also advocated a Federal role in state sites where certain conditions are met. In Title II of S. 1090, the U.S. Environmental Protection Agency (EPA) would be prohibited from taking enforcement actions at a site where a cleanup is being conducted or has been completed under state voluntary cleanup laws. The bill would allow EPA to take action at one of these sites if one of several conditions were met. Examples of these conditions are if a state requests EPA to come into a site or if there is a public health or environmental emergency and the state is unable or unwilling to take appropriate action. The Governors believe that these reopeners represent an appropriate role for the Federal Government in these sites.

Question 2: Is there a clear way to distinguish Federal interest from state interests in the Superfund program?

Response. We believe that the National Priorities List (NPL) is an appropriate distinction between Federal interests and state interests. If a site is not on the NPL, we believe that the site is in the state interest. If EPA would like to take action at a site, then it should have to meet one of the reopeners addressed in the response to Question #1 or list the site on the NPL, subject to a Governor's concurrence.

I again thank you for the opportunity to testify and for the chance to respond to additional questions for the record. If I can be of any assistance as you continue to develop a bipartisan Superfund reform package, please contact me directly. I look forward to working with you on these very important issues.

STATEMENT OF CLAUDIA KERBAWY FOR THE ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS (ASTSWMO)

Good morning. I am Claudia Kerbawy and I am the Chief of the Michigan Superfund program. I am also the primary spokesperson on reauthorization issues for the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) and am here today representing ASTSWMO. ASTSWMO is a non-profit association which represents the collective interests of waste program directors of the nation's States and Territories. Besides the State cleanup and remedial program managers, ASTSWMO's membership also includes the State regulatory program managers for solid waste, hazardous waste, underground storage tanks, and waste minimization and recycling programs. Our membership is drawn exclusively from State employees who deal daily with the many management and resource implications of the State waste management programs they direct. As the day-to-day implementers of the State and Federal cleanup programs, we believe we can offer a unique perspective to this dialog and thank you for recognizing the importance of the State perspective.

ASTSWMO and individual States have participated in the debate to reauthorize the Superfund law for the past three congresses. We wish to extend our gratitude to Senators Smith and Chafee for drafting a bill which appears to acknowledge the evolution of the Superfund program and the important role that States currently

play in remediating contaminated sites. I would like to dedicate the first part of my testimony to speaking on the accomplishments of State programs. As with the Federal Superfund program, most State programs have had the benefit of 18 years to grow and mature in infrastructure capacity and cleanup sophistication. We believe it is very important that Congress understand the actual status of State programs, in order to make a fully informed decision regarding the future of the Federal Superfund program. The second part of my testimony will be devoted to analyzing key aspects of S. 1090 from a State program manager's perspective.

ASTSWMO STATE ACCOMPLISHMENTS STUDY

The Association of State and Territorial Solid Waste Management Officials recently conducted a study on the accomplishments of State cleanup programs. The association asked States to provide detailed information on all short-term removal actions and long-term remedial actions conducted between January 1, 1993 and September 30, 1997 for each site in the State system where hazardous waste cleanup efforts were performed by States directly, under State enforcement authority, and under State voluntary cleanup and property transfer/brownfield programs. Sites listed on the National Priorities List, Resource Conservation Recovery Act corrective actions and underground and above ground storage tank and other petroleum spills were not included in this study. The association received information on 27,235 sites from 33 responding States. I should note that the primary ground rule for the study was that information had to be reported site-specifically and had to be accompanied by background data. Estimates were not accepted or counted as part of either the individual State or national totals for work accomplished.

While this study does not capture the complete site universe either on a national level or individual State level, it is the view of ASTSWMO that enough information was obtained to confirm that a trend has developed whereby on a national level States are not only addressing more sites at any given time, but are also completing (construction completes) more sites through streamlined State programs. State programs have matured and increased in their infrastructure capacity.

Key results of the ASTSWMO study included:

States have completed seven times as many sites per year these last four and three-quarter years than they did during the first 12 years of the program. During the first 12 years of the program, States completed 202 sites per year on average. Over the last four and three-quarter years, States have averaged 1, 475 completions per year for a total of 6,768 completions. State managers believe the large increase in completions can be attributed to the growth of State programs, the advent of State Voluntary Cleanup programs and the development of State cleanup standards (i.e., clearly defined endpoints).

States have completed almost twice as many removals per year during the last four and three-quarter years of the program than they did during the previous 12 years of the program. On a national basis, States completed approximately 48 removals per year as compared to 293 per year during the first 12 years of the program. This doubling of the pace of removals indicates a substantial increase in risk reduction the field.

Three times as many confirmed contaminated sites have been identified and are working their way through the State system than during the first 12 years of the program. During the first 12 years of the program, States had approximately 1,850 sites working their way through their systems at any given time. Today, States are addressing an average of approximately 4,700 sites at any given time. NOTE: the word "address" could refer to site remediation, no further action designations, or site prioritizations. These findings clearly show that States programs have matured and State infrastructures have increased in their capacity to identify and address more sites.

Only 8.9 percent (2,426) of the total sites identified by States (27,235) were classified as inactive. As the data indicate, State capacity to address large numbers of sites has increased dramatically. Most sites are being actively worked on by States either through traditional State Superfund programs or through voluntary cleanup programs and it is the professional judgment of the ASTSWMO membership that the majority of sites classified as inactive are probably of lower relative risk and not destined for the NPL due to the triage system employed by most States.

ANALYSIS OF S. 1090 "THE SUPERFUND PROGRAM COMPLETION ACT OF 1999"
BROWNFIELDS AND STATE RESPONSE

ASTSWMO wishes to commend the committee on the drafting of titles I and II of S. 1090. These are well crafted titles containing provisions which ASTSWMO can fully support. First, ASTSWMO supports the National Governors' Association posi-

tion that Governors' should be given the statutory right to concur with any new National Priority Listing (NPL) in their State. We believe the facts support that position. States today employ a triage system whereby, the worst sites are addressed first. For example, only 8.9 percent (2,426) of the total sites (27,235) identified by the recent ASTSWMO survey were classified as inactive. It is, therefore, the strong belief of the ASTSWMO membership that most sites that have been identified within a State that could qualify for listing on the NPL are already being worked on by the State.

We believe the views of our membership were validated by the recent General Accounting Office (GAO) Report entitled, "Hazardous Waste: Unaddressed Risks at Many Potential Superfund Sites". In this report the GAO reviewed the status of 3,036 sites which had pre-scored above 28.5 but for a variety of reasons had not been placed on the NPL. Out of a total of 3,036 sites only 7.6 percent (232) were estimated by both EPA and State officials to potentially warrant listing on the NPL. This confirms that the EPA regional staff had utilized good judgment in not placing the vast majority of these sites on the NPL; it also confirms that the hazard ranking system could be improved.

The question before this committee is what should be the appropriate role of the Federal Superfund program in the future? While there may be 40 plus States with State Superfund programs and Voluntary Cleanup programs there will always be States who choose not to develop a program and Federal Government assistance may be warranted. There will also be sites which due to either technical or legal complexity or cost, a State either cannot or may prefer to have the Federal Government address. The point I wish to stress is that with the current status of State programs the choice as to whether a site is addressed by the Federal Government or State government should be determined by the State. A Governor should be able to make the determination of whether a site will be listed on the NPL as specified in the S. 1090 mandate that a site must receive Governors' concurrence prior to listing on the NPL. While it is EPA policy to routinely seek concurrence from the Governor before a site is listed on the NPL, it is not -mandatory that the concurrence be received. If a dispute should arise between EPA and a Governor the process within EPA is to have the Assistant Administrator for OSWER make the final determination. Frankly, that is not a satisfactory policy.

Fortunately, there are very few sites where the States and EPA disagree, however, when a dispute does occur the site quickly becomes high profile and both the State and Federal Government can lose credibility. As indicated by the ASTSWMO survey and GAO survey, the States have clearly become the primary regulators for overseeing site remediation. The NPL should be reserved for those sites which both the State and Federal Governments believe warrant expenditure of Federal resources. The NPL is no longer reserved for the "worst of the worst" sites, rather the NPL has shifted to a venue for remediating sites which require Federal resources. The criteria for listing sites on the NPL may quickly shift from one of risk based determinations to one based on resource needs. We, therefore, support the provision for Governors concurrence as outlined in S. 1090.

Second, States are responsible for remediating the vast majority of sites in this country and while it is crucial to clarify the issue of who actually will determine in the future whether a site is listed on the NPL; it is equally as important to clarify which governmental entity will be given the responsibility for determining when a site is fully remediated. In other words, the concept of finality needs to be addressed. The Federal Superfund statute technically applies to any site where a release occurs. However, the reality today is that States are responsible for ensuring the remediation of all sites which do not score above 28.5 using EPA's Hazard Ranking System (HRS)—the cutoff for Federal listing on the NPL. The EPA removal program is able to address some sites which are not listed on the NPL, but the program is designed to stabilize a site, not to ensure the full remediation of the site. EPA can not expend fund money for remediating a site not listed on the NPL. Consequently, the State is often still responsible for completing the remediation of a site even after an EPA removal action has been performed at a site.

It is our belief that Congress needs to decide definitively whether EPA should retain a role in the remediation of non-NPL sites. While in practicality EPA has little or no role at these sites and as our survey indicated, the States are addressing the large universe of non-NPL sites, the statute still maintains a role for EPA In theory. Although the majority of these sites (typically brownfield sites) will never be placed on the NPL, they are still subject to CERCLA liability even after the site has been cleaned up to State standards. It is our belief that we can no longer afford to foster the illusion that State authorized cleanups may somehow not be adequate to satisfy Federal requirements. The potential for EPA overfile and for third party lawsuits under CERCLA is beginning to cause many owners of potential Brownfields sites

to simply "mothball" the properties. We believe it is imperative that Congress seek to clarify the State-Federal roles and potential liability consequences under the Federal Superfund program. States should be able to release sites from both Federal and State liability once a site has been cleaned up to State standards. In situations which are deemed emergencies end where the State requests assistance, we believe the Federal Government should be able to address the site and if necessary hold the responsible party liable consistent with liability assigned under State cleanup law. Emergency actions should be the only exceptions to such releases from Federal liability.

This has been a very contentious issue and we understand that many in the Administration have raised objections to provisions of this nature. We do not agree with the basis for these objections for several reasons. First, EPA does not have the ability to compel parties to take remedial actions at sites not listed on the NPL, except for removal actions. Second the majority of these sites will never be listed on the NPL, therefore, EPA does not have regulatory authority to spend fund money at these sites to perform the necessary remedial actions. Third, if a State should release a site from State liability (of course, all States have standard reopener provisions contained in their liability releases), and a situation should develop which warrants Federal attention, the State will act responsibly and contact EPA For example, the State of New Jersey, as well as Michigan and many other States throughout the country, has a very successful Voluntary Cleanup program. The New Jersey program has remediated over 6,000 sites and receives approximately 150 applications a month for entrance into their Voluntary Cleanup program. One of those sites, the Hoboken site, was remediated under the State Voluntary Cleanup program and a certificate of completion was issued by the State. Previously unknown mercury was later found to be present at the site and the State for financial and technical reasons called EPA in to address the site. Unknown conditions will occur at both NPL and non-NPL sites.

We recognize that situations such as the Hoboken site will occur and believe that the exceptions specified in S. 1090 adequately address the situation. While it is clear in emergency situations that EPA should have the ability to enter a site, we believe the second prong of the condition must also be met, i.e., with State concurrence similar to our recommendation for listing sites on the NPL. We wish to avoid duplication as much as possible and therefore believe that if a State is capable of addressing the emergency then there is no need to utilize EPA's resources. The States have proven they act responsibly in these situations and it is to the State's advantage to notify EPA when either the State's financial, legal or technical resources are not sufficient to adequately address the problem.

We believe the universe of sites to be addressed by State Cleanup (State Superfund and State Voluntary Cleanup) programs and the sites eligible for releases from Federal liability is the non-NPL universe of sites. It seems only practical to officially exclude proposed and listed NPL sites simply for the fact that much work has already ensued in order to place these sites on the NPL. Some suggest that the non-NPL universe can be divided into two categories, NPL-caliber and low risk sites. We are the primary regulators for non-NPL sites and we are here to tell you that there is no clear line that differentiates these sites. Many would suggest the bright line should be 28.5 (as determined by the HRS), but there are two problems with using this arbitrary cutoff. First, 28.5 is the quantitative scoring factor used to determine if a site qualifies for placement on the NPL. However, this figure is based on an arcane hazard ranking system which many EPA and State managers admit is flawed, so much so, that EPA and State managers in the GAO study identified only 7.9 percent of the 3036 pre-scored universe of sites for potential listing on the NPL. Second, in order to use the quantitative NPL-caliber designation, States would have to score sites prior to admitting them to a voluntary cleanup program (a suggestion we understand one EPA Region has made to a State). Clearly, the prescoring of a site as a condition for entering a State Voluntary Cleanup program would be a huge disincentive for marketing a State Voluntary Cleanup program and would not serve to move this large universe of sites to cleanup nor to facilitate economic redevelopment of brownfields. Essentially, the program has operated for years on a "you know it when you see it basis" in identifying NPL-caliber sites. This is bad public policy and should not be acceptable for differentiating State and EPA roles and for providing certainty to the process. If a site is not to be listed or proposed for listing on the NPL, then the State should be free to address the site without EPA interference and the site should be eligible for the same benefits as any other site, such as liability releases. We believe legislation such as S. 1090 is needed and hope that Congress chooses to recognize the benefits of State programs which have had over 18 years to grow and mature and which clearly have become the leaders in site remediation today.

Third, we are also pleased that S. 1090 seeks to streamline the program by providing a fixed State cost share, namely 10 percent of remedial action costs and 10 percent of operation and maintenance costs. The current cost share system has served only to exacerbate the tension which exists between State Waste Agencies and the U.S. EPA. Under the status quo the financial incentives for EPA and the States are diametrically opposed when considering final remedies for a site (States desiring more capital intensive remedies and EPA seeking remedies with lower capital costs and higher operation and maintenance costs). State Waste Officials believe this is a fair and well-reasoned position.

FAIR SHARE LIABILITY ALLOCATIONS AND PROTECTIONS

As State Waste Managers, our principal concern is ensuring the timely and effective cleanup of contaminated sites. We are not the legal experts and therefore will leave the analysis of this title to other State professionals. We would simply note, that the current liability scheme may not be entirely equitable to some responsible parties, but in the past it has provided a stable source of funding. We understand that reforms are needed and understand that the goal of the title is to insert a level of fairness into the program for parties such as municipalities and small businesses. ASTSWMO is in favor of providing relief to these parties so long as the pace of cleanup is not sacrificed.

CONCLUSION

In conclusion, while our membership has not had an opportunity to conduct an in-depth review of S. 109O, or to reach consensus on the bill's language, the initial impressions and reactions from our members is favorable. The primary provisions outlined in S. 1090 are elements ASTSWMO could support. These provisions appear to parallel ASTSWMO's basic positions regarding Governors' concurrence, brownfield liability release and State cost share. We are very encouraged and look forward to working with the committee as the process continues.

STATEMENT OF GORDON J. JOHNSON, ASSISTANT ATTORNEY GENERAL OF THE STATE OF NEW YORK

My name is Gordon J. Johnson, and I am a Deputy Bureau Chief of the Environmental Protection Bureau in the of floe of New York Attorney General Eliot Spitzer. I am appearing today on behalf of Attorney General Spitzer and on behalf of the National Association of Attorneys General (NAAG). We very much appreciate the opportunity to appear before the committee to comment on S. 1090, the Superfund Program Completion Act of 1999, and thank Chairman Chafee and the staff of the committee for their consideration and assistance.

The State Attorneys General have a major interest in Superfund reauthorization legislation. As chief legal of ricers of our respective States, we enforce State and Federal laws in our States. We help protect the health and welfare of our citizens, our environment and natural resources. Because many steps in the Superfund cleanup process necessarily involve legal issues, we often are called upon to advise our client agencies—both response agencies and natural resource trustee agencies—on how the law should be interpreted and implemented to achieve the desired cleanup or restoration goals. We often are also responsible for negotiating cleanup and natural resource damages settlements, and when a settlement cannot be reached, it is our responsibility to commence and litigate an enforcement action. We also defend State agencies and authorities when Superfund claims are made by the United States Environmental Protection Agency (EPA) and other Federal agencies against them.

NAAG also has been deeply involved in the Superfund reauthorization process for many years. At its Summer meeting on June 22–26, 1997, the sole resolution adopted by the State Attorneys General addressed Superfund Reauthorization; a copy of this bipartisan Resolution is attached. The Resolution directly addresses many of the issues that are the subject of S. 1090. The NAAG Resolution arose from the State Attorneys General's recognition of the critical importance of the Superfund program in assuring protection of public health and the environment from releases of hazardous substances at thousands of sites across the country. We want to make the tasks of cleanup and protecting the public less complicated and more efficient, and to reduce the amount of litigation and the attendant costs that result.

While the State agencies that administer cleanup programs are very knowledgeable about the engineering issues involved in selecting remedies and the cleanup process, it is the State Attorneys General who can best evaluate the legal con-

sequences of changes to the current statutory scheme, such as how amendments likely will be interpreted by the courts and the effect of the amendments on enforcement, settlement, and cleanup. We are pleased that we will be able to bring to this committee our insights and experience in administering the Superfund statute.

INTRODUCTION

In New York, our office has been litigating Superfund cases since 1981. A major impetus for the passage of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) was the chemical dumps exemplified by the infamous Love Canal and related Hooker Chemical Company sites in Niagara Falls, New York. CERCLA provided both the Federal and State governments essential legal tools to address the dangers posed by those and thousands of other sites in New York and throughout the country.

Although there were significant problems in the Federal implementation of CERCLA during the 1 980's, the current statute is now getting the job done as intended. As a result of CERCLA, our of lice and the State's Department of Environmental Conservation have been able to obtain cleanups at over 600 hazardous waste sites in New York. While State voters in New York approved bonding for and New York committed $1.1 billion for site cleanups, because of the powers provided in CERCLA, responsible parties have contributed more than $2.3 5 billion toward site remediation and two-thirds of sites are being cleaned by the private parties responsible for their creation. Most States have had similar results. On the Federal level, some $10 billion of public money has been saved because 70 percent of all remedial actions at Federal Superfund sites are being performed by responsible parties.

A major reason for this success is that cleanup liability under CERCLA is now clearly understood by responsible parties and government. It was not always this way. In the 1 980's, the meaning of numerous terms, the reach of the liability provisions, and the application of the remedy selection provisions were the subjects of contentious litigation. These lawsuits caused delays in cleanups, imposed substantial burdens placed on Federal and State programs, and increased everyone's transaction and cleanup costs. Those days are now over: potentially responsible parties (PRPs) now know what the statute means and where they stand, and thus most are ready to settle their liability with government. EPA's practices also have evolved, and it knows what it can require of PRPs. Moreover, EPA has developed practices that lead to earlier settlements and the quicker implementation of remedial decisions. Finally, the States' own Superfund programs have matured. Many of them are modeled on or mainly utilize the Federal statute. State officials too understand what CERCLA means and how to use it, and can obtain appropriate cleanups at minimal taxpayer expense. The message is clear: we must avoid changes to CERCLA that will reignite the courtroom battles over the meaning, scope, and implications of the law. At the same time, we must not lose sight of our primary goal—cleanup of sites and protection of the public and future generations. We have no desire to replay the 1980's, even though we were generally successful in the courtrooms.

S. 1090

We are pleased to note that S. 1090 is a departure from earlier bills arising in the Senate and House. S. 1090 contains some of the revisions that have been sought by the States for years, such as the cap at 10 percent for the State share of remedy operation and maintenance costs. In addition, unlike many previous bills, S. 1090 is limited in its overall scope and selective in its reforms. The bill does not amend the remedy selection and natural resource damages provisions of CERCLA. In many respects, those amendments that are in the bill are more narrow than those previously proposed, and wholesale alterations of existing statutory language are generally avoided. As a result, the defense bar will have fewer opportunities for legal challenges than under earlier reauthorization bills.

S. 1090 also includes a brownfields revitalization program, and allows States to give cooperating PRPs protection from liability under certain circumstances, measures that will assist States in implementing their voluntary and brownfields cleanup programs. Unfortunately, other needed revisions that Attorneys General have been seeking for many years are not included. Clarification of the sovereign immunity waiver, modification of the IRS code to allow natural resource trustees to utilize the Fund to perform natural resource damage assessments, and revision of the natural resource damages statute of limitations, among other needed reforms, are not included in S. 1090.

Despite some improvements in the proposed amendments, there are still serious problems with S. 1090's revisions to the liability and allocation provisions of

CERCLA. While NAAG supports appropriate amendments to provide incentives to settle, reduce transaction costs, and provide limited exemptions from liability for truly "de micromis parties" and a reasonable limitation on liability for municipal solid waste disposal, many of the provisions of S. 1090 are unclear or go too far, shifting the costs of cleanup from polluters and responsible parties to the taxpayers. The proposed mandatory allocation process is unwise, and rather than making settlement easier and quicker, will complicate and delay settlements.

Most critical, however, is the apparent defunding of the Superfund program, which necessarily will shift hundreds of millions of dollars more in costs, if not billions of dollars, to the States. We all wish that there was no need for CERCLA and the Superfund program, but the need is there and will be there for many years. Because operation of existing remedies, construction of new remedies, response to new spills and unaddressed sites, and governmental performance and oversight of these activities must continue beyond 2004, it is important that sufficient funds be dedicated to the Superfund program. When EPA lacks the funds to perform, the burden will shift to the States, which do not have sufficient resources to carry this burden alone. In addition, by creating new liability exceptions at NPL sites and imposing limits on listing new sites, we believe that S. 1090 will seriously erode the operation of the Superfund program and inevitably shift its costs to the States.

1. LIABILITY EXCEPTIONS AND ALLOCATION/SETTLEMENT PROCESS

A. De minimis and de micromis parties

NAAG supports reasonable statutory changes that encourage early settlements with de minimis parties and liability exemptions for truly de micromis parties. However, it is important that these provisions be narrowly and carefully written to avoid inappropriate releases from liability and expansion of the "orphan share" that the Fund and the States then may well have to pay. We note that CERCLA always allowed EPA to settle matters quickly and in recent years EPA has been aggressively entering into such settlements without any changes in the law.

Section 122(g) of CERCLA would be amended by S. 1090, altering the current authority regarding expedited settlements for de minimis parties. De minimis status would be presumed if the volumetric contribution is not more than 1 percent of the total volume. However, creating a statutory presumption will not serve to encourage such settlements and may have the opposite effect. For instance, at many sites, 1 percent is not the appropriate de minimis level; it is either too low or too high. The statutory presumption in S. 1090 allows an upward deviation from the presumed 1 percent de minimis level, but not downward, and then only if the President "promptly identifies a greater threshold based onsite-specific factors," information the President is not always likely to possess because of the mandated expedited nature of the settlement process. Indeed, the 1-percent floor would exempt many contributors of waste at larger sites. For instance, the Hardage Superfund site in Oklahoma received over 21 million gallons of industrial waste during the 1970's, including plating wastes, solvents, coal tars, PCBs, and petroleum refining waste. One percent of the waste at the site is 210,000 gallons, an amount of hazardous waste which can wreak havoc on the environment.

Moreover, creation of a presumption will lead to greater transactional costs, for any deviation from a presumption provides an additional ground for -non-settling parties to challenge the de minimis settlement. PRPs also will litigate the issue of whether they are de minimis based on the presumption, creating even further litigation and higher transaction costs. A statutory presumption should be reconsidered, and instead the appropriate de minimis level should be set on a site-by-site basis without any statutory presumption.

Proposed § 107(r) would exempt from liability "de micromis" parties that sent less than 110 gallons or 200 pounds of material containing hazardous substances to a site. We support an exemption for truly de micromis parties, such as Elk Clubs, pizza parlors, and Girl Scout troops, that sent minimal amounts of low-concentration and low-toxicity mixtures to a site. However, depending onsite-specific circumstances and the type of hazardous substances involved, 200 pounds of solid material or 110 gallons of liquid (which is more mobile than a solid material and will usually have a weight of approximately 880 pounds—four times the weight exemption for solid materials) can constitute a substantial contribution to a release. For instance, 110 gallons of a spent solvent, such as trichloroethylene, could contaminate 10 billion gallons of drinking water to levels twice the standard. We believe exempting such a party statutorily and presumptively would be unfair and inappropriate, particularly without full consideration of concentration or toxicity, and would lead to extensive litigation by parties near the specified weight or gallonage.

B. "Small" Business Exemption

Section 107 of CERCLA would be amended by § 301 of S.1090 to include a new subsection 107(s), limiting liability at NPL sites for small businesses which are current or former owners or operators, generators or transporters. A "small business" is one that had no more than 75 full-time employees, or its equivalent, in the taxable year before receiving notification from the President that it may be liable, or had less than $3 million in gross revenue for that year. If the company qualifies, it escapes liability for costs and damages arising from activity which resulted in the disposal or treatment of material containing a hazardous substance at a facility before the date of enactment of the subsection. The exception is not applicable if the hazardous substance attributable to the business did or could "contribute significantly to the cost of the response action" at the facility or is affiliated through "any familial or corporate relationship" with a liable party (proposed § 107(s)(1)(B)-(C)); or if the business's activity which otherwise would give rise to liability "is determined by a court or administrative body of competent jurisdiction, within the applicable statute of limitation, to have been a violation of any Federal or State law pertaining to the treatment, storage, disposal, or handling of hazardous substances" (proposed § 1 22(p)(2)(F)).

While NAAG supports appropriate relief to de minimis parties, the wholesale exclusion of a large class of otherwise liable parties based solely upon their size or revenues is unwarranted. With this exemption, no matter the amount of material disposed, liability is forgiven. Even if the business engaged in knowing, reckless, or grossly negligent activity, liability is excused. Small businesses which committed illegal acts would not be liable unless they happened to have been caught and convicted "within the applicable statute of limitation," thus rewarding the successful concealment of illegal activities. Ability to pay is irrelevant, except that the very small number of small businesses that would be disqualified from the exemption still would be eligible for a reduction of their liability based on their ability to pay. See, proposed § 122(g)(1)(D)(i)(III). The exemption would eliminate many PRPs, especially at municipal-owned, codisposal facilities, and the Fund and the States would have to make up for this share of liability. The States do not have the resources to absorb these shares.

C. Innocent Owner Protection and Contiguous Property Exemption

In.contrast to such bills as H.R. 1300, which effectively exempts current owners from liability, S. 1090 offers a more thoughtful amendment at §§ 103 and 104. The basic structure of the provision remains in § 101(35) and, in contrast to H.R. 1300, there is no protection for an innocent landowner who knew or should have known of the disposal of hazardous substances. S. 1090 does change the standard for determining whether an owner should have known of the disposal. To prove that the current owner had no reason to know, the owner has to establish that it undertook all "appropriate inquiries" and exercised appropriate care (stopped the source, prevented future releases and prevented exposure to past releases) . EPA has the authority to adopt the ASTM standards and practices which describe appropriate steps a new owner should take, or to adopt others, taking into consideration various factors. Finally, there is a special provision for property for "residential or other similar use" purchased by a "nongovernmental or noncommercial entity," for which a facility inspection and title search revealed no basis for further investigation. This last special protection is problematical because of the meaning of the phrases "other similar use" and "noncommercial entity" is unclear. This language would need to be clarified before NAAG could support it.

These amendments affect only those current owners related by contract to responsible parties. If the current owner is not related by contract, then the owner does not have to comply with the "due diligence" provisions of § 101(35), but only with the "due care" provisions of § 107(b). However, it is possible, if not likely, that courts will define what constitutes "due care" without regard to whether the owner complied with the "due diligence" provisions of § 101(35). If that occurs, then the net result likely would be that all current owners, possibly even if they have actual knowledge of the disposal before buying, will escape liability as long as they cooperate with the governments or other PRPs doing a cleanup by giving access and staying out of the way. NAAG opposes such a very broad exemption, which comes close to eliminating current owners from CERCLA liability. Such owners will reap the benefits associated with a taxpayer-financed cleanup of their properties, even though they paid very little for their land given their knowledge-of contamination. While S. 1090 provides for a "windfall" lien, it is only available to the Federal Government, not to States, and is only created upon sale of the property. As a result, owners will receive the protections against State enforcement but the State does not even get the lien's limited benefit.

Given the protections given innocent owners and the current defense regarding acts of unrelated third parties, CERCLA § 107(b)(3), we see little need for the contiguous owners provision of § 102.

D. Recyclers Exemption

Under the new § 107(u), there is no liability at any site for a person arranging for the recycling of certain recyclable material upon demonstration of specified requirements. "Recyclable material" is defined to include (1) plastic, glass, textiles, rubber (not including whole tires) and scrap metal, as well as minor amounts of material incident to or adhering to such scrap; and (2) spent batteries. Special rules are then provided for transactions involving these different kinds of recyclable materials.

While we agree that recycling activities should be encouraged, we are nevertheless troubled by this exemption because it still is too broad and elements of it unclear. The special rules provide protection to recyclers so long as they comply with various "Federal" regulations or standards. However, only State regulations and standards are applicable in most States and there are no Federal requirements in existence. Therefore, the recyclers will have nothing to comply with and can act irresponsibly without incurring liability. Also, while recyclers claiming the exemption are required to demonstrate that they meet certain criteria, the bill is unclear on whether they, or EPA or the States, must demonstrate that they used reasonable care in their recycling activities.

The exemption is particularly inappropriate as it applies to spent lead-acid batteries. Such batteries contain large quantities of lead, an especially toxic substance. Much of the lead in these batteries is in the form of lead oxide and lead sulfate, compounds that are relatively mobile and bioavailable in the environment. The sulfuric acid in these batteries (which has a pH approaching O) greatly enhances the solubility and mobility of these metals. Moreover, the secondary lead smelter industry has repeatedly argued that the RCRA regulations—under either Federal or State authority—do not apply to spent batteries. These batteries, the industry argues, are raw material; they are not discarded, and thus not solid wastes and not subject to regulation under RCRA. See United States v. ILCO, Inc. 996 F.2d 1126 (11th Cir. 1993). The lead components of spent lead-acid batteries would also fall within the definition of "scrap metal." The limitations on the exemption for scrap metal are less stringent than the limitations on the exemption for spent batteries. As the exemptions are currently drafted, a person recycling the lead from spent lead-acid batteries could take advantage of the less stringent limitation for scrap metal. At a minimum, these problems need to be addressed.

E. MSW Exemption

Section 301 defines "codisposal landfill" and "municipal solid waste," and amends § 107 of CERCLA to add new subsections (q) and (I), both of which address liability involving municipal solid waste ("MSW") and municipal sewage sludge ("sludge") at NPL sites. MSW is defined as (A) all waste generated by households, hotels and motels, and (B) waste generated by commercial, institutional and industrial sources to the extent (i) such materials are "substantially similar" to household or public lodging waste, or (ii) the material is waste that is collected with MSW and, regardless of when generated, is considered conditionally exempt small quantity generator waste under the Solid Waste Disposal Act. The term includes food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, grade and high school lab waste, and household hazardous waste.

NAAG supports reasonable limitations on liability for disposal of municipal solid waste. Unfortunately, the limitations provided under § 107(q) of S. 1090, as written, are confusing and appear to contradict the exemption provided by § 107(t). They will not operate as intended, and in any event still are too broad. First, as written, liability at any NPL site is excused in proposed § 107(q) for anyone liable as a generator or transporter if they are the "owner, operator, or lessee of residential property from which all of the person's municipal waste was generated." Thus, as long as one's MSW comes from residential property, one is immune for liability arising from the generation of other hazardous wastes sent to any NPL site. Similarly, all business and nonprofit groups having less than 100 employees are exempt from any liability at NPL sites. There appear to be significant drafting errors in this provision, and it contradicts the liability provided by § 107(t). Section 107(q) must be rewritten or removed from the bill. We are concerned about § 107(q)'s intent to exempt all but large generators from liability.

Assuming that the bill's real intent is described in the definitions and proposed § 107(t), a substantial portion of PRPs would be relieved of liability even beyond

those intended to be exempted by proposed § 107(q). Under the definition of MSW, the relief applies to not just households, but a wide, almost all-inclusive group of business, commercial, institutional and industrial sources. For instance, at a number of hazardous waste sites, cosmetic manufacturers have disposed of sometimes substantial quantities of waste containing a variety of hazardous substances, e.g. acetone. Under S. 1090, such PRPs would escape liability because their wastes, at least arguably, are "substantially similar to waste materials normally generated by households," i.e., cosmetics thrown away by households. Or, for another example, at municipal-owned, codisposal facilities, it is common to have a large volume of MSW and then a small volume of waste from commercial and industrial sources which is highly toxic. Many commercial, institutional and industrial facilities have used solvents in large quantities, and those wastes were often disposed in landfills over the years. PRPs could argue that their solvents are "substantially similar" to solvents used in households and, therefore, exempt.

In proposed § 107(t), S. 1090 appears to adopt EPA's current settlement policy for municipal solid waste for generators and transporters, as well as for municipal owners and operators. However, the meaning of proposed subparagraph 107(t)(1)(C) is unclear. NAAG also supports liability limitations for municipalities owning or operating codisposal landfills. Municipalities need assistance in closing codisposal landfill sites that have become contaminated with hazardous substances. We are encouraged by the direction taken by S. 1090 regarding municipalities' and generators' liabilities for codisposal sites, and would be happy to work with the committee to craft appropriate language to address this subject.

F. Allocation Process for De minimis and Other Parties under Proposed § 122(g)(1).

Under current law, the President is empowered to perform an allocation whenever "practicable and in the public interest." Section 302 modifies current CERCLA § 107(g) to require the President to contact each PRP eligible for expedited settlement consideration and to offer to reach a final administrative or judicial settlement with the party, apparently with respect to any response action at any facility. Eligible PRPs are (i) de minimis PRPs; (ii) site owners which did not conduct or permit hazardous substance activities on the property nor contribute to the release or threatened release by any action or omission; and (iii) natural persons, small businesses not otherwise exempt from liability, and municipalities which demonstrate an inability to pay a judgment. If the President concludes that a PRP is not eligible for settlement, the President must State the reasons for that determination to any PRP requesting a settlement. Under the proposal, "[a]s soon as practicable after receipt of sufficient information to make a determination," EPA then is required to determine eligibility and to submit a written settlement offer to each. The information relied upon by EPA must be disclosed upon request.

NAAG supports measures that promote early settlement with de minimis parties. However, we are concerned about the mandatory aspect of this provision and its application to every response action. The requirement that EPA make such offers for every facility may place an overwhelming burden on the agency, detracting significantly from its implementation of remedies. It is our general experience that EPA is prepared to enter into de minimis settlements when it has obtained the necessary information. Expansion of mandatory expedited settlement activities to all parties claiming an inability to pay at the earliest moment seems unwise, given the uncertainties such determinations might have on the State and Federal Governments' ability to pay for the cleanup once such parties have been excused from liability.

G. "Fair Share" Allocations and the Allocation/Settlement Process

S. 1090 would establish another mandatory allocation procedure for all parties, the "fair share" allocation, in an effort to reach "fair share" settlement at NPL sites. See proposed §§ 122(n)-(p). Although the heading of proposed § 122(p)(2) suggest that the provisions are limited to "statutory orphan shares and fair share settlements," which are governed by proposed § § 122(n) and (o), the statutory text provides that "[a]ll contribution and cost recovery actions under this Act" against generators and transporters of MSW, municipal codisposal site owners and operators, de minimis parties and parties unable to pay are stayed until EPA offers them a settlement. Moreover, if the President fails to fund a statutory orphan share or fails to "reimburse a party as required by subsection (g)," or "include a statutory orphan share estimate in any settlement when required to do so," the President is forbidden from issuing any further § 106 orders or to commence or maintain any new or existing action to recover response costs at the facility. The President is required to reimburse the parties described above for any cost incurred in excess of the party's allocated share. We note that some of the provisions appear to contain what we assume are drafting errors, and the full meaning and intent of these provisions is unclear.

As written, it appears that the bill provides that EPA inaction will stay adjudication of claims brought by States, or any other party, if EPA has not offered to settle its own claim or even has no claim. For instance, if EPA does not offer-a settlement to a de minimis party that may be liable for any response costs, even at non-NPL sites, a State's action to recover its costs under CERCLA are stayed. This is unwise.

Moreover, if the Fund is insufficient to pay all orphan shares, the United States cannot commence a new action or continue an existing action to recover response costs even from parties who would not be entitled to a settlement or reduction in liability. Nor may it issue a §106 order, even against a party that is not entitled to a settlement offer. See proposed §§111(b)(3); 122(p)(2)(B). By forbidding EPA from recovering costs or ordering remedial or removal actions, these provisions not only are self-defeating, but also could result in further endangerment of public health and the environment.

The allocation process regarding orphan shares is likely to be very cumbersome in practice, and is unlikely to accelerate settlements or remove smaller parties from ongoing litigation and allocation. Because the President is required to estimate the orphan share at a site whenever seeking judicial settlement with any party, settlements are likely to be delayed and de minimis parties stalled in court. Moreover, by requiring the court to review orphan share information when evaluating a settlement, the bill is inviting the courts also to evaluate all prior settlements when deciding whether to enter a settlement. This will lead to needless litigation, delay, and costs. Finally, because of conflicts between provisions requiring EPA to treat parties claiming an inability to pay the same as de minimis parties, and the definition and treatment of orphan shares, the allocation process will be very complicated and will invite litigation rather than avoid it.

Finally, other provisions make unclear whether and the extent to which the allocation and settlement provisions will, in effect, reopen past decrees. Because reimbursement of PRPs is expressly provided for by S. 1090, the language at proposed §122(n)(3) stating that a fair share allocation "shall include" response costs not addressed in a settlement approved by a Federal court prior to enactment needs clarification, as reevaluation of prior settlements is not expressly prohibited. Reopening of prior liability determinations could well impose huge liabilities on the Fund, making further cleanups impossible, paralyzing EPA and the Superfund program, and shifting costs to the States.

2. STATE RESPONSE PROGRAM AMENDMENTS

A. Limits on NPL Listing

Section 202 of S. 1090 proposes a limit on the number of new NPL listings. No more than 30 sites per year could be listed, or one site every 2 years per State on average. We are very troubled by this proposal.

Sites should be listed on the NPL on the basis of the risk they pose to human health and the environment, and not be subject to an arbitrary numerical limit. Sites should be added as long as each poses a serious enough threat to warrant remedial action.

EPA's ability to list a site based on a neutral evaluation of the risks it poses and need for remedial action is important to the States. Possible listing is a major incentive for PRPs to conduct voluntary cleanups. If the possibility of NPL listing is significantly reduced, a major incentive for a PRP to proceed with a cleanup will be lost, forcing the States to cleanup themselves and then seek recovery of their costs. Many States simply cannot afford this course.

B. Revision of the NPL

Section 102(b) of S. 1090 requires EPA to revise the entire NPL in order to change the geographical descriptions of sites and delist portions of sites at which "no release actually occurred," such as those portions whose groundwater is contaminated presumably by migration of contaminants from an area beyond the portion. This task places an unnecessary burden on both EPA and the States, to which EPA will undoubtedly have to look for assistance in performing this reevaluation. We doubt the utility of this exercise, and oppose the provision.

As EPA has explained, "the NPL does not describe releases in precise geographical terms, and that it would be neither feasible nor consistent with the limited purpose of the NPL (as the mere identification of releases) for it to do so." 55 Fed.Reg. 6154, 6156 (Feb. 21, 1990). Indeed, to accurately describe geographical boundaries and to determine whether and where a "release actually occurred" requires a full remedial investigation and feasibility study (RI/FS) and, sometimes, the implementation of the remedial design and remedial action (RD/RA). After all, proof of where a release occurred can often be buried underground, or sometimes just cannot be

determined. As EPA has explained on numerous occasions, delisting uncontaminated areas of sites or even accurately defining the geographical extent of releases "would be time-consuming, subject to constant reverification, and wasteful of resources." Id.; see, e.g. EPA's most recent statement on geographical boundaries, 64 Fed.Reg. 2942, 2943 (Jan. 19, 1999).

Finally, relisting could extinguish State and Federal natural resource damages claims under one reading of the existing statute of limitations. One district court has ruled that CERCLA § 113(g)(1)'s limited stay of the statute of limitations for natural resource damages claims at NPL sites until the President selects the remedy only applies within the geographical boundary of the site. United States v. ASDRCO Inc., 28 F.Supp.2d 1170 (D. Idaho 1998). New Mexico, New York and other States have filed an amicus brief urging the United States Court of Appeals for the Ninth Circuit to reverse that erroneous reading of the law. If upheld, S. 1090's reevaluation could retroactively eliminate many damage claims of the States and Federal natural resource trustees that they concluded were stayed, or force the premature filing of litigation prior to selection of the remedy even though such suits otherwise might be avoided or limited if the remedy selected addresses the restoration of the sites appropriately.

Listing on the NPL does not establish, nor is it intended to establish liability. The reevaluation which would be mandated by this provision would need to be Allowed up repeatedly as new information becomes available. It serves no useful purpose whatsoever.

C. Brownfields Redevelopment and State Voluntary Cleanup Programs

NAAG supports in general §§ 101 and 201 Of S. 109() requiring EPA to establish grant programs to assist in brownfields' characterization and assessment and State response programs. Such grants will assist and strengthen State voluntary cleanup programs. NAAG also favors affording appropriate legal finality to cleanup decisions of qualified State voluntary cleanup programs and brownfields redevelopment programs. See § 201 of S. 1090.

We suggest that the committee make clear, perhaps through the addition of the term "development" to proposed § 127(a)(1)(A), that redevelopment of brownfield sites can include noncommercial uses that are beneficial to the community. For instance, some brownfield sites might be developed for use as community centers, parks, libraries, and similar public facilities. Also, while the bill provides for consultation with the Secretary of Housing and Urban Development, it should also provide for consultation with the States.

In addition, New York believes that the redevelopment of brownfields throughout the Nation should be encouraged and supported by other appropriate targeted financial incentives. Perhaps the simplest way to do this on a national level would be to add brownfields projects to the list of "qualified facilities" for which tax-exempt bond financing is available pursuant to section 142 of the Internal Revenue Code of 1986.

For purposes of § 201, Federal statutory provisions should be flexible enough to accommodate different State voluntary cleanup laws. States should be able to self-certify, subject to EPA's approval. After such approval, the State should be authorized to issue a release from Federal liability when a volunteer complies with a federally approved State brownfields program. In this fashion State brownfields and voluntary cleanup programs can work to their fullest potential.

3. FUNDING

Rather than dedicating a revenue stream to funding the Hazardous Substance Superfund, S. 1090 depends on an authorization allowing a one-time appropriation of not more than $1 billion from the Fund, to be used to enter into settlement agreements under the amended § 122. Monies in the Fund can be used for response actions, i. e., actions designed to protect the public from releases, only if the total amount of moneys in the Fund is greater than specified amounts. Appropriations out of the General Fund are limited to a maximum of $900 million for fiscal year 2000, and are reduced by $25 million per year for succeeding years. Approximately $300 million in additional funds are authorized for appropriation out of the General Fund, but may only be used for newly specified purposes. The amount authorized is well below current spending levels.

Like current law, S. 1090 also authorizes payment of natural resource damages from the Fund, but adds that there first must be a plan in place regarding restoration of the injured or destroyed resources. However, the IRS Code's provisions that forbid use of the Fund for such purposes, effectively overriding current § 111, are not amended. There should be conforming amendments.

Although S. 1090 imposes numerous additional costs on the Fund through liability exemptions and reimbursement requirements, overall funding is cut. It is likely that EPA will not have enough funds to perform removal and remedial actions, particular given the bill's directive to reimburse PRPs first, leaving either the public unprotected or the States—which do not have the funds—with the responsibility to fill the breach resulting from EPA's inability to fund cleanups. Moreover, because there are no dedicated revenue sources for the Fund, actual appropriations and the Superfund program will become the subject of yearly budget battles and closed-door special amendments during the appropriation process.

It is our Federal and State officials' responsibility to protect the public health and the environment and to leave our children a cleaner environment. The funding provisions are inconsistent with this duty. Cleanups now implemented by the Federal Government and PRPs will be left to the States, whose ability to recover the costs will have been hobbled by other provisions of the bill. PRPs will be much less likely to step forward to clean sites absent extensive litigation because they will know that State governments will lack the funds and often the statutory authority to compel cleanups. This is hardly the legacy to leave the next generation. We strongly urge this committee to reconsider the funding mechanism, and insure that the Superfund program will have the funds necessary to truly complete the cleanup program without yearly appropriation battles.

RESOLUTION OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

ADOPTED SUMMER MEETING JUNE 22–26, 1997 JACKSON HOLE, WYOMING

RESOLUTION—SUPERFUND REAUTHORIZATION

WHEREAS, the Attorneys General of the States have significant responsibilities in the implementation and enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and analogous State laws, including advising client agencies on implementation of the cleanup and natural resource damage programs, commencing enforcement actions when necessary to compel those responsible for environmental contamination to take cleanup actions and to reimburse the States for publicly funded cleanup, and advising and defending client agencies that are potentially liable under CERCLA;

WHEREAS, the Superfund programs implemented under CERCLA and analogous State laws are of critical importance to assure protection of public health and the environment from uncontrolled releases of hazardous substances at thousands of sites throughout the country;

WHEREAS, Congress is currently considering legislation to amend and reauthorize CERCLA;

WHEREAS, to avoid unnecessary litigation and transaction costs over the interpretation of new terms and new provisions, amendments to CERCLA should be simple, straightforward, and concise;

WHEREAS, the National Association of Attorneys General has adopted resolutions in March 1987, July 1993, and March 1994 on the amendment of CERCLA;

STATE ROLE

WHEREAS, many State cleanup programs have proven effective in achieving cleanup, yet the CERCLA program fails to use State resources effectively;

WHEREAS, State programs to encourage the cleanup and redevelopment of underutilized "brownfields" are making important strides in improving the health, environment, and economic prospects of communities by providing streamlined cleanup and resolution of liability issues for new owners, developers, and lenders;

FEDERAL FACILITIES

WHEREAS, Federal agencies should be subject to the same liability and cleanup standards as private parties, yet Federal agencies often fail to comply with State and Federal law;

LIABILITY

WHEREAS, the core liability provisions of CERCLA, and analogous liability laws which have been enacted by the majority of the States, are an essential part of a successful cleanup program, by providing incentives for early cleanup settlements, and promoting pollution prevention, improved management of hazardous wastes, and voluntary cleanups incident to property transfer and redevelopment;

WHEREAS, the current CERCLA liability scheme has in some instances produced expensive litigation, excessive transaction costs, and unfair imposition of liability;

REMEDY SELECTION

WHEREAS, constructive amendments to CERCLA are appropriate to streamline the process of selecting remedial actions and to reduce litigation over remedy decisions;

NATURAL RESOURCE DAMAGES

WHEREAS, constructive amendments to CERCLA are appropriate to make it less complicated for natural resource trustees to assess damages and to restore injured natural resources, and to reduce the amount of litigation that may result in implementing the natural resource damage program.

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL urges Congress to enact CERCLA reauthorization legislation that:

A. State Role

1. Provides for delegation of the CERCLA program to qualified States, and for EPA authorization of qualified State programs, with maximum flexibility;
2. Reaffirms that CERCLA does not preempt State law;
3. Ensures that States are not assigned a burdensome proportion of the cost of operation and maintenance of remedial actions and in no event to exceed 10 percent;
4. Clarifies that in any legal action under CERCLA, response actions selected by a State shall be reviewed on the administrative record and shall be upheld unless found to be arbitrary and capricious or otherwise not in accordance with law;

B. Federal Facilities

5. Provides for State oversight of response actions at Federal facilities, including removal actions.
6. Provides a clear and unambiguous waiver of Federal sovereign immunity from actions under State or Federal law;

C. Liability

7. Provides a liability system that: a) includes the core provisions of the current CERCLA liability system that are essential to assure the effectiveness of the cleanup program; b) provides incentives for prompt and efficient cleanups, early cleanup settlements, pollution prevention, and responsible waste management; c) addresses the need to encourage more settlements, discourage excessive litigation, reduce transaction costs, -and apply cleanup liability more fairly and equitably, especially where small contributors and municipal waste landfills are involved; and d) assures adequate funding for cleanup and avoids unfunded State mandates;
8. Provides reasonable limitations on liability for disposal of municipal solid waste;
9. Provides an exemption from liability for "de micromis" parties that sent truly minuscule quantities of waste to a site;
10. Encourages early settlements with de minimis parties that sent minimal quantities of waste to a site;

D. Remedy Selection

11. Provides for the consideration of future land use in selecting remedial actions, provided that future land use is not the controlling factor, and provided that remedial actions based on future land use are conditioned on appropriate, enforceable institutional controls;
12. Retains the requirement that remedial actions attain, at a minimum, applicable State and Federal standards;
13. Retains the prohibition on pre-enforcement review of remedy decisions;
14. Provides that cost-effectiveness should be considered, among other factors, in remedy selection;
15. Allows EPA or the State agency to determine whether to reopen final records of decision for remedial actions, as under current law;

E. Natural Resource Damages

16. Clarifies that in any legal action, restoration decisions of a natural resource trustee shall be reviewed on the administrative record and shall be upheld unless found to be arbitrary and capricious or otherwise in accordance with law, without precluding record review on other issues;

17. Provides that claims for damages for injuries to natural resources must be brought within 3 years of that completion of a damage assessment;

18. Allows Superfund moneys to be used for assessments of damages resulting from injures to natural resources and for efforts to restore injured natural resources;

19. Retains the ability of trustees to recover damages based on any reliable assessment methodology;

20. Does not revise the cap on liability for natural resource damages so as to reduce potential damage recoveries;

21. Clarifies that trustees are entitled to recover legal, enforcement, and oversight costs;

F. Brownfields

22. Strengthens State voluntary cleanup and brownfields redevelopment programs by providing technical and financial assistance to those programs, and by giving appropriate legal finality to cleanup decisions of qualified State voluntary cleanup programs and brownfield redevelopment programs;

G. Miscellaneous

23. Allows EPA to continue to list new sites on the National Priorities List based upon threats to health and the environment, with the concurrence of the State in which the site is located.

BE IT FARTHER RESOLVED that the CERCLA Work Group, in consultation with and with approval of the Environmental Legislative Subcommittee of the Environment Committee, and in consultation with NAAG'S officers is authorized to develop specific positions related to the reauthorization of CERCLA consistent with this resolution; and the Environmental Legislative Subcommittee, or their designees, with the assistance of the NAAG staff and the CERCLA Work Group, are further authorized to represent NAAG's position before Congress and to Federal agencies involved in reauthorization decisions consistent with this resolution and to provide responses to requests from Federal agencies and Congressional members and staff for information, technical assistance, and comments denying from the experience of the State Attorneys General with environmental cleanup programs in their States.

BE IT FURTHER RESOLVED that NAAG directs its Executive Director and General Counsel to send this resolution to the appropriate Congressional committees and subcommittees, and to the appropriate Federal agencies.

ABSTAIN: Attorney General Don Stenberg

RESPONSE OF GORDON JOHNSON TO AN ADDITIONAL QUESTION FROM SENATOR MAX BAUCUS

Question: In your opinion would S. 1090 have the effect of reopening matters that have been addressed in consent decrees, or of revisiting any costs that were spent in accordance with pre-enactment administrative orders? If so, please explain how under the bill prior agreements and expenditures would effectively be reopened, and possible impacts.

Response. There are several ways in which matters already addressed in consent or administrative orders are likely to be reopened under S. 1090. First, S. 1090's transition rule, at the bill's § 301(b)(2), does not apply to the limitation under proposed § 107(t) regarding "municipal solid waste and sewage sludge" disposed of at National Priority List ("NPL") sites. See § 301(b)(2)(A) ("the exemptions under subsections (q), (r), and (s) of section 107 . . . shall not apply" to prior settlements or judgments"). Therefore, any generator or transporter that disposed of such waste streams at NPL sites and settled with the governments appears to be able to reopen its settlement and argue for the settlement terms provided in § 107(t). This reopening is significant and disturbing.

The number of parties qualifying for § 107(t) liability limitation is large. The definition of "municipal solid waste" under § 301(a) of S. 1090 is greatly expanded to include waste from industries and companies which is "substantially similar" to household waste. As we pointed out in our written testimony, at a number of hazardous waste sites, cosmetic manufacturers have disposed of sometimes substantial quantities of waste containing a variety of hazardous substances, e.g., acetone. Many commercial, institutional and industrial facilities have used solvents in large quantities, and those wastes were often disposed in landfills over the years. Under S. 1090, such potentially responsible parties ("PRPs") would substantially limit their liability because their wastes, at least arguably, are "substantially similar to waste materials normally generated by households," i. e., cosmetics or solvents discarded by households. Moreover, a PRP is eligible for the limitation no matter the amount

of waste disposed of by that PRP. Thus, an eligible PRP which disposed of thousands of tons of waste containing large quantities, in total, of hazardous substances such as those described above nonetheless would be entitled to the limitation.

Any industrial or commercial generator in this large group of parties that paid more than the share specified in § 107(t) will seek to reopen a prior settlement to reduce its payment consistent with § 107(t) because the transition rule—§ 301(b)(2)(A)—fails to include § 107(t). By this omission, a court could well conclude that Congress intended to afford past settlers as well as future settlers the benefit of proposed § 107(t). This could result in reopenings of consent and administrative orders at all co-disposal facilities, which total an estimated 25 percent of all NPL sites. Only cases that have gone to final judgment in all respects are likely to be unaffected.

Second, all of the transition rules at best protect only Federal court approved settlements or judgments from reopening, leaving the courts free to reopen administrative settlements or orders and any other determinations other than Federal court approved settlements and judgments. Proposed § 122(n)(3) provides that a fair share allocation "shall include any response costs at a National Priorities gist facility that are not addressed in a settlement or a judgment approved by a United States Federal District Court [emphasis supplied]" before 180 days after enactment. Similarly, under the transition rule, the exemptions at proposed § 107(q)-(r) "shall not apply to any settlement or judgment approved by a United States Federal District Court [emphasis supplied]" before 180 days after enactment. § 301(b)(2)(A). Thus, administrative settlements and orders can be redetermined and reopened under S. 1090. We note that states have settled response cost cases in forums other than the Federal courts. State administrative settlements may not be exempt from reopening, and settlements or orders made in state courts might be attacked and effectively reopened through third-party actions in Federal court.

Third, other provisions of S. 1O90 establish a series of requirements and procedures regarding allocation that are extraordinarily complicated and confusing. While the full import of the statutory language is unclear, it would appear that reopening of prior agreements is required under some provisions. For instance, S. 1O90 also requires EPA to perform a final allocation and "identify the total statutory orphan share owing for a facility," then to "fully" fund the orphan share and reimburse parties for expenditures above their share. See, proposed §§ 107(o)(4), 107(p)(2)(J)(ii). This language could easily be construed as requiring EPA to perform an allocation when the last operable unit is constructed for a facility addressing all costs ever incurred and to reimburse any party that paid too much. Similarly, the fair share, orphan share, and reimbursement provisions apply to parties specified at proposed § 122(g), which include de minimis parties, PRPs with a "limited ability to pay," and certain small businesses. Nothing in the bill suggests that the allocation will not take into consideration prior payments by these parties or any other parties not specifically mentioned at § 301(b)(2)(A).

Thus, the bill could effectively reopen all orders or partial settlements reached prior to the enactment of this bill. Whatever these and other provisions are intended to mean, the confusion created by the complicated procedures and potentially conflicting obligations will lead to many years of further litigation.

We also note that the transition rule for proposed § 107(u) regarding recycling transactions provides that this new exemption "shall not affect any concluded judicial or administrative action or any pending judicial action initiated by the United States prior to the date of enactment of this Act [emphasis supplied]," effectively eliminating their impact on pending litigation. However, that transition rule should also provide, at a minimum, that the exemptions of proposed § 107(u) should not affect any pending judicial action initiated by a State as well as any pending administrative proceedings initiated by either a State or the United States. We also recommend that the transition exclusion be modified to provide that the new exemption does not apply to any judicial or administrative action or proceeding in which the United States or a State has made claims for recovery of response costs, rather than only those actions or proceedings initiated by a government. Who initiated the action should not determine whether the exemption applies, because state or Federal claims sometimes are raised in cases as counterclaims, crossclaims, or third-party claims, or when governments intervene in existing litigation.

The effective reopening of prior agreements and expenditures in any case in which no final judgment has been entered would create substantial delays in the negotiation and settlement of current cases for all parties. Prior allocations would no longer provide guidance for future settlements, with parties likely lodging additional cross-claims based on the new bill's provisions. Transaction costs are likely to increase significantly, and cleanups could be delayed as performing parties reassess their obligation to implement cleanup orders.

RESPONSES OF GORDON JOHNSON TO ADDITIONAL QUESTIONS FROM SENATOR LAUTENBERG

Question 1. What effect, if any, would you expect S. 1090 to have on the likelihood of PRPs entering into consent decrees for the cleanup of NPL sites?

Response. It is unlikely that any PRP which S. 1090 identifies as possibly eligible for an exemption from or limitation on liability will enter into a consent decree for at least 180 days after passage of the bill, or for a considerable period thereafter. First, the transition rules generally provide that the new provisions do not apply to any consent decree approved by a court 180 days after the bill's passage. § 301(b)(2)(A); proposed § 122(n)(3)(B). No party that might take advantage of the change in law would act before then. Second, even after this initial 6 months, many PRPs would decline to enter into consent orders until EPA performed the allocation or offered settlements, particularly those entitled by a statutory stay proposed under § 122(p). Any PRP arguably entitled to an exemption or limitation on liability would seek it rather than enter into any meaningful consent order. The substantial, and ambiguous changes in the exemption and limitation provisions of the statute will limit the number of consent orders reached after passage of the bill until the courts construe the new provisions. That process will take years, as our experience has demonstrated.

Question 2. What are the relative advantages and disadvantages of PRP lead cleanups being conducted under consent decrees versus administrative orders?

Response. A remedial action under CERCLA may be conducted by the responsible party under either a consent decree or a unilateral administrative order (see CERCLA § 122(d)(1)(A)). A consent decree is a settlement agreement negotiated by the parties, usually submitted for public comment, and approved by the court as an order of the court. A unilateral administrative order is, as its name implies, an order issued unilaterally by the agency, without negotiation and without the imprimatur of a court. For several reasons, a negotiated consent decree is preferable to a unilateral order as a vehicle for cleanup.

First, because a consent decree is a negotiated agreement, all parties, including the responsible parties conducting the cleanup, understand and agreed to its terms. There is less likely to be a dispute over the meaning of those terms. Moreover, the responsible parties are much more likely to comply with a consent decree. whose terms they have agreed to, and to do so promptly, than they are to a unilateral order whose terms have been imposed upon them by the agency.

Second, a consent decree is much more easily enforced. A consent decree almost always includes stipulated penalties, see CERCLA § 121 (e)(2), that is, a schedule of civil penalties that the settling responsible parties agree in advance to pay should any violation occur. Moreover, because a consent decree is a court order, it is very easy to seek assistance from the court, e.g. a further court order or sanctions, to ensure its timely implementation. On the other hand, because a unilateral order is not negotiated, there can be no stipulated penalties. To enforce the order, even for relatively minor infractions, EPA must refer the matter to the Department of Justice and a new lawsuit must be initiated.

Third, the parties can agree to more expansive terms in a consent decree. For example, EPA routinely includes a settlement for past response costs—those incurred by the Federal Government and often those incurred by the state government—as part of a cleanup settlement. However, EPA has no authority to require payment of response costs under a unilateral administrative order. A separate lawsuit or lawsuits must be filed.

Fourth, under section 113(f)(2) of CERCLA, the responsible parties that resolve their liability in a settlement are entitled to contribution protection from actions by other responsible parties. No such protection is afforded to the responsible parties under a unilateral order. More litigation, in the form of third-party contribution actions, is likely to result.

Finally, EPA generally issues unilateral administrative orders only if agreement on a negotiated consent decree cannot be reached. Thus, entry of a consent decree usually results in a faster cleanup.

Question 3. What would be the impact of S. 1090 on litigation and transaction costs, for state and Federal Governments, PRPs who are exempt or whose liability is capped, and for non-exempt PRPs?

Response. As a preliminary matter, it can be noted that the current statute is producing intended results. For instance, EPA reports that 70 percent of all remedial actions at Federal Superfund sites were being performed by responsible parties. The experience in most states is similar: about 70 percent of sites are being remediated under state consent orders. A major reason for this success is that the liability under CERCLA has been clear and unequivocal.

It has taken 20 years since CERCLA, and over a dozen years since SARA, for the courts to construe the law. Instead of spending money litigating whether, and how much, they will pay at Superfund sites, the responsible parties are spending considerably less just calculating their share, through settlements and allocations. Similarly, the Federal and state governments have been able to conserve their resources and limit transaction costs.

Unfortunately, S. 1090 proposes that we start all over with whole new categories of exemptions and limitations. All parties' transaction costs likely will shoot up to what they were in the first 10 years of CERCLA litigation. EPA's costs will rise also because of its mandated obligation to perform allocations in every case and make settlement offers to specified classes of parties, as well as promulgate additional regulations implementing S. 1O90's other provisions. PRPs who are exempt or whose liability is capped will also face additional transaction costs initially as the scope of the exemptions and any caps is determined.

STATEMENT OF WILMA SUBRA, SUBRA CO., NEW IBERIA, LOUISIANA

Thank you for the opportunity to testify on the issues of the Superfund Program. I have been involved in Superfund issues since the inception of Superfund, working with citizen groups living around sites, serving as a technical advisor on the National Commission on Superfund, providing technical assistance to citizens groups at 8 NPL sites through the Technical Assistance Grants process, and assisting citizens groups deal with voluntary cleanup efforts.

The Superfund Program Completion Act of 1999 would limit and weaken the Superfund program and result in continued environmental damage and human health impacts from sites that would not be allowed to be addressed by the program The bill limits the number of new NPL sites, reduces the level of funding for the program, encourages State programs to assume program responsibilities in States that lack the financial and technical resources as well as the political ability to carry out the programs, limits and in some cases eliminates public participation, discourages voluntary cleanups by PRP's at sites prior to being listed on the NPL, and places at risk communities that live on or near fund led sites where the remedies were only containment.

Containment Remedies at Fund Sites

A containment remedy is currently being implemented by EPA at the Agriculture Street Landfill Superfund Site in New Orleans. The remedy is being paid for with fund money. The landfill is a 95 acre site operated by the City of New Orleans from 1909 to 1965. The City then developed 47 acres of the landfill as private and public housing, recreational facilities and an elementary school. The residential housing on top of the landfill consists of 67 privately owned homes, 179 rent-to-own town homes, and 128 senior citizen apartments. The containment remedy consists of removal and replacement of two feet of soil and waste in 10 percent of the residential area. Only the exposed soil/waste areas will be addressed. The waste will be allowed to remain under streets and structures and will be located a mere two feet below peoples' yards. When this remedy fails, and it will fail due to subsidence, very shallow ground water, and the area being located below sea level, resources from the fund would not be available, under the proposed bill, to finance the measures necessary to fix the containment remedy. This is just one example of the many sites where containment was utilized at fund led sites where the citizens will lose when the containment remedy fails and fund resources are not available to repair the failed remedy.

Governor Request Required

Section 202.(b)(3) of the bill requires a written request from the Governor of a State in order to add a site to the National Priorities List. The requirement will severely limit the sites proposed for the NPL. Governors will be reluctant to request that the EPA add sites to the NPL when the potentially responsible parties at the sites are his financial campaign contributors. The only sites a Governor may consider requesting be added to the NPL are sites that are 100 percent orphan. In States that lack the financial resources or political will, such orphan sites already fall to EPA to fund the cleanup on a regular basis.

The requirement that a Governor request a site be added to the NPL completely eliminates the ability of citizens to petition to have sites listed. In the State of Louisiana, the majority of the NPL sites were listed as a result of citizens involvement. The elimination of the citizen petition process is not appropriate. Allowing the State Governors to have the ultimate authority over the listing of sites prolongs the expo-

sure of citizens living and working on or near the sites and citizens consuming aquatic and terrestrial organisms contaminated by sites.

Limit on Number of New Sites

Section 202 (b)(2) limits the number of new sites that could be added to the NPL on an annual basis. The limit is set at 30 per year. That is less than one site per State per year. Such a limit is not sufficient to address the number of sites needing to be addressed under the Superfund program.

For States that lack adequate financial resources to address sites that lack responsible parties, the limit on the number of new sites will be a burden that they will not be able to address. The burden will continue to be borne by the citizens living on and adjacent to these hazardous waste sites.

CERCLIS Sites

The EPA will be required to investigate all sites currently on the CERCLIS list within 2 years. If the EPA does not investigate all of the sites and either list, prepare for listing or remove the sites from the CERCLIS list within 2 years, those sites become problems of the State. It is doubtful that the EPA has the financial and technical resources to investigate the more than 10,000 sites on the CERCLIS list. The States definitely do not have the financial and technical resources necessary to address the CERCLIS sites.

The State of Louisiana currently does not have the resources to evaluate the more than 500 potential sites or to perform remedial activities at confirmed hazardous waste sites. More than 50 sites where hazardous waste needs to be cleaned up are waiting for State financial resources to become available. When sites pose an eminent and substantial threat, the EPA has to step in to finance and perform emergency removal actions for the State. The State of Louisiana and many others cannot address the current site load much less handle the Federal CERCLIS sites destined to be dumped on them under the terms of this bill.

State Response Programs

Section 128 (b) sets forth the elements necessary for a State program. The elements listed lack minimum standards for a State program and a mechanism by which EPA is required to evaluate and approve a State program.

The requirements lack a mechanism to insure that a State will be able to maintain sufficient financial and personnel resources to perform the response program. Financial resources can quickly be eliminated by State legislative bodies. A major industrial facility can hire an agencies core and experienced technical people. The State program would then lack the necessary organizational and technical expertise to administer the response program.

The bill specifies adequate opportunity for public participation in a State program. States could basically isolate the public and the impacted community from participating in the State response program.

The bill fails to provide a mechanism for addressing CERCLIS sites in States that do not qualify for the response program. The EPA will not have the authority or financial resources to address the sites in States that cannot qualify for response programs. When sites are not addressed properly in a State, the citizens in the area of the sites continue to be impacted as a result of chemicals associated with the sites.

The bill further endangers public health and the environment by prohibiting the Federal agency from stepping in when there is a release at a State site. When the State fails to take appropriate actions the EPA must have the authority to act. The citizens must be assured that the Federal agency will have the ability to act when their State agency does not or will not act.

STATEMENT OF BERNARD J. REILLY, CORPORATE COUNSEL, DUPONT, ON BEHALF OF THE CHEMICAL MANUFACTURERS ASSOCIATION

I. INTRODUCTION

Good afternoon Chairman Chafee, Chairman Smith and members of the committee. My name is Bernard Reilly. I am Corporate Counsel for DuPont Company and am here representing the Chemical Manufacturers Association (or CMA). CMA is a non-profit, non-partisan trade association whose member companies produce more than 90 percent of the basic industrial chemicals manufactured in the United States. CMA and DuPont also are members of the Superfund Action Alliance (SAA), a combined group of businesses, trade associations and other concerned organizations that has been actively engaged in the Superfund debate for a number of years.

CMA has worked on Superfund reform since the early 1990's with Members of Congress, the Administration, environmental groups, States, cities, and other business organizations. In addition, we have worked with EPA to improve the Superfund program through administrative reforms.

I would like to commend Chairmen Chafee and Smith for their leadership over the years in trying to reform the Superfund law and for their introduction of S. 1090, the Superfund Program Completion Act. CMA recognizes the Senators' accomplishment in producing this bill. As long time participants in the efforts to reform Superfund, CMA understands that this is not an easy task and looks forward to working with both the Republican and Democratic members of the committee and the Senate on this bill.

CMA has completed a preliminary review of the recently introduced bill. I would like to spend the next few minutes highlighting what is especially noteworthy, touching on a number of strong areas, and following with some areas that could be improved.

II. NOTEWORTHY AREAS OF S. 1090

Clearly, the most important issue facing Congress at this point is the future direction of the program. As we have previously noted, after 17 years of existence, there is more of Superfund behind us than ahead of us. According to EPA, nearly 90 percent of all non-Federal sites on the National Priority List (NPL) are undergoing cleanup, 60 percent will be finished by the end of this Congress and 85 percent will be cleaned up by 2005. Congress needs to determine what remains to be done under Superfund, how long it will take, and how much it will cost. We strongly commend the cosponsors of S. 1090 for recognizing these critical issues and taking appropriate steps to address them.

CMA has prepared estimates of the funding required to complete the job at hand. These indicate that Superfund funding could be dramatically reduced and there would still be sufficient funds to pay for both remaining sites and sites that GAO and EPA have concluded will be added to the NPL in the future. Program spending levels should be adjusted accordingly to fit the future needs of the program in order to ensure that more funds than necessary are not appropriated. S. 1090 does exactly that. Congress should take the next step and direct an independent study of funding needs.

In addition to recognizing that Superfund is moving toward completing the job of cleaning up existing sites, and that the funding levels need to be adjusted accordingly, S. 1090 contains other important provisions. These include: finality for State cleanups; an integral Governor's role in the process of listing sites on the NPL;liability relief to ensure that brownfields sites are redeveloped; and a recognition of the States' primary role in cleanup.

III. AREAS OF S. 1090 THAT COULD BE IMPROVED

Another aspect of this bill deserves credit at the same time that it raises some concerns about its implementation. This particular aspect has to do with the exemptions that are provided for certain parties and the allocation system that is set up to pay for those parties' shares. The bill deserves credit for recognizing that it would be wholly unfair to pass exempt parties' shares to the remaining parties at a site. The allocation system that is set up to determine those shares, however, appears to be flawed. Under this system, industrial parties at these sites not only will continue to pay more than their fair share of liability, they probably also will pay for shares attributable to exempt parties.

As we all know only too well, it is not easy to develop fair, defensible, and acceptable liability allocations. CMA has advocated a streamlined system for several years, calling for the inclusion of certain basic elements but not overburdening the system with detail. The single most important element of any streamlined process is that it be administered by third-party neutrals who do not have a vested stake in the outcome. S. 1090 does not include this element. Instead, the bill designates EPA as the allocator. This is not appropriate given EPA's demonstrated, vested interest in preserving the Trust Fund and culture of assigning liability to "deep pockets." The bill also lacks a defined process for information gathering and deadlines for assuring that allocations are completed in a timely manner.

Fundamental reform to ensure the successful, cost-effective future of the Superfund program requires changes to areas including natural resource damages, remedy selection, and cost recovery programs. Improvements in the NRD program would help to ensure that the program focuses on the restoration of injured or lost resources, not surplus damages. Improvements in Superfund's remedy selection provisions, recognizing what is happening in the field and focusing on risk-based rem-

edy selection, would help to ensure that cleanups are as fast, efficient, and cost-effective as reasonably possible. Finally, improvements in the Superfund cost recovery provisions would ensure that EPA is not allowed to recover costs that are "not unreasonable" and "not unnecessary."

IV. CONCLUSION

Chairman Chafee and Chairman Smith and members of the committee, thank you for undertaking the hard work necessary to produce the Superfund Program Completion Act. As I have said, the future direction of the program is the most critical issue facing us in reforming Superfund. We see that future as one in which sites currently listed on the NPL are cleaned up, and the remaining sites are addressed under a reduced program with reduced spending levels. We strongly commend you for taking an innovative look at these issues and addressing them in S. 1090.

We appreciate the opportunity to provide input into this challenging process. At this point, I would be happy to answer any questions you may have.

STATEMENT OF KAREN FLORINI, ENVIRONMENTAL DEFENSE FUND

Introduction

On behalf of the Environmental Defense Fund (EDF), I appreciate this opportunity to present our views on S. 1090, the "Superfund Program Completion Act of 1999." EDF has been actively involved in the Superfund reauthorization process, serving on EPA's NACEPT Committee on Superfund and on the National Commission on Superfund, and testifying repeatedly on Superfund during the last several Congresses.

We recognize that this bill differs significantly from earlier Superfund reauthorization bills introduced in this committee. Unlike its predecessors, S.1090 does not contain radical changes to current provisions on cleanup standards and natural resource damages—changes that we believe would have greatly weakened cleanups, gutted the polluter-pays liability system, and profoundly hampered recovery for natural resource damages.

Nonetheless, S.1090 contains numerous objectionable provisions, compelling us to oppose it strongly. Key problems include:

—sharp reductions in cleanup resources authorized, even as EPA's workload is expanded by the allocation process and other provisions;

—dramatic slowdowns in the pace and quality of cleanups that are likely to result from the superficially innocuous fair-share allocation provisions;

—the preferential status of funds for liability relief compared to cleanup;

—the numerous holes in the Federal safety net for cleanups, including the unwarranted cap on the number of sites, the requirement that sites can be listed only upon a Governor's request, and restrictions on Federal authority at State-cleanups sites even where problems remain; and

—over-breadth of some of the liability limitations.

Before detailing the problems with the bill, I must address the related issue of Superfund's polluter-pays taxes. It is our understanding that the sponsors of this bill do not intend to introduce companion legislation to re-impose the taxes in conjunction with this bill, and indeed will oppose re-imposition of the taxes absent radical revisions to Superfund.

In our view, this bill must be accompanied by companion legislation that re-institutes Superfund's polluter-pays taxes. In simple terms, it's time for the $4-million-plus daily tax holiday for industry to end. Since the taxes lapsed at the end of 1995, industry has benefited to the tune of more than $5 billion in avoided taxation. [1]

Superfund embodies the polluter-pays principle—which is overwhelmingly supported by the American public—in two distinct ways: in its liability provisions, under which responsible parties must conduct cleanups themselves or pay for EPA's cleanup activities, and in its tax provisions. The taxes cover what the liability system does not: sites at which responsible parties cannot be identified or lack the resources needed for cleanups, and certain broader programmatic activities.

But under S.1090, funds for cleanup operations would be appropriated from general revenues, not from the polluter-pays taxes [SPCA § 401 (a), amending CERCLA § 111 (p.89)]. [2] We oppose this fundamental shift in the nation's dumpsite-cleanup

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[1] This estimate is on the low side, as economic expansion in the years since 1995 would have produced tax revenues higher than the approximately $1.5 billion collected in 1995.

[2] In addition, to the extent that cost-recovery actions produce amounts in the Trust Fund in excess of specified levels, those funds can be used for cleanups, but without any concomitant increase the annual authorizations [SPCA § 401 (a), amending CERCLA § 111 (h), p.98].

strategy for both on principle and for pragmatic reasons. As a matter of principle, these taxes should be paid by groups with a closer relationship to the problem, namely industry, rather than individuals with a less-direct relationship, namely the general public. This is rough justice, to be sure, but rough justice is better than none.

From a pragmatic perspective, the existence of a dedicated stream of funds increases the odds that appropriators will spend those funds (at least most of them) for their intended purpose. It is true that, historically, appropriations have not kept pace with the level of tax revenues generated—but those accumulated funds have been financing the program for the last 4 years since expiration of the tax, thus fulfilling the original purpose of their collection.

Additional concerns with the bill are set forth below.[3]

I. Money Matters: Declining Authorizations Will Retard Cleanups

Far from assuring that additional resources will be available so that EPA can accelerate or even maintain the rate of cleanup completions while meeting the new demands imposed by S. 1090,[4] the bill does precisely the opposite: it sharply ratchets down authorizations, beginning with fiscal year 2000 [SPCA § 401 (a), amending CERCLA § 111(h), p.98]. The exact degree of reduction is difficult to ascertain, because the bill creates new categories for various kinds of expenditures. Nonetheless, it is clear that the amount of funding authorized for fiscal year 2000 is substantially below that actually appropriated for fiscal year 1999. In addition, authorizations decline by another $100 million by 2004 (and inflation will reduce the real-dollar values even further).

Ratcheting down authorizations at this point in the Superfund program is insupportable. There is no basis for believing that EPA will need less money to conduct cleanups in the next five fiscal years than it does in this one. While construction is complete for about 600 Superfund sites,[5] there are another 700 sites still to be completed.[6] It is my understanding from informal discussions with EPA staff that the agency expects to continue construction-completions at the same pace for the next 5 years, namely about 85 per year—unless, of course, funds are curtailed.

For years, critics of the Superfund program have bemoaned the slow pace of cleanups. Now that progress is faster,[7] the sponsors of this bill propose to curtail sharply the availability of the resources needed to sustain that progress. As a result, communities that have long awaited completion of nearby Superfund cleanups will have to wait longer still.

This makes no sense.

Moreover, while it is true that there are fewer sites in Superfund's pipeline overall for future cleanup than was recently the case, the bill simply ignores the fact that—correspondingly—there are more sites now in the operation and maintenance phase. A recent article by Dr. Joel Hirshhorn (copy appended) points out that EPA to date has done a miserable job in conducting the statutorily required 5-year reviews of sites at which some contaminants are left in place.[8] Only by this kind of

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[3] All references to the bill are to the version introduced on May 20, 1999, headed TOM99.310, as downloaded from www.senate.gov/epw/ on May 21, 1999.

[4] These include conducting allocations at hundreds of sites [SPCA § 303(a), adding CERCLA § 122(n), p.76]; revising the National Priorities List to address the "parcelization" problem for contiguous properties [SPCA § 102(b), adding CERCLA § 105(h), p. 181; and reviewing the CERCLIS data base of potentially contaminated sites within 2 years to determine which sites should be listed as NPL sites [SPCA § 202, amending CERCLA § 105(b)(1), p.381.

[5] There had been 599 construction completions as of 4123199. See http://www.epa.gov/superfund/sites/npl/nplfin.htm (as of 5/21/99).

[6] As of May 18, 1999, there were 1211 sites on the National Priorities List of Superfund Sites, with several dozen additional proposed sites. See http://www.epa.gov/superfund/sites/npl/nplfin.htm (as of 5/21/99).

[7] The faster rate of progress is a silver lining with some serious clouds on the horizon. Anecdotal reports suggest that EPA's eagerness to achieve a faster rate of construction completions has prompted the agency to rely heavily—unduly so—on containment-based rather than treatment-based remedies. Indeed, it is our understanding that only about 30 percent of current remedies involve treatment. While treatment options are not always available, they are strongly preferable where they are feasible, since containment remedies threaten health and the environment if monitoring and maintenance is allowed to lapse. Moreover, containment remedies inevitably hamper communities' flexibility to change land use over time as community needs change, since the containment restrictions must continue to be observed.

[8] Hirshhorn, "EPA's Five-Year Review of Superfund Sites Needs Higher Priority," Environment Reporter, Vol. 29, No. 42 (Feb. 26, 1999). Dr. Hirshhorn has had extensive hands-on experience with the Superfund program through many years of service as a Technical Adviser to communities and was previously with the Office of Technology Assessment.

active oversight can we possibly hope to know if remedies are working, and to have advance warning where they aren't.

In other words, even if EPA were to need fewer resources for construction-completions over the next 5 years—an assumption that is by no means warranted—the agency will clearly need more resources to conduct 5-year reviews, and to take followup action where needed.

It is no secret that the authors of this bill view cleanup of highly contaminated hazardous waste dumps as a State responsibility, not a Federal one, and are moving to dump cleanups back on the States—regardless of whether all States have, and will continue to have, the resources and inclination to clean up highly contaminated sites. In our view, this approach elevates theoretical federalism over protection of health and the environment, and we oppose it strongly. Dumping Superfund responsibilities on States that may currently or in the future lack the resources or aptitude to provide effective cleanups is as unconscionable as dumping wastes into the environment in the first place.

Moreover, down-sloping authorizations are unnecessary. Authorizations provide a ceiling, not a floor. If it turns out during the next 5 years that fewer funds are needed than were authorized, the Appropriations Committee will be able to make mid-course corrections. As programs seldom receive the full amount of appropriations that are authorized, this is hardly a-revolutionary concept.

II. Money Matters, Part 2: Preferential Treatment for Liability Relief over Cleanups

To add insult to injury, S.1090 provides that funds for liability relief get preferential treatment and that inability to finance liability relief at a site limits EPA's ability to order additional cleanup at that site [SPCA § 303(a), adding CERCLA § 122(o)(4)(B), p.80 and (p)(2)(B), p.82]. Specifically, liability-relief funds tap the remaining balance in the Trust Fund from the accumulated reserves of the now-expired taxes, while funds for cleanups come from general revenues [SPCA § 401 (a), amending CERCLA § 111(a) p.90 and § 111 (h), p.98].

Moreover, while EPA is obliged to spend funds reimbursing polluters for all costs attributable to a party whose liability is limited [SPCA § 303(a), adding CERCLA § 122(p)(2)(J)(ii), p.88], there is no corresponding obligation to spend one thin dime on actual cleanups. And because there is no "fireball" between funds for paybacks and funds for cleanups, all of the moneys in the Superfund could be exhausted on liability-relief funds, leaving none for actual cleanups, oversight, and enforcement by EPA, as well as vitiating programs for Technical Assistance Grants.

Finally, S.1090 contains extremely confusing language that could readily be interpreted to require EPA to reimburse polluters for work they have already agreed to do—an unwarranted windfall. Specifically, the bill provides that a "judicially approved consent decree or settlement shall identify the total statutory orphan share owing for a facility" if the decree or settlement covers the last stages of the cleanup [SPCA § 303(a), adding CERCLA § 122(o)(4), p. 80 (italics added)].

During discussions with majority staff, we were told that it is not the sponsors' intent to re-open any existing settlements. We concur that this bill should let "bygones be bygones" for both fiscal and practical reasons, as generally occurs in new legislation. However, we are far from convinced that the language now in the bill achieves that objective. To the contrary, the use of the words "total" and "facility" suggest that before the final settlement, EPA must go back, determine how much the statutory orphan share would have been for all the other stages of the cleanup, and deduct that from the amounts owed by the polluters in the final settlement. This approach would be a logistical nightmare, as well as a huge drain on program resources. It is imperative that this language be clarified to avoid such an outcome.

III. A Cure Worse than the Disease: How the Allocation System Will Degrade the Quality and Pace of Cleanups

Although a fair-share allocation system sounds innocuous, the approach taken in S. 1090 is likely to result in a dramatic curtailment in the pace of cleanup progress—and in the quality of cleanups as well. This somewhat counter-intuitive result will occur for the following reasons.

Most overtly, the bill expressly bars issuance of cleanup orders where EPA cannot pay the orphan share when required to do so [SPCA § 303, adding CERCLA § 122(p)(2)(B), p.82]. In other words, if liability-relief funds run short, cleanups can't be completed. This approach is simply unacceptable. There is nothing "fair share" about a system that holds completion of cleanups hostage to the availability of liability-relief funds—it just punishes communities that have waited completion of cleanups for far too long already.

Moreover, by replacing joint and several liability with a "fair share" system, and simultaneously cutting the authorization, the bill leaves the agency with a Hobson's

choice among three unappealing alternatives: (i) EPA can pay for cleanups itself—until it runs out of funding for that year; (ii) EPA can enter into consent decrees for cleanups—giving polluters leverage to insist on cheaper, containment-based remedies rather than treatment-based remedies that offer superior long-term protection but have a higher initial price-tag, or (iii) EPA can issue unilateral administrative orders to polluters that require them to carry out a cleanup—but the prior experience suggests that unwilling parties do a poor job, require extensive oversight, and drag their heels. None of these approaches achieves environmentally sound outcomes.

In addition, S.1090 could substantially delay cleanups for which no final settlement has yet been adopted. Under the bill, a party's statutory orphan share must be estimated before a settlement can be adopted [SPCA § 303(a), adding CERCLA § 122(p)(2)(K), p.89]. It is not at all clear how these estimates are to relate to the allocations required under section 122(n) (as added by SPCA § 303(a), p.76). If the estimate must be based on the allocation, substantial delays will arise. This is because the allocation itself will take quite a while, particularly for sites with a large number of parties. Each party will have to be contacted (including any de minimis parties or others who have long since received settlements), and directed to gather and submit their records (which is certain to raise the ire of parties who have already entered into settlements). That information will have to be evaluated and the allocation prepared. Moreover, polluters will have an incentive to identify as many additional potential parties as feasible, in the hopes of lowering their own allocated share, despite the added workload for those parties in gathering their records.

If it is not intended that the estimate be based on a 122(n) allocation, that should be made clear in the text. (While this would alleviate some of the pace concerns, it by no means obviates them, as EPA-will still have to conduct a large number of complex allocations—diverting its limited resources from cleanups.)

None of these evils are necessary ones. If Congress wants to assure that EPA will help cover the costs of entities who can't or shouldn't be sued—as the agency has been doing with considerable success for the last few years—it can designate a pot of funds for that exclusive purpose.[9] At this juncture, a statutory allocation system is a solution in search of a problem, and one that will create innumerable problems in itself.

II. CUTTING HOLES IN THE FEDERAL SAFETY NET

A. Limits on Superband Authorities at State Cleanup Sites

The public needs and deserves an effective Federal fallback, or safety net, where States fail to carry out their environmental responsibilities appropriately for toxic site cleanups, just as occurs for air and water pollution programs. Yet, with certain exceptions, S.1090 bars EPA from ordering cleanups, and from recovering cleanup costs, for releases that are "within the scope of a response action that is being conducted or has been completed under State law" [SPCA § 201 (b), adding CERCLA § 1 28(c)]

Remarkably, there are no criteria at all for these prohibitions. They apply—regardless of whether there has been any public participation whatsoever in -development of that State response action,

—regardless of whether that action will be protective,

—regardless of whether citizens have judicial review for unprotective cleanups,

—regardless of whether the State response plan is actually being complied with, and even regardless of whether the State has the legal or practical capacity to enforce the action.

Once a State response action exists, EPA is barred from ordering a cleanup or recovering cleanup costs, even where a site presents an imminent and substantial endangerment to health or the environment (save by using the Fund's increasingly limited resources, without cost-recovery).

Moreover, there are no substantive standards whatsoever for State cleanups. Unless a State opts to establish regulations, each site's plan will be issued an ad hoc basis with no baseline standards to assure the safety or adequacy of cleanups, meaningful public participation, judicial review, or any other safeguard. Tens or hundreds of thousands of sites may be dealt with on an ad-hoc basis, making effective public oversight completely impossible—even apart from the fact that the bill makes no provisions for community technical assistance. And meanwhile, use of Superfund's authorities at these sites are limited.

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[9] However, such funds should not have priority over cleanup funds, nor compete directly with them.

We recognize that the bill provides certain exemptions that allow EPA to issue cleanup orders and recover costs. These include a request from the State, or EPA's finding of interstate pollution. In addition, EPA may act upon determining that the State isn't taking appropriate action and the situation presents "a public health or environmental emergency" for an ongoing cleanup. For already-completed responses, the standard is "substantial risk" as evidenced by new information, fraud, or failure of the remedy where there is a clear threat of exposure [SPCA § 201 (b), adding CERCLA § 1 28(c)(3)(B).] In other words, EPA cannot come in, even where the remedy isn't working, unless the agency can show a clear threat of exposure.

This approach is the antithesis of prevention. It creates different legal standards, and provides ammunition for polluters to argue that they should be exempt from cleanup or payment obligations based on supposed lack of clear exposure, or on the ground that the State wasn't really unwilling to act, or that there wasn't an "emergency."

We strongly oppose these limits on Superfund authority. While carefully crafted liability relief for prospective purchasers may well be desirable (assuming community participation rights are assured), limiting Superfund authorities for a large but amorphous range of sites is indefensible. Such limitations are also unnecessary: the private market is increasingly providing mechanisms for moving forward brownfield redevelopment today, with Superfund in place. [10]

B. Silent Vetoes through Gubernatorial Inertia

In another highly objectionable feature of the bill, new sites can be added to the Superfund list only upon the written request of the Governor of the State in which the sites is located [SPCA § 202, adding CERCLA § 105(b)(3), p.38]. (S.1090 is even more extreme than its predecessor bills, which required concurrence rather than an affirmative request.)

While it may be appropriate to give States "first dibs" on cleanups at sites that will be appropriately addressed through State action, this provision goes much too far. A State could, through simple inaction, bar action under Superfund even though the site will not otherwise be cleaned up. The State need not even give any reasons for failing to submit a request, inviting potential abuses (if, for example, a major potentially responsible party at the site also happened to be a campaign contributor to a high-ranking State official). EPA should defer to a State only upon affirmatively determining that the State will conduct an adequate, timely cleanup absent the listing or 106 order.

C. The NPL Cap: Dumping Cleanups on Communities and States

Yet another serious problem is the bill's inclusion of an arbitrary cap on the number of additional sites that can be added to the National Priorities List. Under S.1090, EPA cannot add more than 30 sites annually until 2004 [SPCA § 202, adding CERCLA § 105(b)(2), p.37]. A cap has profound consequences because, unless a site is listed, EPA cannot undertake cleanup activities (other than a short-term, low-cost emergency removal). In effect, this provision dumps the problem of Superfund site cleanups into the laps of the States—regardless of whether they have the resources or capacity to conduct those cleanups.

Late last year, the General Accounting Office reported that more than half of the 44 State officials interviewed said that their ability to fund cleanups is poor or very poor. [11] The same report concluded that, for about 1,800 sites potentially eligible for Superfund listing, it was unclear how more than half would be handled, while States and EPA said that about 13 percent may be listed on Superfund—but with little overlap as to which ones.

Earlier, the GAO had reported that a cap could force States to accept responsibility for 1,400 to 2,300 sites (1,100 already identified by EPA, along with an estimated 300–1,200 yet-undiscovered sites). [12] The estimated cleanup costs range from $8.4 to $19.9 billion.

The GAO report makes painfully clear that the States are in no position to take on this added burden. Indeed, States are having difficulty securing resources for their current cleanup efforts. Of the States surveyed by GAO,

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[10] Conferences with titles such as Getting Contaminated Property Deals Done," proclaiming that "we will excite you with brownfield and financial success stories" are increasingly common. [Flier for RTM Communications conference, April 6–7 1999, Washington, DC]

[11] U.S. General Accounting Office, Unaddressed Risks at Many Potential Superfund Sites. GAO/RCED–99–8, . November 1998.

[12] U.S. General Accounting Office, Impact on States of Capping Superfund Sites. GAO/ACED–106R. March 1996. As the 1998 report does not refer to the 1996 report, it is not entirely clear how GAO would view the relationship between these two sets of findings.

"three of the seven States with active programs said that taking on these additional cleanups would exacerbate an already difficult financial situation. Two other States said that they expect to face funding shortfalls beginning in fiscal year 1997 that will make it difficult to absorb the additional cleanup responsibilities, at least for a few years subsequent to that time. Another two States said that while they had sufficient funds to manage their own inventories, funding the additional cleanups would be difficult." [13]

Thus, there is no basis for capping the number of sites that EPA may add to the National Priorities list.

This provision also undercuts two of the valuable incentives created by Superfund: that which prompts voluntary cleanup of non-NPL sites in order to avoid a potential future NPL listing, and that which prompts careful management of wastes generated now.

GAO noted that State program managers "pointed out that a major incentive for private parties to clean up sites is to avoid having their properties added to the list of the most contaminated sites in the country." [14] In short, a cap on the number of Superfund sites may have the perverse effect of creating a greater need for more Superfund listings, by reducing incentives for non-Superfund voluntary cleanups.

The NPL cap will also undercut incentives for sound prospective waste management. Facilities will be able to gamble that States will lack, or forego use of, cleanup enforcement authorities for tackling sites created after the NPL list is effectively closed. The continuing nominal availability of litigation authorities under § 107 is far from an adequate substitute, given that § 107 suits can only be brought to recoup expenditures—thus requiring cash-strapped States to front all the cleanup money. Where they are unable to do so, today's polluters will evade cleanup responsibilities, and sites will remain unaddressed.

In short, the cap should be eliminated. As a matter of sound science and good public policy, EPA should be able to list however many sites need listing.

IV. Liability Provisions.

There is no dispute that Superfund's existing liability system has often been abused by polluters that have filed massive contribution actions against entities with minimal or no connection to the site. Curbing these abuses is necessary, but does not necessarily require legislation, since EPA routinely provides contribution protection to settling parties.

EDF does not oppose carefully crafted provisions that would bar abuses of the liability system for small parties that won't, as a practical matter, end up putting much money into a cleanup. Even though such parties may theoretically qualify as polluters, Superfund's liability system is and should be pragmatic: it's a way of getting resources to pay for cleanups from the parties most closely associated with the site. It simply isn't efficient for litigation to involve parties who sent only trivial quantities, or who sent wastes that don't affect cleanup costs, or who clearly won't be able to put more than a token amount into a cleanup.

If statutory liability relief is to be provided to such parties, as it is under S.1090, we believe it is imperative to have an appropriate "pull-back" provision. We believe the pull-back contained in S.1090 is appropriately crafted. That set of provisions addresses whether the wastes in question "contributed significantly" to response costs (e.g., [SPCA § 301 (b), adding CERCLA §§ 107(r)(2) and (s)(2), p.46]. The bill's liability-relief provisions provide rough rules of thumb for parties it probably doesn't make sense to sue, but they are just that—rough. The pull-back assures that when it really matters, the liability provisions won't force an anomalous result. For example, if the one drum that a party sent to a site was full of dioxin, that party should not be exempted from liability under the de micromis limitations. Likewise, if a party qualifies for the small-business exemption (which as discussed below is unduly broad) but was a primary actor in the events leading to creation of the site, it will be appropriate to take a hard look at the business to determine just what its ability-to-pay really is.

With regard to the small business limitation itself, while we do not necessarily oppose curtailing liability for truly small businesses with a limited connection to a site who have limited ability-to-pay in any event, the current exemption is ill-crafted. First, the $3 million annual-revenue threshold is simply too high [SPCA § 301(b), adding CERCLA 107(s)(1), p.45]. Moreover, the exemption applies to companies with either fewer than 75 employees, or less than $3 million gross revenues. This potentially exempts wealthy corporations that happen to have relatively few employees (and 75 is a significant number of employees in any event). If a small-business ex-

[13] Ibid., p.2.
[14] Ibid., p.3.

emption is to be adopted, it should use narrower thresholds, and should require meeting criteria for both numbers of employees and gross revenues.

Conclusion.

Thank you for this opportunity to present our views. We would welcome an opportunity to work with the committee in crafting a Superfund bill that reinstates the taxes, adopts narrowly drawn liability-relief provisions to make the liability system operate more effectively, and preserves the basic structure of this important statute.

Analysis & Perspective

superfund site remedies

Congress created the requirement for 5-year reviews of Superfund site remedies chosen by the Environmental Protection Agency that leave hazardous contaminants at sites because of a concern that impermanent remedies require long-term attention and may not remain protective of human health and the environment. The requirement has not acted as a disincentive to lower-cost remedies that leave contaminants at sites. Instead, EPA has largely given the effort a low priority. The 5-year review program has been highly criticized in two independent government studies, mainly because EPA was not giving reviews high enough priority to avoid a backlog, even though the reviews were useful.

EPA's Five-Year Review of Superfund Sites Needs Higher Priority

(By Joel S. Hirschhorn, Ph.D.)

Introduction

Interestingly, the Superfund's 5-year review activity has received relatively little attention, despite Superfund being one of the most studied environment programs. The public interest and environmental community has never focused on the reviews as a means of obtaining better long-term protection of human health and the environment. Two government agencies that have examined the Superfund 5-year review program have been very critical of it, although they also noted how some reviews identified problems and deficiencies in cleanups.

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In its guidance to regional offices, EPA has said that the main purpose of reviews is "to determine whether: the remedy remains protective of human health and the environment; is functioning as designed; and necessary operation and maintenance is being performed." A loss of protectiveness could result from failures of technology, ineffective monitoring, poor operation and maintenance activities, changing site conditions and poor implementation of institutional controls. This paper examines how EPA has implemented the statutory requirement for 5-year reviews and also identifies some policy options to improve the program.

EPA Is Required to Conduct Reviews

In the 1986 amendments to the Federal Superfund statute, Congress mandated that EPA conduct 5-year reviews for remedial cleanups. The amendments generally placed a priority on Superfund cleanups achieving permanent remedies based as much as possible on using treatment technologies, in contrast to containment and institutional control remedies which left hazardous substances at sites and necessitated restrictions on using land or ground water. The 5-year review requirement was devised as a safeguard for those remedies that were not permanent, because they left hazardous substances on the original sites and required periodic verification that the cleanups were continuing to protect human health and the environment. It was realized that a lot could go wrong with cleanups dependent on: containment of wastes; systems that had to operate for many years, well-enforced institutional controls, such as land use restrictions. or natural attenuation remedies requiring many years of monitoring.

Subsequently, in 1990, EPA finalized the National Contingency Plan (NCP) as a set of regulations governing the Superfund program, and it included some specific

language on the requirement for 5-year reviews. It is important to see the exact language in the law and the regulations and to understand subtle but important differences in the language used.

The key language in Section 121(c) of the Comprehensive Environmental Response, Compensation, and Liability Act states:

"If the President [EPA] selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the President [EPA] shall review such remedial action no less often than each 5 years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented." [emphasis added]

The law also said that EPA would have to take any necessary action appropriate to assuring protectiveness. Note the use of the word "any" in the above statement, which would seem to indicate a very stringent view of the basis for requiring reviews.

In the subsequent NCP, in Section 300.430(f)(4)(ii), EPA used the following language:

"If a remedial action is selected that results in hazardous substances, pollutants, or contaminants remaining at the site above levels that allow for unlimited use and unrestricted exposure, the lead agency shall review such action no less often than every 5 years after initiation of the selected remedial action." [emphasis added]

In place of the word "any" EPA introduced the concept of not having unlimited use and unrestricted exposure as a condition establishing the need for a 5-year review. This could be seen as a softening of the original statutory requirement. That is, some hazardous substances, pollutants or contaminants might be left at a Superfund site, but if the levels were such that there were no restrictions on use or exposure, then reviews would not be required. In fairness, one could argue, of course, that it is impossible to remove absolutely every atom or molecule of hazardous substance from a Superfund site and, therefore, that the original statutory language was impractical because it implied leaving absolutely no amount of contaminants in order to avoid the review requirement.

Pragmatic Interpretation Not Challenged in Court

This more pragmatic NCP interpretation apparently has never been challenged in court. One potential problem of course is that risk assessments and cleanup standards could be changed over time so as to change or remove original restrictions, and doing so could then remove the requirement for future 5-year reviews. The NCP also clarified that all Records of Decision (RODs) had to clearly state whether 5-year reviews were necessary.

In the preamble to the NCP, EPA also said the following: "EPA agrees that the review should in general focus on monitoring data, where available, to evaluate whether the remedy continues to provide adequate protection of human health and environment. New technologies will be considered where the existing remedy is not protective, but the 5-year review is not intended as an opportunity to consider an alternative to a protective remedy that was initially selected."

In this statement one sees an important EPA perspective that may have importance for seeing the limitations of reviews where technology change is an issue. That is, EPA seems to believe that an original technical approach must be implemented and found nonprotective, rather than considering as part of a review some newer technology, for example, to replace a part of an original remedy that may not have been fully implemented. In contrast, EPA has a remedy update program as part of its Superfund reforms that is aimed at changing remedies because of new science or technology if costs can be reduced. However, EPA's 1996 guidance to regions on conducting remedy updates did not consider how such actions related to 5-year reviews. Nevertheless, according to EPA's latest summary report for updating remedy decisions, with the exceptions of Regions I and V, regional offices have indicated in their plans for implementing the remedy decision reform effort that 5-year reviews serve as a mechanism for considering remedy changes. This contrasts to seeing them as only a means to fix original remedies.

A recently announced Federal court decision in Puerto Rico supports the need for EPA to take the statutory requirement for 5-year reviews quite seriously (M.R. (Vega Alta) Inc. v. Caribe General Electric Products, D.P.R., No. 97–2294, 12/3/98). For a Superfund site in Puerto Rico, a group seeks to require EPA to perform such a review of an ongoing cleanup. The U.S. District Court for the District of Puerto Rico agreed to hear the suit and rejected a government motion to dismiss. The court found that the request to order the review is not a challenge to the response action, and said that the review "would not affect the remedial action or unduly compromise the EPA's limited resources."

EPA's Guidance to Regions

EPA headquarters has issued guidance for regional offices, although regions are always free to disregard the guidance on the basis of site-specific circumstances. The guidance clearly said that examining whether a cleanup remained protective meant, for example, if the remedy depended on containment with a cap, examining whether the cap was still effective; if the remedy depended on institutional controls whether they remained in place; and if the remedy included ground water collection and treatment, whether such a system was performing as predicted. The main guidance was issued in 1991, after finalization of the NCP and just in time to handle the first required reviews, and it set the structure of three distinct levels of reviews, differing mainly in the scope of review activities.[1] It was contemplated that the simplest Level I review would be appropriate in all but a relatively few cases. Only Level II and III reviews included sampling for getting new data to confirm existing remedy protectiveness. The guidance also established two main types of reviews: statutory and policy.

The statutory sites are those with Records of Decision issued after the Superfund statute was amended in 1986 to create the requirement for the-reviews. Statutory reviews apply to National Priorities List sites, construction complete sites, and sites delisted from the NPL. Policy or discretionary reviews are for sites that, strictly speaking, did not legally require reviews but which EPA decided should receive them, including sites with remedies conducted prior to 1986. From a risk perspective, of course, both types of sites pose equal needs for reviews because of hazardous materials left on the site. If anything, one might even argue that pre-1986 sites might be of lower quality than later sites, simply because of less experience with Superfund cleanups.

Subsequent supplemental guidance in 1994 was designed to provide a fourth, even simpler, streamlined and lower-cost review, termed Level la, appropriate for sites where remedial construction was ongoing.[2] For example, EPA estimated that 160 to 170 hours were necessary for a Level I review, but only 30 to 40 hours for a Level la review. Nearly 30 percent of reviews seem to be Level la type. It appeared that the creation of the Level la reviews was in response to growing criticism, including by the EPA Inspector General, about the backlog of reviews. By reducing the scope and cost of many reviews the logic was that EPA regional offices would be able to conduct more reviews. This guidance also clarified that reviews were to cover the entire site and all operable units or multiple remedies. However, none of the EPA guidance seems to address the tough issue of deciding whether a declaration of protectiveness or the lack of it requires the same condition for all parts of a remedy. This supplemental guidance also established priorities, with the first priority being all statutory reviews, the second priority being policy reviews where the lead agency has completed remedial action—and is no longer onsite, and the third priority being all remaining policy sites. Interestingly, an Office of Inspector General audit (discussed below) found some inappropriate uses of the Level la review and ones where problems with the cleanup were not identified.

Second Supplemental Guidance Issued

A second supplemental guidance was issued in late 1995.[3] It explicitly said that it was a response to an Office of Inspector General (OIG) audit of the review program (discussed below). In the interest of performing more reviews with limited resources, EPA headquarters encouraged its regional offices to use "potentially responsible parties (PRPs) to provide information for 5-year reviews." There was no direct attention to or discussion of the obvious issue of a conflict of interest for PRPs who might lack the objectivity to identify problems with remedies that they had conceived, implemented, and paid for. The guidance clarified that regional officials would have to clearly state whether the remedy is protective, is not protective, or if it would be protective if certain measures were taken. The guidance also stressed that if a remedy was determined to lack protectiveness, then regional offices should present recommendations for actions, milestones toward achieving protectiveness with clear timetables, and should also state which agency has oversight responsibility to ensure that the necessary measures are completed. This guidance also clarified that "A Type II or Type III review should be employed only when site-specific

[1] EPA, "Structure and Components of Five-Year Reviews," May 23, 1991, OSWER Directive 9355.7–02.

[2] EPA, "Supplemental Five-Year Review Guidance," July 26 1994, OSWER Directive 9355.7–02A.

[3] EPA, "Second Supplemental Five-Year Review Guidance," Dec. 21, 1995, OSWER Directive 9355.7–03A.

circumstances indicate a need for a recalculation of the risk, or a new risk assessment, respectively."

What merits more attention is the issue of different possible views about the most fundamental finding that a 5-year review is supposed to explicitly present as a declaration in the report: about the presence or absence of protectiveness. There is a need for improved EPA guidance that addresses the criteria that regional offices should use when reaching their decision about protectiveness. None of the existing EPA guidance actually presents specific, detailed clear criteria by which reviewers could decide what the declaration should be. For example, if some required part of a remedy (such as a monitoring well) is simply not functioning or being performed as designed or planned, is that alone sufficient to issue a declaration that protectiveness is lacking? Or, is it necessary for the review to document some uncontrolled releases of hazardous substances, or to document some actual unacceptable exposure necessary for a declaration of a lack of protectiveness? If only one operable unit is not functioning entirely as designed or planned but the remainder of the remedy is all right, is that situation sufficient to declare that protectiveness is lacking? The goal of improved EPA guidance should be to remove any ambiguities about the key decision process regarding protectiveness with regard to any and all conditions that justify a declaration that protectiveness is lacking at the time of the review.

This author has been told that EPA headquarters in consultation with regional offices has been developing new guidance for the reviews that may be released in summer 1999.

EPA headquarters issues many guidance documents for the Superfund program and some of these have some connection to 5-year reviews, but often they do not refer to them. However, the guidance on how land use is considered in making remedy decisions also included reference to 5-year reviews.[4] Under the heading "Future Changes in Land Use" the directive said: "Where waste is left onsite at levels that would require limited use and restricted exposure, EPA will conduct reviews at least every 5 years to monitor the site for any changes. Such reviews should analyze the implementation and effectiveness of institutional controls with the same degree of care as other parts of the remedy. Should land use change, it will be necessary to evaluate the implications of that change for the selected remedy, and whether the remedy remains protective."

The issue for conduct of the reviews is whether there is a sufficient effort to identify problems with institutional controls. Many institutional controls could be difficult to fully and fairly evaluate, particularly the extent to which they are implemented as originally planned. EPA's guidance documents do not provide explicit details on the extent to which some failure of institutional controls may constitute sufficient basis for declaring a lack of protectiveness for a remedy.

Studies of EPA's Program

In early 1995 EPA's Office of Inspector General completed its independent audit of the 5-year review program.[5] It found a substantial backlog of 5-year reviews existed because EPA managers had not given them a high priority. As is normally done, the audit covered only a sample of three of the ten EPA regions. It reported that at the end of fiscal year 1994 only 30 percent of the NPL Superfund sites that were supposed to have received statutory and policy reviews had received them. The report concluded that the backlog was generally caused by the low priority management placed on the reviews and it was noted that EPA officials who were interviewed often "appeared to view the 5-year reviews as a nuisance, and gave the impression that the reports had little or no value. . . . It was apparent from our interviews that regional officials did not believe the 5-year reviews were important." The audit also found problems in the quality of reviews, including ones that did not follow EPA guidance.

On the positive side, the OIG audit found that the "reviews were valuable tools to identify successful remedies or those remedies that have developed problems or have failed." This clearly made EPA's backlog significant. In one case, a site visit found that required surface water sampling had not been conducted for years and that a landfill cover had been damaged. The reviews were also important for checking on Operation & Maintenance (O&M) activities and cited an example where a review activity had found a dead animal inside a monitoring well that rendered it ineffective. The main recommendation was that the Superfund program should give

[4] EPA, "Land Use in the CERCLA Remedy Selection Process," May 25, 1995, OSWER Directive 9355.7–04.

[5] EPA, Office of Inspector General, "Backlog Warrants Higher Priority for Five-Year Reviews," Audit Report, March 24,1995.

a higher priority to the reviews. For the audit's sample of review reports, some 31 percent were deemed to lack protectiveness.

One specific result of the OIG audit was that EPA headquarters created a lower cost review and it said that it would take action to increase the priority of the reviews. This author has been told that the OIG is currently conducting a followup audit of the 5-year review program.

A study by the congressional General Accounting Office of the Superfund program also examined the reviews and generally supported the findings of the OIG audit.[6] GAO concluded that "these reviews have often revealed potential and actual problems that the states or responsible parties have had to correct. However, the agency has a significant backlog of overdue reviews and consequently may be unaware of deteriorating conditions at some sites." At the time of the GAO study there was no clear indication that the backlog problem was being solved and GAO said that "the agency may not be aware of problems that may be occurring at other Superfund sites."

More specifically, GAO reviewed O&M activities at 57 sites, including 43 sites at which 5-year reviews had been performed and at three of these GAO conducted case studies. In one case GAO found that the EPA review revealed that the site's responsible party had not been sampling ground water as was required. The review caused a sampling plan to be implemented. At another Superfund site GAO found that a review had discovered that no required maintenance had been implemented and that trees were growing on the landfill cover, a most serious problem. For another site, EPA recommended that the state conduct surface water sampling more frequently, because of high contaminant levels.

Why Not a High Priority?

Clearly, both the OIG and GAO studies verified the wisdom of the congressional mandate and they identified the paradox of 5-year reviews being very useful tools but that EPA was not giving them a high priority. The OIG report made a point about the benefit of EPA identifying problems with cleanups "before serious damage occurs or they become a public scandal." But it seems that EPA Superfund managers did not see the reviews in the same positive way. Why? The most logical interpretation is that EPA officials in regional offices were not motivated to identify problems or deficiencies with "their" cleanups. Moreover, despite the OIG and GAO reports, there was no widespread interest in the subject by environmental or public interest groups. EPA's assertions that the backlogs found by the OIG and GAO studies were an inevitable consequence of inadequate resources seem implausible considering the relatively low costs of conducting reviews, nor were they consistent with the attitudes of EPA staff found by the OIG audit.

In 1996 a professional paper was given at a major conference on this same subject.[7] The paper presented a good review of EPA's program. Other than informing professionals about EPA's implementation, the paper focused on presenting a summary of opportunities for PRPs to reduce cleanup costs by participating in the review process. The paper noted that PRPs were slated to pay the majority of the many billions of dollars for O&M activities at Superfund sites. While concerned citizens would likely see reviews as a major opportunity for the government to identify deficiencies with cleanups in progress or completed, PRPs could see reviews very differently, because they could focus on how some O&M activities might be reduced or eliminated. The paper noted that "USEPA recognizes that PRPs may propose additional response actions to reduce O&M activities or to contain rising O&M costs." The paper identified nine specific indicators of opportunities to reduce costs. These included, for example, reducing monitoring requirements, changing cleanup standards, and changing O&M activities.

EPA Conducts Contractor Study of Review Program

EPA has had its own contractor study of the 5-year review program to collect data and perform analysis to help EPA improve its 5-year review program. The study was conducted in the summer of 1997 and examined 100 first 5-year review reports prepared by all ten EPA regional offices. There also were data on the number of first 5-year reviews completed by regions versus the number of reviews remaining to be completed through fiscal year 2000. Only a small fraction had been completed, generally much less than 10 percent. Of the 100 reviews studied, 98 percent fit EPA's Level I or Ia and 2 percent were Level II; there were none in the Level III

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[6] GAO, "Superfund Operations and Maintenance Activities Will Require Billions of Dollars," Sept. 1995.

[7] J.L. Pintenich, "Components, Levels, and Opportunities In The Five-Year Review Process," Proceedings of Hazwaste World and Superfund XVII Conference, Oct. 1996.

category. The Level I and Ia reviews are the smallest efforts, Level II is more extensive, and Level III even more extensive (as discussed above). The most important purpose of a review is to provide a statement whether the site remains protective of human health and the environment. The study found that 72 percent of reviews provided statements that the remedy remained protective, 10 percent had information that implied protectiveness, 13 percent did not have an explicit statement because the remedy was still being implemented, 2 percent had no required statement or implicit information, and only 2 percent stated that the remedy was not protective. One review said that further investigation was necessary to determine protectiveness.

The study also found that 55 percent of reviews made recommendations, with the most common types being: improve O&M (30 percent), upgrade the remedy (16 percent), conduct additional evaluation or investigation (13 percent), and repair the remedy (9 percent). Considering that only 2 percent of the reviews said that the remedy had not remained protective, the fact that 25 percent needed upgrading or repair is quite interesting, certainly suggesting that the reviews had found protectiveness either diminished or in jeopardy. It also suggests that EPA regional offices may be very reluctant to officially declare that a remedy they originally conceived and approved is explicitly declared as not being protective. Interestingly, nearly all of these 25 percent resulted from Level I or la reviews, the most minimal types of reviews. It might be reasonable to speculate that more intensive reviews (Level II or III) could be even more effective in identifying problems with remedies, if they were truly objective and impartial.

Importantly, the OIG report that examined 26 review reports from Regions III, V and VI found that eight of them, or 31 percent, "indicated that the remedies were not protective of human health and the environment." In addition to 16 reports declaring that the remedies were protective, two reports provided no conclusion about protectiveness. This result of a 31 percent remedy failure rate is quite inconsistent with the contractor study finding that only 2 percent were not protective. However, the answer may be that the combined total of the 25 percent discussed above and the 2 percent explicitly declaring remedies non-protective is what should be compared to the OIG value of 31 percent, because many review reports (particularly older ones) may have to be interpreted as to their basic determination about protectiveness. EPA's contractor may have been less objective or less willing than the OIG audit to interpret review reports as saying that there was a lack of protectiveness.

Comparing EPA's Annual Reporting With Studies

The Superfund statute also required EPA to report to Congress on the 5-year reviews, including "the results of all such reviews." In a 1989 report EPA said it "will report annually the results of all 5-year reviews that were conducted during the preceding 12 month period."[8] This author was told by an EPA headquarters official that this reporting has been done as part of EPA's annual Superfund reports. However, these reports to Congress on the progress of the Superfund program seem to have been stopped by EPA several years ago. The three most recent Superfund reports are available on the EPA's World Wide Web site, with the most recent one being for fiscal 1994. Thus, EPA has not fulfilled its commitment to reporting on the 5-year review program for 4 years (i.e., fiscal 1995 through fiscal 1998).

The following information was retrieved from the three reports: in fiscal 1991 there was one review (i.e., consistent with first guidance in that year), in fiscal 1992 there were three statutory reviews and three policy reviews; in fiscal 1993 there were six statutory reviews and 1–9 policy ones; in fiscal 1994 there were 15 statutory reviews and 10 policy ones. Note that in fiscal 1993 out of the 22 statutory reviews required in that year only four were conducted, and in fiscal 1994 out of the 39 required only 10 were conducted. Clearly, statutory reviews were not receiving the highest priority, which may explain the priority-setting in the 1994 guidance. The fiscal 1992 report did not reveal how many reviews were required in that year. The grand total for fiscal 1991 through fiscal 1994 was 57 reviews. For fiscal 1993 and fiscal 1994 the percent of required reviews actually performed in the required years was 23 percent (ices, 14 of 61).

These data support the conclusions by OIG and GAO concerning a backlog of unperformed, required reviews. Also, EPA's 1997 contractor study indicated that the 100 first-year reviews examined represented only 11 percent of the total of 930 re-

[8] EPA, "A Management Review of the Superfund Program," 1989. In this report EPA made a commitment that no NPL site would be delisted without receiving at least one 5-year review. However, a recent Amended ROD for the Munisport Superfund site in Florida explicitly committed to delisting and said that no 5-year review was necessary even though the limited remedial action had clearly not produced a condition for future unrestricted use.

views required by fiscal 2000; however, it is likely that those 100 reviews represented what was accomplished through fiscal 1996, leaving 4 years to accomplish the remaining 89 percent. However, considering that only 25 required reviews were conducted in the period of fiscal 1991 through fiscal 1994, and probably 75 more in fiscal 1995 and fiscal 1996, it seems that there is still a major backlog of required reviews.

As to the results of the reviews, the annual reports presented minimal information. It was said that nearly all the reviews confirmed the protectiveness of the remedies. Although, as discussed above, the problem may be a difference between the technical substance in review reports versus what is explicitly declared in terms of the presence or absence of protectiveness. There was only one description of a review finding a problem and addressing it. This was for a site handled in fiscal 1992 where the review recommended-development of more enforceable deed and land use restrictions, which were subsequently implemented. This apparent fraction of one site that may have had a determination of nonprotectiveness out of a total of 57 is consistent with EPA's contractor study that indicated only two out of 100 site with such a negative finding. But it would not be consistent with the OIG's finding of some 31 percent lacking protectiveness. It seems fair to conclude that EPA's official record of reviews through fiscal 1994 was not impressive in terms of identifying cleanup problems or deficiencies supporting a conclusion of a lack of protectiveness. One would expect, of course, EPA to take the position that so few reviews find a lack of protectiveness because EPA has done such a good job in the first place in conceiving and implementing Superfund cleanups. But another possibility is that the reviews lack enough effort or objectivity to accurately identify significant problems indicating a lack of protectiveness or more likely that they often have not explicitly stated a lack of protectiveness, even when the technical findings support such a negative declaration.

It seems fair to conclude that all the available information indicates that EPA's 5-year review program is far from a success and a very low EPA priority. It should also be noted that over the past several years EPA has had a major Superfund reform program consisting of many different activities and improvements in the program. However, there was no reform aimed at improving the 5-year review effort. This is most interesting because of the trend in recent years of increasing numbers of Superfund cleanups being dependent on containment and institutional controls. Yet most studies of the Superfund program have not paid attention to the 5-year review program, even when addressing relevant issues, particularly long-term effectiveness of remedies.[9] The lack of attention to the 5-year program by Congress and public interest groups means that there is no balancing of the likely inherent low interest within regional offices in using reviews to identify problems or deficiencies requiring attention and increased spending. In theory, the 5-year review program is a critically important quality control program for Superfund cleanups. But there is no evidence that it has yet functioned in an optimal way. This is not only unfortunate for Superfund cleanups, but it has failed to set what might have been a positive example for many other cleanup programs in the country, some Federal and some state, where there is also increasing use of remedies that leave hazardous materials at sites. Perhaps, eventually, more citizens in Superfund communities will ask the logical question: "Is this cleanup still working effectively?" If they do, perhaps then will EPA and others start to pay more attention to the 5-year reviews.

Lastly, it should be noted that no information found on the 5-year review program has indicated any attention to reviews after the initial one, and whether regional offices are conducting them in a timely manner and what they are finding. Since significant numbers of reviews were first conducted in fiscal 1992 and fiscal 1993, followup reviews should have already been done at many sites. While it appears that there is still a major backlog of first 5-year reviews, it is even more likely that there is a larger total backlog when subsequent reviews for all sites are considered, including construction complete sites and sites delisted from the NPL.

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[9] A very good independent study "Linking Land Use and Superfund Cleanups—Uncharted Territory," by Resources for the Future (June 1997), presented considerable evidence of problems with the long-term effectiveness of institutional controls at Superfund sites. But even this study did not examine the 5-year review program. One of the ideas presented in the report was for EPA to create a new office or for a new agency to be created "whose sole responsibility would be long-term oversight of contaminated sites." It also suggested that the Superfund law "could require EPA to review land use controls at NPL sites every 3 years (or some relatively short period) and stipulate damages against landowners who violate property use restrictions specified in consent decrees or in RODs." Another study, "A Remedy for Superfund—Designing a Better Way of Cleaning Up America," Clean Sites (Feb. 1994), noted the need to "Establish procedures for long-term control and oversight of sites that are remediated to less than residential cleanup levels." But it did not even mention the 5-year review requirement.

Conclusions

Because the 1990's have seen a remarkable increase in cleanups based on containment, institutional controls, and natural attenuation, which leave contaminants at sites, there is a major need for senior EPA managers to refocus their plans and strategies for the Superfund 5-year review program. Congress was correct in introducing the 5-year review requirement into CERCLA in 1986, but they could not have anticipated that it would become increasingly necessary as treatment remedies became used less frequently. Rather than acting as a kind of disincentive for remedies that leave contaminants at sites, 5-year reviews have largely been given little priority or visibility.

Now, Congress should make the 5-year review program a topic to consider seriously during Superfund reauthorization. Instead of being buried deep within the bureaucracy, the 5-year review program should be re-engineered to be the model for all cleanup programs in the United States, both Federal and state. There is no indication that EPA regional offices have ever seen the intrinsic benefits of a long-term quality control program for Superfund cleanups, even though the EPA Inspector General's office and the General Accounting Office have clearly identified important benefits of 5-year reviews. Claims of insufficient resources to conduct 5-year reviews have no credibility.

The real explanation seems to be a widespread reluctance to impartially review Superfund remedies that the regional offices themselves have conceived, approved and implemented. Congress should consider creating some independent office to conduct 5-year reviews with sufficient resources to ensure timely reviews for all Superfund sites.

STATEMENT OF MARK GREGOR, MANAGER, DIVISION OF ENVIRONMENTAL QUALITY, CITY OF ROCHESTER, NEW YORK

Introduction

Chairman Chafee, and members of the committee, my name is Mark Gregor and I am the Manager of the Division of Environmental Quality for the City of Rochester, New York. I am here today to testify on behalf of the National Association of Local Government Environmental Professionals, or "NALGEP." NALGEP appreciates the opportunity to present this testimony on the views of local government officials from across the Nation on the need for additional Federal Legislative end regulatory incentives to promote the cleanup, redevelopment end productive reuse of brownfields sites in local communities.

NALGEP represents local government of finials responsible for ensuring environmental compliance, and developing and implementing environmental policies and programs. NALGEP's membership consists of more than 100 local government entities located throughout the United States, and includes environmental managers, solid waste coordinators, public works directors and attorneys, all working on behalf of cities, towns, counties and municipal associations. Our members include many of the leading brownfields communities in the country such as Chicago, Portland, Baltimore, Salt Lake City, Los Angeles, Dallas, Cuyahoga County and others.

In 1995, NALGEP initiated a brownfields project to determine local government views on national brownfields initiatives such as the EPA Brownfields Action Agenda. The NALGEP Brownfields Project culminated in a report, entitled Building a Brownfields Partnership from the Ground Up: Local Government Views on the Value and Promise of National Brownfields Initiatives, which was issued in February, 1997. In 1997, NALGEP was invited to testify on brownfields issues and present the findings of our report to this committee as well as to the House Commerce Committee and the House Transportation and Infrastructure Committee.

During the past 2 years, NALGEP has continued its work on brownfields through coordinating work groups of local of finials to address the following issues: (1) Brownfields Cleanup Revolving Loan Funds; (2) use of Community Development Block Grants for Brownfields; (3) building partnerships between business and local government of finials to promote smart growth; and (4) implementing the Administration's Brownfields Showcase Community initiative. As a result of these efforts, NALGEP is well qualified to provide the committee with a representative view of how local governments, and their environmental and development professionals, believe the Nation must move ahead to create long-term success in the revitalization of brownfields properties.

NALGEP's testimony today will focus on the following areas: (1) the continued need for Federal funding to support the cleanup and redevelopment of brownfields sites across the country; (2) the need for further liability clarification to encourage the private sector to step forward and revitalize more sites; and (3) the need to fa-

cilitate the participation of other Federal agencies (e.g., Army Corps of Engineers, Department of Transportation, HUD) in supporting local brownfields initiatives.

The cleanup and revitalization of brownfields represents one of the most exciting, and most challenging, environmental and economic initiatives in the nation. Brownfields are abandoned, idled, or under-used industrial and commercial properties where expansion or redevelopment is hindered by real or perceived contamination. The brownfields challenge faces virtually every community; experts estimate that there may be as many as 500,000 brownfields sites throughout the country.

The brownfields issue illustrates the connection among environmental, economic and community goals that can be simultaneously fostered through a combination of national leadership, Federal and State incentives, and the innovation of local and private sector leaders. Cleaning up and redeveloping brownfields provides many environmental, economic and community benefits including:

expediting the cleanup of thousands of contaminated sites;

renewing local economies by stimulating redevelopment, creating jobs and enhancing the vitality of communities; and

limiting sprawl and its associated environmental problems such as air pollution, traffic and the development of rapidly disappearing open spaces.

ROCHESTER'S BROWNFIELDS INITIATIVE

During the last 5 years, the City of Rochester, New York has completed the redemption of more than 50 acres of brownfields sites including the site of Bausch and Lomb's new corporate headquarters, the site of a new Federal Aviation Administration funded Aircraft Rescue and Fire Fighting facility, and the site of the state-of-the-art Rochester/Monroe County "911" Center.

The City of Rochester was selected as one the first round of brownfields pilot cities by the U.S. Environmental Protection Agency. Rochester was also awarded a Brownfields Cleanup Revolving Loan Fund grant from EPA.

Using the EPA pilot grant funds for investigation and City funding for cleanup, Rochester has remediated 15.5 acres that were once junkyards, fuel depots, and a rail yard and is now the Erie Canal Industrial Park. Rochester is also in the process of establishing a site investigation funding program using EPA funding.

The Federal Government, particularly the U.S. EPA, has played an important role in helping Rochester develop and advance our brownfields redevelopment efforts. They have provided critical funding to enable us to institutionalized local program and to help investigate and clean up specific sites. They have provided technical assistance and other resources that have helped us learn from other communities and take on the many challenging obstacles to brownfields revitalization. They have helped connect us with other Federal agencies that have resources and technical expertise. And perhaps, most importantly, they have provided the critical leadership needed to educate the many stakeholders and the general public that redeveloping brownfields can be done and that it can provide significant economic and environmental benefits for communities across the nation.

Several barriers, however, continue to hamper brownfields cleanup and redevelopment in Rochester and other communities. New Federal legislation to further clarify and provide some limits on the liability of "non-responsible" new owners of brownfields sites that voluntarily complete cleanups would be an important stimulus to the reuse of many brownfields. Additional Federal funding in the form of grant and loan programs continues to be important especially for cities like Rochester that have a declining tax base and falling assessed properly values. It is also important that the many Federal agencies that become involved in aspects of the brownfields problem recognize the important effects that funding and policy decisions can have toward promoting brownfields reuse and not encouraging sprawl conditions in our suburbs and rural areas.

BROWNFIELDS LEGISLATIVE NEEDS

I. Ensuring Adequate Resources for Brownfields Revitalization

NALGEP finds that to ensure long-term success on brownfields, local governments need additional Federal funding for site assessment, remediation and economic redevelopment. The costs of site assessment end remediation can create a significant barrier to the redevelopment of brownfields sites. In particular, the costs of site assessment can pose an initial barrier that drives development away from brownfields sites. With this initial barrier removed, localities are much better able to put sites into a development/rack. In addition, the allocation of public resources for site assessment can provide a signal to the development community that the public sector is serious about resolving liability issues at a site and putting it back into productive reuse.

The use of public funds for the assessment and cleanup of brownfields sites is a smart investment. Public funding can be leveraged into substantial private sector resources. Investments in brownfields yield the economic fruit of increased jobs, expanded tax bases for cities, and urban revitalization. And the investment of public resources in brownfields areas will help defer the environmental and economic costs that can result from unwise, sprawling development outside of our urban centers.

The following types of Federal funding would go a long way toward helping local communities continue to make progress in revitalizing our brownfields sites:

Grants for Site Assessments and Investigation: EPA's Brownfields Assessment Pilot grants have been extremely effective in helping localities to establish local brownfields programs, inventory sites in their communities, investigate the potential contamination at specific sites, and educate key stakeholders and the general public about overcoming the obstacles to brownfields redevelopment. Additional funding for site assessments and investigation is needed to help more communities establish local brownfields programs and begin the process of revitalizing these sites in their communities.

Grants for Cleanup of Brownfields need for Federal grants to support the cleanup of brownfields sites across the country. The U.S. Conference of Mayors' recent report on the status of brownfields sites in 223 cities nationwide indicates that the lack of cleanup funds is the major obstacle to reusing these properties. For many brownfields sites, a modest grant targeted for cleanup can make the critical difference in determining whether a site is redeveloped, creating new jobs and tax revenues or whether the site remains polluted and idle.

Grants to Capitalize Brownfields Cleanup Revolving Loan Funds: Federal funding to help localities and States establish revolving loan funds (RLFs) for brownfields cleanup is another effective mechanism to leverage public and private resources for redevelopment. EPA deserves credit for championing brownfields RLFs as a mechanism for helping communities fill a critical gap in cleanup funding. Unfortunately, the effectiveness of the EPA's current brownfields cleanup RLF program is severely undermined by the lack of new Federal brownfields legislation. Under current law, localities are required to jump through and over numerous National Contingency Plan (NCP) bureaucratic troops and hurdles to establish/heir local RLFs. These NCP requirements were originally established for Superfund NPL sites and not for brownfields sites. Consequently, we strongly recommend that any new legislation make it clear that local brownfields RLFs are not required to meet the NCP requirements established for Superfund sites.

II. Clarification of Superfund Liability at Brownfields Sites

On the issue of Federal Superfund liability associated with brownfields sites, NALGEP has found that the Environmental Protection Agency's overall leadership and its package of liability clarification policies have helped establish a climate conducive to brownfields renewal, and have contributed to the cleanup of specific sites throughout the nation. It is clear that these EPA policies, and brownfields redevelopment in general, are most effective in States with effective voluntary cleanup programs. Congress can enhance these liability reforms by further clarifying in legislation that Superfund liability does not apply to certain "non-responsible" parties such as innocent landowners, prospective purchasers and contiguous property owners.

NALGEP has also found that EPA's initiative to negotiate "Superfund Memoranda of Agreement" (MOAs) with States that have effective voluntary cleanup programs has helped to facilitate brownfields cleanups in those States. Specifically, these MOAs defer liability clarification authority to those States. In order to further facilitate brownfields cleanups across the country, NALGEP finds that Congress should enable the EPA to delegate authority to limit liability and issue no further action decisions for brownfields sites to States with cleanup programs that meet minimum requirements to protect public health and the environment.

A strong delegation of EPA liability clarification authority to approved States is critical to the effective redevelopment of local brownfields sites. Such delegation will increase local flexibility and provide confidence to developers, lenders, prospective purchasers and other parties that brownfields sites can be revitalized without the specter of Superfund liability or the involvement of Federal enforcement personnel. Parties developing brownfields want to know that the State can provide the last word on liability, and that there will be only one "policeman," barring exceptional circumstances.

At the same time, local officials are also concerned about delegating too much cleanup authority too fast to States. States vary widely in the technical expertise, resources, staffing, statutory authority and commitment necessary to ensure that brownfields cleanups are adequately protective of public health and the environment. If brownfields sites are improperly assessed, remediated or put into reuse, it

is most likely that the local government will bear the largest brunt resulting from any public health emergency or contamination of the environment. NALGEP believes that the U.S. EPA has a key role to play in ensuring that liability authority over brownfields sites should only be delegated to States that demonstrate an ability and commitment to ensure protection of public health and the environment in the brownfields redevelopment process.

To foster expanded redevelopment of brownfields sites while ensuring the protection of public health and the environment, NALGEP finds that there should be three components to the EPA brownfields delegation program. First, the law should clearly distinguish between Superfund NPL sites and other sites subject to enforcement under CERCLA or RCRA on one hand, and the remaining sites that can be put on a "brownfields track." The delegation of liability authority to States should focus on these "brownfields back" sites. Putting sites on a brownfields back will allow the application of EPA and State policy tools specifically designed to foster expedited, cost-effective brownfields redevelopment.

Second, NALGEP finds that EPA delegation of liability authority over brownfields sites should be granted only to State cleanup programs that can ensure protection of public health and the environment. NALGEP suggests the following types of criteria for State delegation:

1. Mechanisms to ensure adequate site assessments early in the process. Good site assessments will help prevent unanticipated problems from surfacing, and facilitate efforts to direct particular sites into a "brownfields track."
2. Adequate State technical expertise, staff and enforcement authority to ensure effective implementation of cleanup activities.
3. Use of risk-based cleanup standards, that can be tied to reasonably anticipated land use, established through an adequate public approval process.
4. Institutional controls such as deed restrictions, zoning requirements or other mechanisms that are enforceable over time to ensure that future land uses tied to certain cleanup standards are maintained.
5. Commitment to establish community information and involvement processes, and assurance that State and local brownfields activities will consider community values and priorities.
6. Commitment to build the capacity, through training and technical assistance, of local government hearth and environmental agencies to affectively participate in the brownfields development process and ensure protection of public health and environment.
7. Adequate mechanisms to address unanticipated cleanups or orphaned sites where liability has been eliminated.

Finally, NALGEP believes that EPA's ability to reopen its involvement at a particular brownfields site in a delegated State should be limited to situations where there are exceptional circumstances and the State is not effectively addressing the problem. An EPA reopener for particular sites is necessary to ensure that EPA can become involved at any sites at which the State is unable or unwilling to adequately respond to a substantial and imminent threat to public health or the environment. At the same time, the reopener must be sufficiently limited to permit the State to take the lead role at brownfields sites, and to give confidence to developers, prospective purchasers, lenders and local governments that EPA will not improperly hinder or interfere in State liability decisions.

Therefore, in delegating brownfields authority for non-NPL caliber sites to the States, NALGEP proposes that: EPA should provide that it will not plan or anticipate further action at any sites unless, at a particular site, there is: (1) an imminent and substantial threat to public health or the environment; and (2) either the State response is not adequate or the State requests U.S. EPA assistance.

III. Facilitating the Participation of Other Federal Agencies in Brownfields Revitalization

The cleanup and redevelopment of a brownfields site is often a challenging task that requires coordinated efforts among different government agencies at the local, State and national levels, public-private partnerships, the leveraging of financial resources from diverse sources, and the participation of many different stakeholders. Many different Federal agencies can play a valuable role in providing funding, technical expertise, regulatory flexibility, and incentives to facilitate brownfields revitalization. For example, HUD, the Economic Development Administration, the Department of Transportation, and the Army Corps of Engineers have all contributed important resources to expedite local brownfields projects. The U.S. EPA and the Administration have provided strong leadership through the Brownfields Showcase Project to demonstrate how the Federal Government can coordinate and leverage re-

sources from many different Federal agencies to help localities solve their brownfields problems.

Congress can help strengthen the national brownfields partnership by further clarifying that the various Federal partners play a critical role in redeveloping brownfields and by encouraging the agencies to work cooperatively to meet local needs. For example, Congress should be commended for Legislation passed last year to clarify that HUD Community Development Block Grant funds can be used for all aspects of brownfields projects including site assessments, cleanup and redevelopment. This simple step has cleared the way for communities across the country to use these funds in a flexible fashion to meet their specific local needs. Similarly, Congress should take a look this year at clarifying that it is appropriate and desirable for the Army Corps of Engineers to use its resources and substantial technical expertise for local brownfields projects. In addition, Congress should consider clarifying that Department of Transportation funds can be used for cleanup activities associated with various transportation projects. Congress also should work with EPA to determine how other agencies can help facilitate more brownfields revitalization. By taking these steps, Congress can give communities additional tools, resources, and flexibility to overcome the many obstacles to brownfields redevelopment.

CONCLUSION

In conclusion, local governments are excited to work with the Federal Government to promote the revitalization of brownfields, through a combination of increased Federal investment in community revitalization, further liability clarification, and other mechanisms to strengthen the national partnership to cleanup and redevelop our communities. NALGEP thanks the committee for this opportunity to testify, and looks forward to working with you as the process moves forward.

STATEMENT OF MIKE NOBIS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. Chairman and distinguished members of this committee, my name is Mike Nobis and I am from Quincy, Illinois. I would like to thank you for allowing me to speak to you today and to share my hometown's experiences with a landfill that became a Superfund site. I am the General Manager and part owner of JK Creative Printers. My company, which our family has owned for almost 30 years, employs 43 full time people. We are proud to be members of the National Federation of Independent Business (NFIB) and are honored to present this testimony on behalf of NFIB's 600,000 small business owner members.

Quincy is a small community of 42,000 people, located on the banks of the Mississippi River just 150 miles north of St. Louis, MO. Our town is a great place to live and to raise a family. We have enjoyed years of good economic growth, good schools, strong community involvement and good city leadership. Of all the expectations we have for our town, having our local landfill declared a Superfund site was not one of them. In 1993, the Mississippi River reached its highest flood stages in history prompting our community to rally together and beat back the flood and its effects. Now, my community has been forced to band together again—to fight the unfairness of a Superfund law that is punishing us for legally disposing of our trash. Companies that once worked together to save our town from the flood, are now suing each other because of this Superfund landfill. Companies who have worked together for so many years are now suing one another.

For my company, it started on February 10, 1999 when we received a letter in the mail from the EPA that stated 6 large local corporations and the city were looking to recover some of their cost for the cleanup of our local landfill. Even though what we had hauled there was only trash and totally legal, EPA said that because our trash was sent to that site, we were potentially responsible for paying our proportional share of the cleanup.

When I read the letter, I felt sick. For me and the 148 other companies that received the letter, it was unexpected and without warning. At first, we had no idea of what the letter was telling us. It was asking us, as small companies, to "contribute" $3.1 million. I laughed at the language they used, contribute. They weren't asking us to contribute; they were threatening us to pay. My company's designated amount to pay was $42,000, and I consider myself lucky. There were several other companies and individuals being asked to pay $70,000, $85,000 and some to pay over $100,000. As I read through the list, I saw Catholic grade schools, our local university, bowling allies, restaurants, small Mom and Pop trash haulers, furniture stores and our local McDonald's listed to pay. Most of the companies named only generated waste like plain office trash or food scraps. In the mid 70's, when our company's trash began to be put in the landfill, I was in college. One of the owners

of another company was only 7 when this landfill was in use. Yet we are being held responsible. The document made it sound as though we were major hazardous waste dumpers. Yet, nowhere in the document did it list what waste we were accused of dumping. It only said that our trash was hauled to the landfill during the time in question and we now have to help pay for the cleanup, regardless of the fact that there was no other place to dump our trash.

On February 24, 1999, the EPA sent one of their attorneys to Quincy to help explain the letter and to answer questions. The meeting lasted for over 2 hours. The EPA attorney tried to answer questions and to comment on how the law was being applied. Many people stood up and pleaded their situations and how unfair and un-American this whole situation was. He admitted to everyone there that the law was probably unfair and very harsh. He said it was intended to be harsh, but he couldn't do anything about its unfairness. Even though the law seemed unfair, he said that it was all he had to work with.

EPA and the 6 large companies weren't concerned about the waste that was sent to the landfill. The make-up of what we sent there was irrelevant. It was the volume that we sent to the landfill that they cared about, even if the trash was not dangerous. They knew we didn't send hazardous waste and they knew we couldn't afford to fight them. We became an easy money source for them because of the real threat of litigation by the 6 large companies. And when you think about it, what small company can take on 6 large corporations and the EPA alone and win? If we didn't accept the settlement offer, the big 6 would sue us for the entire cleanup cost. We were stuck. Pay up or be wiped out. The attorney for the EPA admitted that it would cost us more to fight them in court to prove we didn't haul hazardous waste to the landfill than to just go ahead and settle. It all came down to money . . . . and they had more than we did.

Who were the companies forced to pay this settlement? Most of the companies were individual people. Some were independent trash haulers; mom and dad hauling to help supplement their income to help raise their families. If you talk to them, you will notice they didn't make much money hauling trash. Others were small building contractors. Some are people in their retirement years. Some are widows whose husbands have passed away and they now have this settlement to deal with. Some are sons whose fathers once owned the business and now, years later, they have inherited the problem. We have business owners who bought businesses a few years ago who had nothing to do with this landfill, yet are being forced to pay up because they now own the assets and are the present money source. If they could have known this liability was going to be theirs in the future, they never would have bought the business. Mothers and fathers would have been reluctant to pass a family business—and its liability—to the next generation. We have some men in their late 70's and early 80's that could lose their life's savings when they should be enjoying their retirement years. They are spending their time and money paying the EPA for something they did 25 years ago that was legal. Are these the people Superfund was designed to collect from or has something gone wrong? It is needless business pressures like this that destroy small businesses and cause undo pain and hardship. Victimizing small businesses is not going to help speed the cleanup of Superfund sites. Most of the cost contributed by our companies to this site didn't clean one ounce of the landfill. The money went to attorneys. Of all the money spent, the attorneys got the most. Consider how much the EPA and the big 6 gave attorneys in order to get the settlement with the 149 small companies. The EPA itself admits that 2/3 of the money in the Superfund is spent on litigation, not cleaning up the hazardous sites. The estimate for the legal help that some of us received in Quincy (not including the settlement amounts) is close to $500,000. This is hard stuff. And for what? Who wins? The attorneys are the winners. It was just reported in our local newspaper that the EPA and the 6 corporations are now suing all those companies who didn't settle, resulting in more business for the attorneys. As I understand it, these companies will be allowed in later months to bring third party lawsuits. Where will it end? I do not think this law's intent is to place hardships on small business when the ultimate winners are the attorneys, not the environment.

To me and the thousands of small business owners that have been in my shoes, Superfund is not some abstract policy. Superfund affects small businesses, and has devastated my friends and neighbors, both emotionally and financially. Why? For doing the right thing 20-some years ago. I greatly admire the strength of Barbara Williams who has addressed this committee in the past. But, there are tons of small business owners that don't have the courage to fight. What will happen to those small businesses if we let this continue unchecked?

Today our country's leaders need to look again at the intent of this law called Superfund. I don't believe you intended for it to burden or destroy individuals and

small businesses in order to clean up hazardous sites. We have a chance to help small businesses get out from under this problem by supporting the language in the Superfund Program Completion Act of 1999.

I commend this committee for looking seriously at this problem, and hope that this is the year small business owners will gain freedom from this unfair system. Small businesses need your help now. Please change this law for the benefit of small business owners and help restore some common sense to the Superfund law.

STATEMENT OF RED CAVANEY, PRESIDENT, AMERICAN PETROLEUM INSTITUTE

Introduction

This statement is submitted to accompany the testimony of Mr. Red Cavaney, President of the American Petroleum Institute, before the Committee on Environment and Public Works, U.S. Senate, May 25, 1999, regarding S. 1090, the Superfund Program Completion Act of 1999. API represents approximately 400 companies involved in all aspects of the oil and gas industry, including exploration, production, transportation, refining, and marketing.

API supports the provisions of the Chafee-Smith bill and applauds the sponsors for moving the Superfund debate a giant step forward. The legislation addresses the difficult and complex issue of liability reform—one of the central problems that has plagued the program; it moves the program toward completion by capping the number of sites to be added to the National Priority List and increasing the responsibility of the States for administering cleanup activity; it addresses the emerging issue of Brownfields rehabilitation; and, it appropriately recognizes that the Superfund program should be funded with general revenues.

To be sure, the Superfund program needs additional repairs which we will address later in this testimony. However, as the sponsors of S.1090 so correctly note, the Congress and this Administration have been unable to find acceptable compromises on those issues. The lack of agreement on those issues should not prevent Congress from making the important changes embodied in the Chafee-Smith bill.

General Revenue Funding

API wholeheartedly supports the intention of the sponsors of the Chafee-Smith bill to authorize general revenue funding of the Superfund program. As we have previously stated before this committee and others, the petroleum industry has a unique perspective with regard to Superfund. Petroleum-related businesses are estimated by EPA to be responsible for less than 10 percent of the contamination at Superfund sites; yet these businesses have historically paid over 50 percent of the taxes that were imposed to support the Trust Fund. This inequity has been of paramount concern to our members and must be rectified. The attached charts illustrate the unfair tax burden that has been imposed on our industry.

Between 1982 and 1996, 74 percent of the Superfund program's funding came from specific Superfund taxes on industry (the petroleum tax, the chemical tax, and the corporate environmental income tax). During those years, the petroleum industry's share of annual taxes paid to Superfund ranged from 53 percent to 63 percent, averaging 57 percent over the entire period.

EPA officials have claimed that using general revenues to pay for Superfund would be deserting the "polluter pays" principle and would be "letting polluters off the hook." That is simply not true and does not reflect the reality of the Superfund program.

The Superfund program was created to pay for the cleanup of "orphan" waste disposal sites—those whose owners no longer exist (corporate owners) or who have died (individuals), or whose owners are bankrupt. Under the joint and several liability scheme of Superfund, once responsible parties are identified, the Fund itself is not looked to as the primary source of cleanup funding—unless those parties are insolvent. In fact, by the mid-1990's, the Superfund program had identified at least one potentially responsible party at 93 percent of nonFederal sites on the National Priority List. In other words, by that time only 7 percent of nonFederal sites on the NPL remained "orphan" sites requiring cleanup by EPA.

In addition to covering the cleanup costs of "orphan sites," EPA has been using the Superfund—funded with dedicated taxes—to pay administrative costs and for other purposes. In fact, EPA's use of Superfund moneys for other purposes has increased to such a degree that the General Accounting Office (GAO) reported that in 1998 only 46 percent of the expended funds covered direct cleanup costs. Fifty-four percent paid the salaries of EPA officials, program administration, and other extraneous costs. The committee is well aware of other GAO findings—EPA's failure to recover all allowable costs from responsible parties, continued high program costs

related to contractors, and EPA's failure to deobligate and recover unspent funds from completed Superfund contracts, to name just a few.

EPA has reported recently that cleanup projects at 90 percent of the nonFederal Superfund sites are either completed or under construction, and responsible parties are performing 70 percent of all new remedial work. The funding needs of the program are declining and will continue to decline. It makes sense for Congress to use general revenues to pay for orphan shares and administrative costs in the remaining years of the program, just as the Chafee-Smith bill contemplates.

No Restrictions on Use of General Revenues

Despite claims by some to the contrary, both GAO and the Congressional Budget Office have stated there is no legal or Budget Act restriction on the use of general revenues to fund the Superfund program. An explanation of the relationship and operation of the Superfund Trust Fund and appropriations for the Superfund program may be helpful.

Historically the Superfund Trust Fund has received revenues from two main sources: dedicated taxes and general revenues. The dedicated taxes have included a chemical feedstock tax, a crude oil tax, and a general corporate environmental income tax. Those taxes expired at the end of 1995.

The general revenue funding is transferred from the General Fund to the Trust Fund in the annual VA, HUD, and Independent Agencies appropriations bill, and that same bill appropriates money from the Superfund Trust Fund for annual Superfund program spending. The Superfund Trust Fund also collects revenues from interest on the moneys in the Fund, fines and penalties imposed under the Superfund program, deferred tax collections, receipts from deobligated funds, and cost recoveries from responsible parties.

Under the Congressional Budget Act, the Superfund Trust Fund is considered to be "on-budget" for purposes of the unified budget. Any taxes dedicated to the Trust Fund are treated as revenues for purposes of the overall Federal budget, and any spending from the Trust Fund is included in the total spending for the Federal Budget. However, transfers between the General Fund and the Trust Fund (such as for interest or direct transfers of general revenues) do not have any budgetary impact.

Superfund is a discretionary domestic program subject to the same budget rules that apply to all discretionary spending. The Trust Fund balance does not affect the amount that can be appropriated for the Superfund program. In other words, the discretionary spending caps, rather than the Trust Fund balance, control the Superfund program's spending level.

To summarize the foregoing explanation, appropriations for the Superfund program are not connected to, and do not depend on, any dedicated taxes. Thus, concerns that without reinstatement of the taxes the Superfund program would grind to a halt are completely unfounded.

Brownfields

The Chafee-Smith bill addresses the issue of brownfields rehabilitation by establishing grants for site investigation and remediation, and providing liability relief for innocent landowners and prospective purchasers of contaminated properties. API has supported brownfields reform as part of a comprehensive Superfund reauthorization. In addition, we have been concerned that the funding for this program not come from the Superfund Trust Fund and the Chafee-Smith bill funds the program through general revenues. API members have identified the following elements as essential in development of a brownfields program:

The remedy selection process for brownfields sites should be site-specific and risk-based—as it should be for all Superfund sites.

Reasonably anticipated future land and water uses must be considered in selecting the appropriate remedy.

Liability protection should be given to owners and sellers of property, as well as to purchasers.

A brownfields program should be broadly applied. The location of the site and redevelopment potential should determine brownfields applicability, not statutory jurisdiction. API believes that sites on the NPL and those proposed for listing, along with sites subject to corrective action or a planned removal under the Resource Conservation and Recovery Act (RCRA) should be eligible for brownfields programs.

Money to fund brownfields programs should come from general revenues and should include EPA as well as HUD appropriations.

Comprehensive Reform

API's position has been, and remains, that the current Superfund program should undergo comprehensive legislative reform, should sunset at the completion of clean-

ups of the CERCLA sites currently on the NPL, and should be paid for with general revenues. In addition to the liability scheme, other issues that the reform legislation should address are: remedy selection, natural resource damage assessments, no carve outs for any special interest s that have contributed waste to a site, and the possible transfer of the administration of cleanup programs to the States.

Remedy Selection Reform

API members continue to support remediation standards that are site-specific and risk-based. We support provisions that would establish requirements for facility-specific risk evaluations to determine the need for remedial actions and to evaluate the protectiveness of remedial actions. The remediation process should provide protection of human health and the environment through methods that are practical and achievable in a cost-effective fashion. API has 11 recommendations for reform.

They include:

—Remedy selection must be based onsite evaluation and scientific risk assessment combined with site-specific risk management decisions and remedy selection criteria.

—Risks must be prioritized so that limited resources are used efficiently.

—Benefit/cost analysis must be used to assess remedial alternatives.

—Realistic land and water use assessment must be explicitly considered in remedy selection.

—Groundwater remedy selection should be based on future use and exposure.

—The preference for treatment and permanent solutions should be eliminated.

—Provisions for use of Applicable or Relevant and Appropriate Requirements (ARARs) should be amended.

—Technological feasibility must receive greater consideration in assessing alternative remedial actions.

—The public should have input and receive information as part of the decision-making process.

—Voluntary cleanup should be encouraged.

—Pre-enforcement judicial review should be allowed.

Natural Resource Damage Provisions

There are a number of revisions to the statute that would improve the NRD program under CERCLA and OPA. The following principles for NRD reform should be the core elements of such revisions:

—Refocus the program on restoring, replacing or acquiring the equivalent of injured natural resources in order to re-establish the services provided to the public by the measurable and ecologically significant functions of the affected resources, and prohibit surplus recoveries based on speculative lost-use and non-use values.

—Ensure that actions to restore or replace resources are cost-effective and cost-reasonable.

—Clarify the existing limitations on NRD liabilities.

—Require NRD trustees to prove claims in court like any other plaintiff.

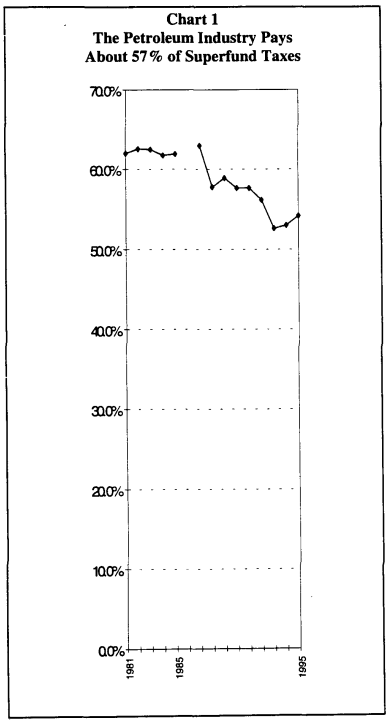
—Require consistency between Superfund cleanup and NRD programs.

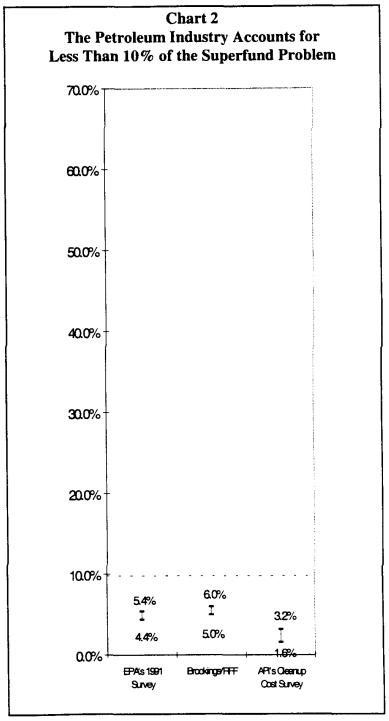
API has commented extensively on these and other aspects of the Superfund program needing restructuring. We will continue to do so in the appropriate forums and to work for comprehensive reform. In the meantime, we believe that at this time the Chafee-Smith bill represents the best chance for legislative improvement and continued funding of the program through general revenues.

In conclusion, API appreciates the opportunity to testify in support of the Chafee-Smith reform proposal, and we commend the sponsors for their diligent efforts dedicated to improving the Superfund program.

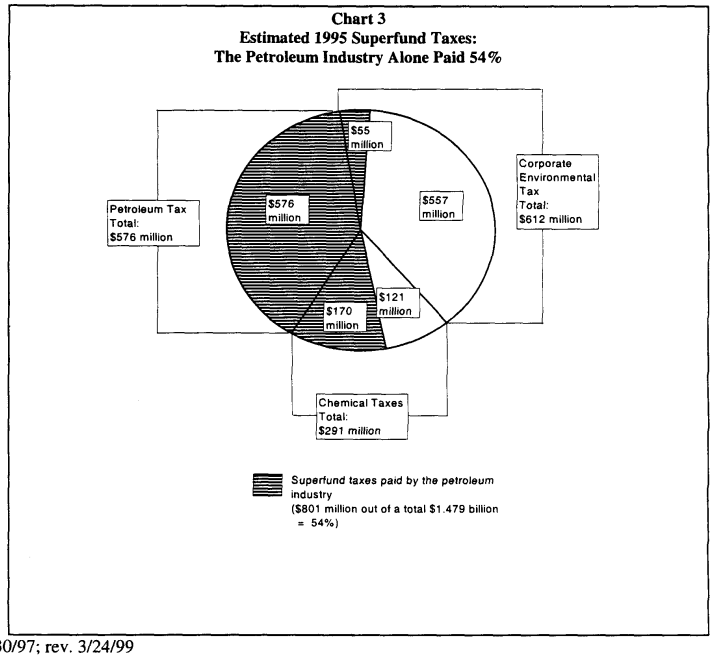
The Petroleum Industry's Superfund Taxes Greatly Exceed Its Liability

- The U.S. oil industry has paid more than half of **all** Superfund taxes (57%), although EPA and others have estimated the industry's responsibility for problem sites at less than 10%.
- The petroleum industry's share of **annual** taxes paid to Superfund has ranged from 53% to 63% (Chart 1).
- In 1995, the oil industry paid a total of $801 million in Superfund taxes -- $576 million in crude oil taxes, $170 million in chemical taxes, and $55 million in corporate environmental taxes (Chart 3).
- The petroleum industry's estimated share of responsibility for Superfund cleanups has ranged from 1.6% to 6.0% (Chart 2).





For details and full references, see Jody M. Perkins and Russell O. Jones, *Superfund Liability and Taxes: Petroleum Industry Shares in Their Historical Context*, American Petroleum Institute, Research Study #082, July 1996.



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For details and full references, see Jody M. Perkins and Russell O. Jones, *Superfund Liability and Taxes: Petroleum Industry Shares in Their Historical Context*, American Petroleum Institute, Research Study #082, July 1996.

STATEMENT OF THE NATIONAL ASSOCIATION OF REALTORS

Thank you for the opportunity to present the views of the National Association of Realtors (NAR) on S. 1090, the Superfund Program Completion Act. I wish to thank Chairman Chafee and Chairman Smith for their continued and determined leadership in building bipartisan consensus on this very important issue.

My name is Mike Ford. I own a full service residential and commercial real estate company in Clark, New Jersey, and I have been a real estate broker for 25 years.

It is often said—and I agree—that realtors don't sell homes, we sell communities. The more than 730,00 members of the National Association of Realtors, real estate professionals involved in all aspects of the real estate industry, are concerned and active members of our communities. We want clean air, clean water and clean soil.

We want to see properties affected by historic pollution cleaned up and returned to the marketplace. We care about a healthy quality of life as well as a vibrant economy, and we are willing to do our part to maintain that important balance.

However, we also expect the same fairness, certainty and predictability from government regulators that our customers and business partners expect from us. In this respect, Superfund has clearly failed.

Superfund began with the laudable goal of cleaning up hazardous waste sites to protect human health and the environment. Progress has been achieved, and for that the EPA deserves credit. Unfortunately, progress has come at a high price. While serving as a mechanism for hazardous waste cleanup, Superfund has also served as an engine for massive litigation. Deep-pocket parties targeted by EPA have turned around and sued smaller parties. Many of these smaller parties—small business owners who did nothing more than dispose of common garbage, recyclers who tried to be environmentally conscious, and innocent property owners who have not caused or contributed to hazardous waste contamination—have been drawn into years of costly litigation defending against the threat of huge cleanup liability.

As a first step, these parties should be provided with the maximum possible degree of liability relief so that resources can be targeted toward cleanup rather than litigation. When it comes to Superfund cleanup, we must ensure that the real polluters pay so that hazardous waste sites are returned to productive use as quickly as possible.

From the perspective of a taxpaying citizen, it is the right thing to do to ensure that Superfund is administered in a fair and effective manner. From the perspective of a businessman, it will provide the certainty needed in order to move forward in developing sites that are known or suspected to be contaminated.

As a second step, the Federal Government should recognize and support the hazardous waste cleanup efforts underway at the state level. In an effort to revitalize their urban centers, most of the states—including my home state of New Jersey—are creatively attacking the hazardous waste problem by providing incentives through voluntary cleanup programs.

One common incentive provided by these programs is liability relief. Typically, the state will provide some form of liability relief once it has approved a cleanup. In New Jersey, relief comes in the form of a "No Further Action" letter from the state DEP. Unfortunately, there is no guarantee that the Federal EPA will not assert authority at a future date and require additional cleanup. Without the certainty of knowing that they are protected from Federal as well as from state liability, property owners and developers are very reluctant to undertake development of a site which is or might be contaminated.

In New Jersey, we have our fair share of hazardous waste sites. However, I've seen what can be accomplished when local, state and Federal Government work together with private business interests to make something out of nothing. In my home town of Clark, General Motors cleaned up a contaminated property and funded construction of a golf course. The local government runs the course and makes a healthy profit.

If these reforms are achieved, hazardous waste sites throughout the country will be returned to productive use, revitalizing communities by increasing the tax base, creating jobs, and rejuvenating neighborhoods. Otherwise they will remain barren, contributing to nothing but economic ruin.

S. 1090 presents a "win-win" opportunity for everyone by achieving cleanup of hazardous waste sites, encouraging property reuse and enhancing community growth. Now is the time for Congress to assert bipartisan leadership and reinforce our nationwide effort to turn "brownfields" into "greenfields." The NATIONAL ASSOCIATION OF REALTORS supports S. 1090, and we encourage the 106th Congress to act now on Superfund reform.

Thank you again for the opportunity to present the views of the National Association of Realtors. I am happy to answer any questions.

STATEMENT OF THE ASSOCIATION OF BATTERY RECYCLERS

Mr. Chairman and members of the committee, we thank you for the opportunity to submit this statement on behalf of the Association of Battery Recyclers, Inc. ("ABR"). The ABR represents the interests of the lead recycling industry. This statement addresses the "recycling exemption" contained in S. 1090 and sets forth several issues of concern to the ABR regarding the application of the exemption to lead bearing materials.

The ABR has previously raised concerns about the need for, and the scope of, a recycling exemption. These concerns have been limited to the issues associated with

the recycling of lead bearing materials, and in particular, lead acid batteries. The lead industry consistently has achieved recycling rates of more than 90 percent for many years, an achievement far beyond that attained for any other recyclable material. This result has been achieved without the imposition of any "recycling exemption" from Superfund liability. Nonetheless, this exemption has been advocated by others based (in part) on the need to encourage recycling activities. Moreover, the exemption provides relief only for a limited number of parties, and does not apply to the owners and operators of the facilities that actually conduct the recycling activities. Thus, the ABR continues to question the need for and the limited scope of the exemption.

Notwithstanding these concerns, the ABR has participated in the legislative dialog over the last several years in an effort to reach a compromise with those parties advocating the exemption. The ABR recognizes that much effort has been expended in constructing the exemption. Thus, the ABR will limit its comments in this statement to certain specific issues of concern to the lead recycling industry in the hope that the exemption will be modified to reflect the interests of all parties involved in the lead recycling chain.

First, if the exemption is to be fair and meaningful, it must include all parties involved in the recycling chain. Specifically, the exemption should extend to secondary lead smelters that reclaim lead-bearing materials. The smelters are the critical component to the successful recycling rates achieved by the lead industry.

Second, the definition of the term "recyclable material" omits any mention of battery parts, various lead-bearing battery materials (powders, sludges, crosses, etc.) or lead-bearing materials from other industries (e.g., chemical industry, electronics industry). As a result, facilities handling such materials implicitly are not exempted from Superfund liability by the bill.

Third, since the exemption is retroactive, the bill would reward recalcitrant potentially responsible parties ("PRPs"), and would penalize PRPs who have voluntarily cooperated with the government in site cleanup efforts. The exemption should be made prospective from the date of enactment of the bill or it should contain "transition" language that avoids rewarding recalcitrant PRPs. Specifically, Section 301(b)(2)(B) should be amended to preclude application of the exemption to pending administrative and enforcement actions, in addition to pending judicial actions. No relief should be afforded to a party that prior to enactment of S. 1090 has received but not complied with an enforcement order issued pursuant to Section 106.

Finally, Section 303 of the bill would allow parties otherwise liable but for the recycling exemption to collect attorneys fees, and other litigation costs, from PRPs who seek contribution, even if the PRPs have a good faith believe that the other parties do not qualify for the exemption. This provision will discourage PRPs from initiating cleanups, since they will be penalized for seeking contribution from other similarly situated parties for their response costs. Hence, Section 303 should be modified to provide that litigation fees and costs should only be imposed where it can clearly be demonstrated that there was no basis to file a contribution action.

On behalf of the Association of Battery Recyclers, Inc., we appreciate the opportunity to submit these comments. We commend you and the other committee members in their efforts to amend Superfund in a manner that is more workable and fair to all affected parties.

HAZARDOUS WASTE ACTION COALITION,
June 4, 1999.

The HONORABLE JOHN H. CHAFEE, *Chairman,*
Senate Environment and Public Works Committee
Dirksen Senate Office Building
Washington, DC 20510

DEAR CHAIRMAN CHAFEE AND CHAIRMAN SMITH: On behalf of the Hazardous Waste Action Coalition (HWAC), the association of leading engineering and science firms practicing in multimedia environmental management and remediation, I respectfully request that the attached letter be made part of the hearing record for the May 25 hearing on S.1090, the Superfund Program Completion Act of 1999. If you have any questions, or if you need additional copies of the attached letter or a disc containing the letter, feel free to contact HWAC staffer Carolyn Kiely at 202–682–4354.

Sincerely,

DANIEL E. KENNEDY, *President.*

STATEMENT OF THE HAZARDOUS WASTE ACTION COALITION

As you know, the Hazardous Waste Action Coalition (HWAC) is the leading trade association representing engineering and science firms practicing in multimedia environmental management and remediation. HWAC member firms are at the forefront of implementing the nation's Superfund law for the governmental and private sectors. HWAC has been a strong supporter of your efforts to comprehensively reform the Federal Superfund statute over the past several years.

HWAC is disappointed that this year's Superfund Program Completion Act of 1999 (S. 1090) addresses only limited aspects of the Superfund program, while leaving intact the most important element of the program, the actual methodology for hazardous waste cleanup. Tinkering with some aspects of the "who pays" component of Superfund, while winding down funding to conduct and oversee cleanups, and at the same time leaving the present cleanup system unchanged, will perpetuate many of the present complaints about the slow pace and high cost of cleanup. In addition, not reforming the liability traps that snare response action contractors when they try to be efficient and innovative in cleaning up problems is a shortcoming that actually harms all stakeholders.

HWAC strongly encourages you to promote the comprehensive changes advanced in S.8, which you cosponsored in the last Congress. S.8 established bold reforms that would truly move the Superfund program forward. The major beneficiaries of S.8's reforms would be the American public, who would receive more prompt, cost-effective cleanups that truly protect public health and the environment.

As the implementers of hazardous waste cleanups, we see on a day-to-day basis what in the present law isn't working from a practical, implementation viewpoint. HWAC truly believes that the only way to improve the workings of the present law is through comprehensive reform that touches all aspects of the program. The current law is in need of significant changes in remedy selection and cleanup methodologies, as well as reform of the liability and funding provisions. Changing the remedy selection portion of Superfund is where the American public will receive the largest benefit from legislative Superfund reauthorization efforts. Presently, those parties who are undertaking responsible cleanup activities are often unable to take advantage of today's innovative technologies which would ultimately lead to more efficient and cost-effective cleanup of hazardous waste sites.

We wish to work cooperatively with your office to address our concerns, with the hope that we would then be able to support your efforts to pass comprehensive Superfund legislation this year. HWAC stands ready to work with you as needed to debate the changes which are vital to improving the overall cleanup process and result in cheaper, faster, more cost-effective cleanups that will benefit the American public. Feel free to contact me at 202–828–7368 to discuss our views on Superfund implementation at your convenience.

STATEMENT OF THE NUCLEAR ENERGY INSTITUTE

Mr. Chairman and members of the subcommittee, my name is Joe Colvin. I am president and chief executive officer of the Nuclear Energy Institute. The Institute sets policy for the U.S. nuclear energy industry and represents more than 275 members with a broad spectrum of interests, including every U.S. utility that operates a nuclear power plant. NEI's members also include nuclear fuel cycle companies, suppliers, engineering and consulting firms, national research laboratories, manufacturers of radiopharmaceuticals, universities, labor unions and law firms.

The Institute is pleased that the Subcommittee is re-authorizing the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and commends Chairman Smith, Ranking Member Lautenberg and subcommittee members for undertaking the reform and affording the industry an opportunity to comment for the record.

In reauthorizing CERCLA, this subcommittee has an opportunity to make reforms to the law that would greatly improve Federal oversight by directing effective use of Federal agency authority, expertise and resources. In doing so, this subcommittee would eliminate duplicative and inconsistent regulatory policies that arise during the license termination and cleanup of sites licensed by the Nuclear Regulatory Commission through its authority under the Atomic Energy Act of 1954. Those sites include medical institutions, universities with research programs, radiopharmaceutical companies and nuclear power plants.

Such action will align the National Priorities List—the Superfund program—with President Clinton's Executive Order No. 12866[1] to implement "a regulatory system that protects and improves [the American people's] health, safety, environment and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society."

In its current form, CERCLA sets the stage for conflicting and overlapping authority between the NRC and Environmental Protection Agency that prohibits the remediation of NRC-licensed sites in a safe, timely, and cost-effective manner. The conflict stems from the fact that the Atomic Energy Act gives the NRC responsibility to regulate civilian use of nuclear materials. Under its authority, the NRC has overseen the successful remediation of more than 70 sites to a level that fully protects public health and safety. By comparison, CERCLA assigns the EPA primary responsibility to administer the remediation of contaminated sites included on the Superfund list.

This subcommittee can eliminate the statutory confusion created in CERCLA by reaffirming the NRC's authority under the Atomic Energy Act of 1954 to oversee license termination and site remediation of NRC licensees. This clarification would ensure that Federal resources are used efficiently and effectively. More importantly, amending the CERCLA language will continue to ensure full protection of public health and safety.

Background

In 1992, the EPA agreed to defer remediation of NRC-licensed sites to the nuclear regulator. That interagency accord was consistent with NRC's mission under the Atomic Energy Act of 1954, to act as the sole regulator and standard-setter of certain radioactive materials. Drawing on that accord, the NRC used its policy and guidelines to successfully regulate the site remediation and license termination on a case-by-case basis of more than 70 sites.

In 1997, the NRC formalized its approach by issuing a final rule that included a generic environmental impact statement. In addition to providing a clear regulatory approach, the final rule articulated specific radiation safety standards for remediation and license termination. The NRC stated that "the final rule will result in more efficient and consistent licensing actions related to the numerous and complex site decommissioning activities anticipated in the future."

The NRC adopted this rule after 4 years of extensive scientific study and public comment, during which NRC held more than a dozen major workshops and meetings on residual radiation standards and provided three separate noticed requests for public comments. This broad level of public-participation produced more than 7,000 comments from a wide range of interests—including scientific and professional organizations—EPA and other Federal agencies, state and local governments; Native Americans, NRC licensees, academic bodies, and civic and environmental organizations. The EPA actively participated in this process and was consulted by NRC throughout the rulemaking effort.

NRC's 4-year rulemaking process and related scientific studies led the agency to conclude that public health and safety is best protected by a regulation that sets a maximum limit on potential exposure to members of the public from residual radiation at remediated sites from all possible "dose pathways," such as air, soil, surface and ground water, and food products grown at the remediated site. The regulation also requires that a site-specific, cost-benefit analysis be performed by the licensee to identify actions to be taken to further remediate the site and reduce potential levels of exposure below the maximum limit.

The approach taken by NRC including a maximum radiation dose limit and a requirement to further reduce potential exposure to levels that are-"as low as reasonably achievable," incorporates the recommendations of respected national and international scientific organizations[2] and is consistent with regulatory standards adopted in other countries. However, this approach differs from that taken previously by the EPA. The EPA approach included a maximum radiation dose limit, but does not include a requirement to further reduce exposure levels. EPA also supports a separate groundwater requirement that utilizes the maximum contaminant levels (MCLs) established by EPA under the Safe Drinking Water Act (SDWA).

Based primarily on the lack of a separate radiation standard for groundwater in the NRC rule, EPA Administrator Carol Browner in 1997 informed NRC Chairman

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[1] Executive Order 12866 of September 30, 1993, "Regulatory Planning and Review," published in the Federal Register, Vol. 58 No. 190, pp. 51735–51744, dated Monday, October 4, 1993.

[2] Such organizations include the National Council on Radiation Protection and Measurements, the International Commission on Radiological Protection, and the International Atomic Energy Agency.

Shirley Jackson that EPA "would be forced to reconsider its policy of exempting NRC sites" unless EPA's approach was incorporated into NRC's final rule.[3]

Shortly before that correspondence, EPA pursued its rule for site cleanup standards that would have been generally applicable to all Federal agencies, including the NRC. However, the EPA rule was rejected during an interagency review process, involving primarily EPA, NRC and the Energy Department, facilitated by the Office of Management and Budget. The EPA formally withdrew its proposed rulemaking in December 1996.

After substantial interaction with EPA—and despite continuing disagreement between the agencies on the regulatory approach to site remediation—the NRC issued its final rule in July 1997. NRC's rule has been applied to license termination decisions for its licensees.

Nonetheless, the EPA has continued to challenge NRC's regulatory program. In August 1997, the EPA issued a guidance memorandum to its regional offices that rejects the general acceptance of NRC's criteria under CERCLA, although the memorandum notes: "We expect that NRC's implementation of the [NRC] rule for license termination will result in cleanups within the Superfund risk range at the vast majority of NRC sites."[4] EPA also has interacted with public interest groups and the media on the decommissioning of NRC-licensed facilities, expressing concerns about the NRC standard and regulatory approach. Most recently, the EPA has formally criticized NRC's regulatory process as part of an NRC licensing review and has requested technical information from an NRC licensee regarding its site remediation plans.

Through its duplicative actions, the EPA is diverting attention away from the NRC's clear, consistent site cleanup standards to protect public health and safety. Rather, the focus has shifted to EPA's refusal to accept NRC's decommissioning standards for remediated sites. In the case of nuclear power plants, NRC regulations require plant licensees to collectively accrue $45 billion in funds to decommission these sites. It would be financially imprudent for these licensees to spend accrued funds to pursue cleanup under a threat of being revisited by another Federal agency on the same issues.

Such EPA interactions have taken place despite congressional direction that the NRC site remediation rule fully protect public health and safety: "It has come to the [Appropriations] Committee's attention that the [EPA] has recently proposed the reversal of its long-standing policy of deferring to the . . . NRC for cleanup of NRC-licensed sites. In the past, EPA has not placed sites which have been successfully remediated under the NRC on the National Priority List. The Committee is satisfied that the NRC has and will continue to remediate sites to a level that fully protects public health and safety, and believes that reversing this policy is unwarranted and not a good use of public or private funds. EPA is therefore directed to continue its long-standing policy on this matter with the NRC and spend no funds to place NRC-remediated sites on the NPL."[5]

EPA's Interaction In Remediation of NRC-Licensed Sites Is Duplicative, Inconsistent

EPA's continuing interactions in NRC's regulatory process reflect an inconsistent and duplicative regulatory approach and demonstrate a threat to list remediated sites on the National Priorities List even after a NRC has terminated a license and relinquished jurisdiction.

To that end, EPA's intervention has raised serious stakeholder concerns regarding the authority and finality of NRC licensing decisions; the potential of parties associated with affected sites for future liability; and the looming uncertainty regarding a site remediation's ultimate duration and costs. More importantly, EPA's involvement erodes stakeholder confidence in the integrity of Federal regulatory review and oversight, which runs counter to the objectives of the administration for "reforming and making more efficient the regulatory process."

For the reasons stated above, the industry respectfully recommends that the subcommittee consider including the enclosed amendment in legislation to reauthorize the Superfund program. We note that the proposed amendments are drawn from NRC recommendations for legislative changes recently submitted to the Vice President.[6]

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[3] Letter from EPA Administrator Carol M. Browner to NRC Chairman Shirley Ann Jackson, Feb. 7, 1997.

[4] Establishment of Cleanup Levels for CERCLA Sites with Radioactive Contamination, Aug. 22, 1997, OSWER No. 9200.4–18.

[5] House Rpt. 105–610: Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Bill for 1999 (accompanies H.R. 4194-P.L. 105–276).

[6] Letter from NRC Chairman Shirley Ann Jackson to Vice President Albert Gore, Jr., as President of the U.S. Senate, dated May 13, 1999.

The Nuclear Energy Institute appreciates the opportunity to provide the industry's perspective on this important issue.

ATTACHMENT

SUGGESTED AMENDMENTS TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601 et seq.) is amended—(1) by adding the following new paragraph at the end of section 121(b):

"(3) No authority of this Act may be used to commence an administrative or judicial action with respect to source, special nuclear, or byproduct material that is subject to the decontamination regulations issued by the Nuclear Regulatory Commission for license termination under the Atomic Energy Act of 1954, or by a State that has entered into an agreement pursuant to section 274.b. of that Act, unless such action is requested by the Nuclear Regulatory Commission or, in the case of such material under the Jurisdiction of a State that has entered into an agreement pursuant to section 274.b. of that Act, the Governor of the State." (2) by inserting the following before the period at the end of paragraph (K) of section 101 (10):

", or any release of such material in accordance with regulations of the Nuclear Regulatory Commission following termination of a license issued by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) or by a State acting under an Agreement entered into pursuant to section 274.b. of that Act."

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