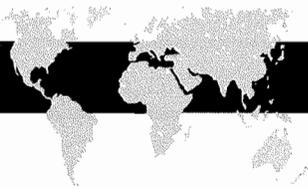


BRIEF ANALYSIS

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Four Steps to Reforming Superfund

Superfund is the largest single project of the Environmental Protection Agency (EPA). Yet despite cumulative federal expenditures of more than \$30 billion over 15 years, Superfund successes are few. More than 1,300 sites were listed on the National Priorities List for cleanup, but only 97 sites have been removed from the list, ending federal supervision.

Superfund was approved by a lame-duck Congress at the end of 1980. Pushed along by exaggerated fears about buried chemicals at Love Canal in upper New York state, Superfund was touted as a federal emergency response to widespread public health risks posed by abandoned toxic waste sites. Yet experience has shown that the design of Superfund incorporates four major flaws:

- Instead of making the polluters pay for cleanup, Superfund imposes penalties on parties who were not at fault.
- The health risks Superfund is designed to avert are largely nonexistent.
- Superfund mandates one-size-fits-all cleanup technologies instead of allowing those responsible for each cleanup to use the most efficient technologies.
- Superfund violates the federalism principle by giving federal authorities the power to decide local issues.

Primarily as a result of these problems, Superfund cleanups have been incredibly expensive and inefficient, and the law has been ineffective in protecting both human health and the environment. With reauthorization overdue, now is a good time for reform.

Step 1: Restore Polluter Pays. Superfund is supposed to enforce the “polluter pays” principle. If culpable parties can be linked to a site, these “potentially responsible parties” (PRPs) are supposed to pay for cleanup. The principle is sound, but it has little to do with the way Superfund liability is now determined. The single most important step Congress could take to make Superfund more effective would be to discard the oner-

ous, retroactive, joint-and-several and strict liability provisions of the law. These provisions force polluter and nonpolluter alike to overpay. People and companies are made liable for the cleanup of wastes that were legally deposited using the best available technology or even legally mandated methods at the time. In addition, these individuals and organizations can be held responsible for a site’s entire cleanup cost, even if they deposited less than 1 percent of the waste.

The current liability system depresses local economies by creating urban “brownfields” (see below) and increases the incomes of lawyers. In fact, 30 to 60 percent of the Superfund goes for lawyers’ fees and other transaction costs — which may explain why lawyers have fought tooth and nail against fair and reasonable changes to the fund’s liability scheme. Future Superfund legislation should require parties responsible to pay only proportionally to their share of illegally deposited wastes.

As a second-best measure, Congress could exempt from liability all PRPs except owner/operators of current waste sites and limit their liability to wastes deposited after 1980, when retroactivity was imposed. Exempting from Superfund liability those who generate or transport waste, as well as past, present and future creditors would eliminate 90 percent of the current PRPs. Many are small businesses and individuals that cannot contribute significantly to cleanup but can be devastated economically by PRP designation. This reform would substantially reduce litigation, and cleanups should progress more quickly and with less acrimony.

Step 2: Require Rational Risk Analysis. The current Superfund law requires that cleanup standards make unrealistic assumptions about possible risks at a site. Even worse, one hypothetical risk is stacked atop another to produce wildly exaggerated scenarios that are physically impossible or extremely unlikely. The result is unreasonable standards. For example, chemically contaminated groundwater often is required to meet drinking water standards even though no one will ever drink from the source. Site cleanup standards should be based on estimates of reasonably anticipated land use, and each site remedy should pass a cost-benefit test based on the most up-to-date scientific understanding.

Under such standards, simple and inexpensive deed restrictions often could provide the same or greater levels of protection.

This single step would go a long way toward controlling Superfund spending.

Step 3: Stop Mandating Cleanup Technology. Governments are notoriously poor at choosing the most cost-effective, least intrusive means of solving environmental problems. Once standards are established, how they are met should be left to the parties charged with cleanup. Self-interest can be trusted to lead them to the least costly means of meeting the standards.

Step 4: Restore Federalism. Traditionally, the states have been responsible for environmental health and public safety. Occasionally, federal intervention was considered necessary to stimulate a state response to a widespread problem. However, 15 years of failure under Superfund have erased the argument for a continued federal role. So have the proven commitment and often superior ability of the states to handle environmental problems. The states, not the federal government, should be responsible for selecting Superfund sites and setting cleanup standards in purely intrastate matters.

The states might argue that an immediate end to federal involvement would amount to an unlawful, unfunded mandate. In the interest of avoiding conflict, the federal government could phase out its Superfund involvement over a period of, say, five to seven years. In addition, the number of new sites that could be added to the National Priority List should be capped. The Superfund program should cease to exist when the government certifies the last Superfund site as clean.

During the phase-out period, state cleanup programs could be phased in. Nineteen states already have voluntary cleanup programs, and five others are seeking EPA approval. As federalism is restored and state cleanup programs come on line, states will need the assurance that their judgments concerning site listing, cleanup standards and acceptable completion of the cleanup will be final. Currently, upon the completion of a state cleanup plan the state issues some form of written assurance to the owner that the state will not return with

further demands for clean up. However, the EPA is not required to respect state waivers of liability, so PRPs remain fearful even after spending millions of dollars studying and cleaning their sites. The end of the EPA's ability to second-guess the states should accompany the end of all federal involvement.

How Reforms Affect Brownfields. Reform also must address the brownfields created by Superfund liability. Brownfields are once-productive commercial and industrial sites that now sit abandoned, in part because they may contain toxic waste and thus may carry Superfund liability. Superfund reform should encourage private investors and local communities to redevelop these sites. Ironically, Superfund, a law created to protect human health and promote environmental cleanup, has resulted in a use-and-throw-away pattern of property ownership in inner cities and increasing urban sprawl as greenfields (pastures, forests and farmlands) are cleared to make way for industrial growth.

There may be as many as 450,000 brownfield sites across the country sitting idle, adding to the blight of inner-city landscapes. Brownfield redevelopment represents a win/win opportunity for virtually all interested parties. Local communities and municipal officials want to return brownfield properties to the tax rolls and increase employment in economically depressed areas. Environmentalists and community activists want to preserve existing greenfields and make contaminated sites safe. The owners of brownfields are eager to turn major liabilities into profitable assets.

Conclusion. Each of the four reforms would contribute to quicker, less costly cleanups. Much of the money now spent fighting Superfund liability could be productively redirected brownfield cleanup. Superfund liability would no longer be a sword of Damocles hanging over such sites. The states could set rational site-specific cleanup standards based on actual risks to humans in light of the intended reuse of the property, and give potential lenders and investors the confidence to undertake brownfield redevelopment.

This Brief Analysis was prepared by NCPA environmental policy analyst H. Sterling Burnett.