



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

*Enviro -
Superfund*

AUG 15 1996

MEMORANDUM FOR: LEON PANETTA
HAROLD ICKES
DON BAER
JOHN HILLEY
LAURA D'ANDREA TYSON
CAROL RASCO
BRUCE REED
KATHLEEN MCGINTY
KITTY HIGGINS
T.J. GLAUTHIER
RON KLAIN

THE ADMINISTRATOR

Subject: Environmental Goals

Attached please find my recommendation for a bold environmental initiative that would reaffirm the Administration's role in protecting public health and the environment. This reflects further discussions over the last several days and is a refinement of my August 12 Memorandum to the President and the Vice President. Our proposal would focus on controlling toxic pollution in our land and water, and would provide Americans with the tools they need to make informed decisions about toxics. It would build upon the significant successes of the Administration in reforming Superfund, cleaning up urban contaminated sites, protecting and expanding Americans' right to know, and providing special protections for the unique environmental health risks facing children.

The actions the Administration could take include three primary components:

- (1) Dramatically expanding the pace of cleanup of hazardous waste sites to insure the removal of toxics from communities, through both the Superfund program and Brownfields;
- (2) Assuring that toxic pollutants are controlled in our nation's drinking and surface waters -- our rivers, lakes, streams, and underground aquifers; and
- (3) Honoring Americans' right to know about toxic pollution by providing comprehensive environmental and public health information.

I look forward to working with you to develop and implement this proposal.

A handwritten signature in cursive script, appearing to read "Carol M. Browner".

Carol M. Browner

encl.



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CLEANUP OF THE NATION'S WORST TOXIC WASTE SITES

GOAL: To double the pace of projected additional Superfund cleanups over the current program, so that cleanups will have been completed by the year 2000 at two thirds of the Nations's worst toxic waste sites currently on the Superfund NPL list.

BENEFITS

***Improved quality of life for more than 30 million Americans, including over 4 million children.**

1 in 4 Americans live within four miles of a Superfund site, including 10 million children under the age of 12.

***Creation of jobs.**

Superfund cleanups create jobs. Many jobs will be created in the remediation industry. Further, when sites are cleaned up and available for reuse and redevelopment, additional jobs are created as the property returns to productive use.

***Double the pace of cleanups.**

The current Superfund program is projected to do approximately 300 additional cleanups by the year 2000. This initiative would approximately double that number so that two thirds of the sites currently on the NPL would be cleaned.

PROGRAM COMPONENTS.

Approximately \$1.5 billion to \$2 billion in additional funding for Superfund targeted to site cleanup, spread over fiscal years 1998 and 1999. (To meet the goal by the end of four years, funding for this effort needs to occur primarily in the first two years because the average time to complete a final cleanup is 2½ years.) This effort would also require approximately 100 additional FTEs for on scene coordination and remedial project management.

BACKGROUND

The Clinton/Gore Administration has promised to make the Superfund program faster, fairer and more efficient. Through a series of very successful administrative changes to the program, it has done so. The legislative changes recommended by the Administration would further accelerate the program. This proposal to provide additional funding would give further evidence of the Clinton/Gore Administration's desire to assist those who have had to live in the shadow of these Superfund sites for too long.

There are currently 1387 sites on the National Priorities List (NPL -- the list of the worst toxic waste sites). Since the beginning of the program in 1981, 362 cleanups have been completed, including 240 during the first three and one-half years of this Administration. Under

current funding levels, a total of 650 sites will be cleaned up by the year 2000. This proposal would increase the total number cleanups by the year 2000 to some 900 sites, allowing us to say two thirds of the current NPL sites have been cleaned up and the pace of additional cleanups has doubled over the current program.

If the Superfund reauthorization program proposed by the Administration were adopted by Congress, we would expect even more cleanups by the year 2000. The Clinton/Gore Administration's Superfund reauthorization proposals would reduce cleanup times by 20 percent. This means that those cleanups being done by private parties -- those that polluted the sites -- would not take as long as they do under the current Superfund program. We have not included those numbers in this goal since Congress has not adopted legislation and it would be impossible to calculate a number without legislation.

The Superfund program cleans up the worst toxic waste sites in the Nation. It is one of the Agency's most important programs for protecting public health and the environment. The National Priorities List is the inventory of the worst sites in the country -- those sites where federal monies can be spent on cleanup if the polluters have disappeared or are bankrupt and cannot perform the cleanup work themselves. Approximately 70 percent of cleanup costs at these sites are now paid for by the polluters, the remaining 30 percent are covered by funds appropriated to EPA from the Superfund Trust Fund. The trust fund is funded by a tax on oil and chemical companies and a portion of the corporate environmental tax. After 15 years of collections, these taxes expired in January 1996. The Administration has called for a continuation of the taxes at current levels.

POTENTIAL NEGATIVES

The fight with Congress over reauthorization has generally been very positive for the Administration in terms of our position that the largest polluters must pay their fair share. However, the congressional leadership has sought to suggest that we take our position just to be friendly to the trial lawyers as they say we have sought to do in other areas.

We have based this initiative on our estimates of the time and money typically involved in cleaning up a Superfund site. Despite our best efforts at sampling and other work to determine the extent of contamination at a Superfund site, we do sometimes find levels or types of contamination that take longer to remediate than originally anticipated. Such unanticipated circumstances -- or other unexpected delays (severe weather, labor problems, etc.) -- could keep us from reaching the goal set out in this initiative. We do believe that clean up will be completed or substantially completed on the additional sites covered by the initiative by 2000.

CLEANUP AND REDEVELOPMENT OF URBAN CONTAMINATED SITES

****The numbers presented in this proposal reflect the combined impacts of a new EPA/HUD initiative and the President's proposed Brownfields tax incentive.****

GOAL: The cleanup and redevelopment of up to 33,000 brownfield contaminated sites in 300 cities across the country by the year 2000.

BENEFITS

***Improved quality of life for 15 million Americans.**

15 million Americans live within a 5 miles of at least one brownfield site.

***Creation of up to 300,000 jobs.**

Brownfields cleanups and redevelopment creates jobs. For example, at a former Buffalo, New York steel-mill site, after receiving a \$200,000 EPA Brownfield grant the site is being cleaned up and a hydroponic tomato farm will be constructed and 300 workers employed.

***Increased local property tax base.**

Brownfields cleanups and redevelopment help local governments expand their tax bases through increased economic activity. For example, in Cleveland, at a site where cleanup and redevelopment has already occurred and 182 new workers are employed, the City's tax base has increased by \$1.1 million.

***Increased private sector investment.**

Brownfields cleanups and redevelopment help expand local economies. For example, the Cleveland site which received a \$200,000 EPA Brownfield grant has leveraged \$4.2 million in private sector investments.

***Enhanced greenfield protection.**

The Northeast/Midwest Institute estimates that redevelopment of brownfield sites results in a 25% reduction in new development of greenfield sites, preserving open spaces and saving cities the increased costs involved in urban sprawl, e.g., water, sewer, electric lines.

PROGRAM COMPONENTS

President's Brownfields Tax Incentive

\$85 million/yr EPA Brownfield Grants Program

— Grants to cities for site assessment (up to \$200,000) and cleanup (up to \$500,000)

\$10 million/yr EPA State Voluntary Cleanup Program Support

\$ 5 million/yr EPA Worker Training Program

-- To train citizens living in Brownfield communities in cleanup technologies to create opportunity for employment at these sites.

\$100 million/yr HUD Loan Guarantees for Brownfield Redevelopment**\$25 million/yr HUD Economic Redevelopment Grants****\$ 5 million/yr HUD YOUTHBUILD Job Training and Creation Program****BACKGROUND**

Brownfields sites are contaminated, abandoned, urban properties. The contamination is not serious enough for EPA to list the site on its ranking list of the worst sites requiring cleanup, but is serious enough that banks generally will not lend money for redevelopment because of their fear of potential liability for the contamination. Thus, the sites stay idled and remain a blight on our cities and communities.

The General Accounting Office estimates that there are some 450,000 brownfields sites in the United States. Of that number, EPA and the Department of the Treasury estimated that some 130,000 would be eligible for the Brownfields tax credit. That number provides an estimate of the number of sites that are good candidates for redevelopment. This program would, therefore, help cleanup as much as 25 percent of the sites that are candidates for redevelopment.

EPA Administrator Carol Browner announced EPA's Brownfields Action Agenda in January 1995. The Agenda includes activity in four broad areas:

- EPA funds pilot activities with \$200,000 grants to cities for site assessment;
- EPA has issued guidance to clarify the liability of prospective purchasers, property owners and others;
- EPA is working to build partnerships with states, cities and community representatives to develop strategies for promoting public participation in Brownfields decision-making; and
- EPA is joining with community colleges to develop long-term plans for job development and training in connection with Brownfields activities.

SAFE DRINKING WATER FOR ALL AMERICANS' COMMUNITIES

****This proposal reflects implementation of the recently signed Safe Drinking Water Act, expansion of EPA's drinking water program.****

GOAL: Protect Americans from toxics and microbial contaminants in their drinking water.

BENEFITS

***Strengthened public health water quality standards for toxic and microbial water pollutants, including for example, triazines, benzene, toluene and cryptosporidium.**

A cryptosporidium outbreak in Milwaukee caused more than 400,000 to become ill and more than 100 to die.

There is growing concern that exposure to certain toxics, including triazines in drinking water, may result in cancer, liver toxicity, and reproductive effects.

Communities have had toxic spills that have contaminated drinking water supplies.

***Public health protection for 243 million Americans through improved and upgraded drinking water treatment facilities and programs.**

45.2 million people are served by drinking water systems with public health violations, often due to inadequate treatment or leaking distribution systems.

25.8 million Americans are served by small water systems, many of which may experience technical and financial difficulties in meeting strong drinking water standards. Development of affordable small system technologies are essential for these communities.

Twelve million Americans are served by water systems that do not adequately filter drinking water increasing the risks of chemical and microbial contamination.

More than 200,000 children still suffer lead poisoning due to antiquated pipes.

***Improved protection of the rivers, lakes and underground aquifers that become our drinking water.**

Fifty percent of the American public receives their drinking water from a river or lake. Preventing the toxic contamination of these source waters is a common sense pollution prevent solution.

Fifty percent of the American public receive their drinking water from groundwater. Aquifer cleanups are extremely costly and lengthy. Preventing toxic contamination of this limited and precious resource must be a priority.

By protecting both surface and ground water sources for drinking water, we will also provide clean water to support important fisheries and other aquatic habitats. Aquatic species are disappearing at an alarming rate (faster than terrestrial species).

***Reduced the discharge of toxics to the Great Lakes by six to eight million pounds per year.**

23 million Americans receive their drinking water from the Great Lakes which represent 95% of the nation's fresh water.

Pursuant to the Clinton Administration's Great Lakes Water Quality Initiative states will adopt water quality standards reducing the discharge of toxic contaminants by six to eight million pounds per year.

PROGRAM COMPONENTS

1996 Safe Drinking Water State Revolving Loan Fund

-\$725 million/year to upgrade drinking water treatment systems

(This is not new money, it is assumed in the President's balanced budget plan.)

1996 Safe Drinking Water Act Program Implementation

-\$20 million/year to implement drinking water program

Source Water Protection State Grant Program:

-\$60 million/year to identify pollution threats and prevent toxic pollution of rivers, lakes and aquifers.

Expanded Public Health Drinking Water Standard Setting for Toxics

-\$20 million/year to conduct research and set safety standards for triazines (such as atrazine, simazine, and cyanazine) and petroleum chemicals (such as benzene, toluene, ethyl benzene, and xylene) in drinking water. Program to include assessment of threats from these toxic chemicals, screening for these chemicals, setting new federal drinking water standards for these contaminants, and identifying effective treatment technologies for American's drinking water.

POTENTIAL WEAKNESSES

- **An announcement that includes the \$725 million for the SRF may be viewed as an inadequate financial commitment, when needs are estimated to be in the tens of billions of dollars.**
- **The \$60 million state grant program may be perceived by the states as an insufficient amount to develop a comprehensive source water program.**

HONORING AMERICANS' RIGHT TO KNOW ABOUT TOXICS

GOAL: By the year 2000, the Administration would ensure that every American has access to timely information about toxic and other pollutants in their local air, land, and water through a comprehensive monitoring system with computer links to schools, libraries, community centers, and home computers in all cities with populations over 100,000.

BENEFITS

***Provide Americans access to air, water and land pollution data about toxics.**

EPA already receives, via the Internet, 3 million inquiries per month for public health and environmental information. Currently only limited pollution information is available and no information is available on a real-time basis.

***Reduced incidence of childhood asthma and other diseases.**

For the parent of an asthmatic child, access to real-time air quality information can mean the difference between hospitalization and a healthy day. Asthma is now the leading cause of hospitalization for young children in the United States. By integrating health effects information with real time reporting, parents could make more informed choices for their family.

***Increased community participation.**

Informed, involved individuals are far better able to participate in making sensible choices for their communities, including permitting decisions, pollution control requirements, and working with industry to reduce pollution impacts and use of toxics.

***Better enforcement.**

Through the installation of new monitoring devices government and citizens will have better tools for ensuring compliance with environmental and public health standards.

***Foster more flexible standard setting.**

By focusing on the status of the environment, we will have better tools for more flexible regulatory and voluntary approaches to reducing pollution, such as those being developed through EPA's Project XL.

PROGRAM COMPONENTS

Set up of the nationwide monitoring network, information transmission, including quality assurance, computer hookups nationwide, and administration of the program would require an initial investment of approximately \$250 million over four years.

EPA, in cooperation with states and industry, would establish a national network to collect information about toxics in air, land, and water, and make it available to citizens on a real time basis by Zip Codes to citizens. Information would include:

- leading public health and environmental indicators for their air, land, and water (such as air toxics and ozone and particulate levels in air, bacteria and toxic metals levels in waterways, and lead in soils); and
- information derived from facility permits for discharges of toxics and other pollutants.

This information would be integrated with other advisories and reporting, and would be tied in to available information about health effects from exposure to toxic pollutants.

BACKGROUND

EPA currently provides information under the Toxics Release Inventory on releases of only certain chemicals from some manufacturing facilities. This initiative would greatly expand the information by establishing a national monitoring network providing critical information about the environment, as well as integrated information currently collected from states. In addition, we would provide public information on toxic and other pollution discharges now collected through EPA and state permitting and evaluation systems.

POTENTIAL NEGATIVES

Right to know is criticized as increasing the paperwork burden facing industry in a manner unrelated to real environmental risks. It also may be seen as akin to the controversy spawned by the National Biological Inventory. These concerns, however, should not apply to an approach that makes better use of existing reporting requirements and that focuses on vital common public health resources, such as clean air and water.

OVERVIEW OF ENVIRONMENTAL INITIATIVES

Attached are descriptions of the five potential environmental initiatives developed by the interagency environmental working group. They include:

1. **Increase Superfund Cleanups the Nation's Worst Toxic Waste Sites.** There are currently 1,387 Superfund toxic waste sites. Some 362 cleanups have been completed, and at current levels of funding, a total of 650 sites will be cleaned up by the year 2000. This proposal would increase the total number of cleanups by the year 2000 to some 900 sites, allowing us to say two-thirds of the current sites will be cleaned up and the pace of additional cleanups doubled. Cost: \$1.5-\$2 billion over 2 years.
2. **Cleanup and Redevelopment of Urban Contaminated Sites.** This initiative would cleanup and redevelop up to 33,000 contaminated brownfield sites in 300 communities out of a total of 150,000 sites nationwide. Cost: \$400 million over 4 years.
3. **Safe Drinking Water for all Americans' Communities.** This proposal reflects implementation of the recently signed Safe Drinking Water Act's expansion of EPA's drinking water program. Cost: \$400 million over 4 years (in addition to funding already included in our budget).
4. **Honoring Americans' Right to Know About Toxics.** This would set up a national network to collect information about toxics in the air, land, and water and make it available via computer to citizens by zip codes so that the by year 2000 every American has access to timely information about toxics and other pollutants in their community. Cost: \$250 million over 4 years.
5. **Getting Tough on Criminal Polluters.** This proposal would increase penalties for the worse offenders, strengthen our partnership with state and local law enforcement agencies, and plug loopholes in existing laws that allow environmental crimes to go unpunished. Cost: No cost.

Total Cost: \$2.55-3 billion but could be scaled back.

A Major Acceleration of Superfund Cleanups in our Communities

President Clinton is today announcing a major acceleration of the Superfund program, committing to clean up at least two-thirds of the toxic sites now on Superfund's national priorities list by the year 2000. By executive order, the President is giving Interior, USDA, and NOAA new authority to make polluters clean up toxic pollution, which will boost site cleanups and clean water protection.

In just three years, the Clinton Administration has cleaned up more toxic sites on the Superfund National Priorities List (NPL) than in the previous 12 years combined. Under President Clinton, EPA has done more to streamline cleanups, reduce litigation and bureaucracy, and initiate common sense improvements to the Superfund program than in the previous ten years combined. These steps include an ambitious initiative to clean up Brownfields -- toxic sites that threaten both the health and the economy of distressed communities. These steps, combined with today's initiatives, make today's new target possible.

By contrast, the Dole-Gingrich Congress has waged a concerted effort underfund Superfund and to use Superfund monies to let toxic polluters off the hook. This initiative will make sure Superfund monies are used to clean up toxics from our communities, not to pay polluters.

- ▶ ***Accelerating the Pace Of Cleanup.*** President Clinton is setting an ambitious new goal for Superfund: doubling the pace of cleanup so that two-thirds of the existing Superfund sites are cleaned up by the year 2000.
- ▶ ***Challenging Congress to Make Polluters Pay For Cleanups.*** Because of its extreme proposals to end the Superfund program and let toxic polluter off the hook, the Dole-Gingrich Congress allowed the corporate taxes that support Superfund to lapse. This means that special interests are getting a \$1.6 billion dollar windfall this year and that future Superfund cleanups may be at risk. President Clinton is calling upon Congress to enact legislation before adjournment that achieves three goals to protect and expand Superfund cleanups:
 - 1) Reinstatement of the lapsed Superfund taxes;
 - 2) Enactment of provisions to require that the Superfund pay for cleanups that are ready to go, rather than make communities wait for Congress to budget more money. [Proposed],
 - 3) Enactment of President Clinton's Brownfields tax incentive, announced in the State of the Union and later introduced in the House and Senate, to accelerate brownfields cleanup.
 - 4) Rejection of proposals to use Superfund to pay polluters.
- ▶ ***Making Polluters Clean Up More Toxic Threats to Lands and Waters.*** Hampered by

the limitations in a Reagan Administration executive order implementing Superfund, federal agencies often lack the authority to compel polluters to clean up toxic waste sites that threaten our lands and waters. President Clinton is changing that order, and broadly expanding the authority of Interior, NOAA, and USDA to compel polluters to clean up.

Investments: EPA (\$1.5 billion).

Potential Negatives

The fight with Congress over reauthorization has generally been very positive for the Administration in terms of our position that the largest polluters must pay their fair share. However, the congressional leadership has sought to suggest that we take our position just to be friendly to the trial lawyers as they say we have sought to do in other areas.

We have based this initiative on our estimates of the time and money typically involved in cleaning up a Superfund site. Despite our best efforts at sampling and other work to determine the extent of contamination at a Superfund site, we do sometimes find levels or types of contamination that take longer to remediate than originally anticipated. Such unanticipated circumstances -- or other unexpected delays (severe weather, labor problems, etc.) -- could keep us from reaching the goal set out in this initiative. We do believe that clean up will be completed or substantially completed on the additional sites covered by the initiative by 2000.

[August 18, 1996, 15:00]

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***Creation of up to 300,000 jobs.**

Brownfields cleanups and redevelopment creates jobs. For example, at a former Buffalo, New York steel mill site, after receiving a \$200,000 EPA Brownfield grant the site is being cleaned up and a hydroponic tomato farm will be constructed and 300 workers employed.

***Increased local property tax base.**

Brownfields cleanups and redevelopment help local governments expand their tax bases through increased economic activity. For example, in Cleveland, at a site where cleanup and redevelopment has already occurred and 182 new workers are employed, the City's tax base has increased by \$1.1 million.

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BACKGROUND

Brownfields sites are contaminated, abandoned, urban properties. The contamination is not serious enough for EPA to list the site on its ranking list of the worst sites requiring cleanup, but is serious enough that banks generally will not lend money for redevelopment because of their fear of potential liability for the contamination. Thus, the sites stay idled and remain a blight on our cities and communities.

The General Accounting Office estimates that there are some 450,000 brownfields sites in the United States. Of that number, EPA and the Department of the Treasury estimated that some 130,000 would be eligible for the Brownfields tax credit. That number provides an estimate of the number of sites that are good candidates for redevelopment. This program would, therefore, help cleanup as much as 25 percent of the sites that are candidates for redevelopment.

EPA Administrator Carol Browner announced EPA's Brownfields Action Agenda in January 1995. The Agenda includes activity in four broad areas:

- EPA funds pilot activities with \$200,000 grants to cities for site assessment;
- EPA has issued guidance to clarify the liability of prospective purchasers, property owners and others;
- EPA is working to build partnerships with states; cities and community representatives to develop strategies for promoting public participation in Brownfields decision-making; and
- EPA is joining with community colleges to develop long-term plans for job development and training in connection with Brownfields activities.

Potential Negatives

This proposal would only provide a marginal increase in sites (3,000, not 33,000) cleaned up. The proposal "double counts" the number of clean-ups that will result from the President's announced \$2 billion tax incentive (30,000 sites).

If the Brownfields clean-up component is rejected, it would be appropriate to consider adding \$40 million in Brownfield site assessments -- up to \$200,000 for each of 300 cities and potentially covering tens of thousands of additional Brownfields sites.

Making Water Safe and Clean for All Americans

[August 18, 1996, 15:00]

President Clinton is announcing a series of steps to stop toxic pollution from entering our drinking water sources and other streams and rivers, while providing new resources to state and local governments fighting toxic pollution. President Clinton is also taking strong executive action to meet these goals, making better use of existing authority to make polluters clean up toxics that threaten our lands and waters. President Clinton will also transmit to Congress additional proposals for Clean Water Act reauthorization that advance these principles and strengthen protection against toxic pollution -- especially from polluted runoff.

- ▶ ***Making Polluters Clean Up More Toxic Threats to Lands and Waters.*** Hampered by the limitations in a Reagan Administration executive order implementing Superfund, federal agencies often lack the authority to compel polluters to clean up toxic waste sites that threaten our lands and waters. President Clinton's is changing that order, and expanding the authority of Interior, NOAA, and USDA to compel polluters to clean up.
- ▶ ***Protection for Drinking Water Sources.*** Earlier this month, President Clinton signed a Safe Drinking Water Bill that enacts his proposals to strengthen the ability of EPA and state and local governments to protect drinking water supplies. However, Congress has not yet provided full funding for the program. President Clinton is now challenging Congress to restore the money for communities to protect their drinking water, through the Safe Drinking Water Revolving Fund that President Clinton proposed. The President will also seek additional funding for communities to protect their drinking water sources.
- ▶ ***Protecting Communities from Toxic Mine Wastes.*** As demonstrated by President Clinton's decision to stop the mining operation that threatened Yellowstone, mining operations can pose a serious threat our nations waters. Many of these threats -- from acid and other toxics draining into our waters -- come from abandoned mines where there is no viable party left to do the cleanup. To address these threats, the President is proposing a dedicated Hard Rock Mining Reclamation Fund and an expanded cleanup program to stop toxic discharges from hundreds of mines and restore thousands of miles of rivers to productive use.
- ▶ ***Targeting Farm Bill Resources to Reducing Toxic Cleanup.*** The 1996 Farm Bill provided a number of opportunities for USDA to work in partnership with local governments and soil conservation districts on voluntary, community-oriented conservation projects. The President is directing USDA to focus those programs on reducing toxic and agricultural pollution into our waterways, beginning with an effort to focus the Conservation Reserve Program on water quality goals. These efforts should result in water quality protection efforts covering more than 50 million acres of lands nationwide.
- ▶ ***State and Local Protection of Rivers and Beaches.*** The President is strengthening the partnerships with state and local governments that provide front-line protection of rivers

and beaches from toxic pollution. The President is directing EPA and NOAA to create new partnerships with state and local governments to control polluted runoff, and to manage critical coastal zone areas.

Investments: EPA (\$405 million); NOAA (\$65 million); Interior (\$155 million); USDA (\$10 million).

Potential Negatives

An announcement that includes the \$725 million for the SRF may be viewed as an inadequate financial commitment, when needs are estimated to be in the tens of billions of dollars. In addition, the \$65 million state grant program may be perceived by the states as an insufficient amount to develop a comprehensive source water program.

Expanding Every American's Right-to-Know About Toxic Pollution

To honor every American's right to know about toxic pollution in their neighborhood, President Clinton is today calling upon Congress to strengthen our right-to-know laws. The President also is announcing steps to enhance right-to-know by executive action. By the year 2000, EPA, the Department of the Interior, and NOAA will make more local environmental information about the quality of the air and water -- which for ordinary citizens can often be impossible to find -- available instantly for all American communities. This information would be coupled with information about food and products that present major risks to families. This new service would complement the information available from EPA's Toxics Release Inventory, which has been highly effective in informing citizens about chemical data from major manufacturing facilities in their neighborhoods.

▶ **A Call for Right-to-Know Legislation.** Our right-to-know laws, now more than a decade old, need to be strengthened across-the-board. Congress took small steps in this direction by enacting proposals to strengthen right-to-know in the new Food Quality Protection Act and Safe Drinking Water Act. President Clinton is now calling upon Congress to work with the Administration to finish the job, and enact right-to-know legislation that will:

1. Let communities know more about the toxics used in, and transported through, their neighborhoods -- reinforcing the steps President Clinton has taken by executive action;
2. Make sure companies disclose major potential health threats in their products;
3. Make sure that communities can enforce their rights of access to pollution information when polluters don't comply.

▶ **Making Right-to-Know Accessible for All Americans.** President Clinton is directing EPA to embark on a program to ensure that, by the year 2000, Americans have one-stop access to timely, safety and health-related information about local air and water quality in communities across America. For the first time Americans will easily find out whether the air and water in their community is healthy through computer links to schools, libraries, community centers, and homes. Most of this information is already collected but never made available to communities. Making this information readily available and usable will help families and communities make informed choices about their health, and the protection of their communities. For example, timely air quality information can mean the difference between hospitalization and a healthy day for an asthmatic child. Asthma is now the leading cause of hospitalization for young children in the United States.

▶ **Expanding Right-to-Know About Water Quality.** Federal agencies now have timely information about water quality for only half the nation's rivers, lakes, streams, and beaches. President Clinton is expanding the effort so that communities across American have information about their waters and beaches, that they can get this information easily.

Investments: EPA (\$250 million over 4 years); Interior (\$75 million); NOAA (\$5 million).

Potential Negatives

Right to Know is criticized as increasing the paperwork burden facing industry in a manner unrelated to real environmental risks. It also may be seen as akin to the controversy spawned by the National Biological Inventory. These concerns, however, should not apply to an approach that makes better use of existing reporting requirements and that focuses on vital common public health resources, such as clean air and water.

[August 18, 1996; 15:00]

Getting Tough on Environmental Crimes

Illegal dumping of toxics and other pollutants is real crime, and communities are the victims. Police, prosecutors, and investigators need better tools to protect our communities from the toxic threat posed by environmental criminals.

President Clinton is calling upon Congress to enact his Environmental Crimes Bill, which will strengthen community protection against environmental criminals. This bill will ensure that the assets of environment criminals can be secured even before conviction, and are used to restore the communities they victimize. The bill would impose stronger penalties for the worst environmental crimes, and strengthen our partnership with state and local prosecutors.

- 1. Prosecutors should be able to secure the assets of environmental criminals when they threaten our communities.*

Background. Criminal defendants are often able to shield their assets from prosecutors, and communities are often at risk that the damage done by the crime will remain unrestored.

Legislative Proposal

- ▶ President Clinton's Environmental Crimes Bill proposes new authority for prosecutors to secure the assets of environmental criminals, even before conviction, when those assets are needed to repair the environmental harm that has been done. Broader even than a lien, this provision will allow prosecutors, after a hearing, to secure any of the assets belonging to an environmental criminal, to make sure the money is there to clean up the environment for victimized communities.

- 2. There should be tougher penalties for the worst environmental offenses.*

Background: Current law has no provision for environmental criminals whose offenses result in death or injury to the public, including to police and other law enforcement personnel. There are no laws against attempted environmental crimes, which hampers efforts to capture criminals before environmental damage is done through "sting" operations and other undercover work. Current statutes of limitations have no exceptions for those who conceal their environmental crimes, with the result that some of the most egregious environmental crimes cannot be prosecuted.

Legislative Proposal

President Clinton's Environmental Crimes bill would:

- ▶ Enhance penalties for environmental crimes that result in death or serious bodily injury to law enforcement personnel or the public;
- ▶ Outlaw "attempts" to commit environmental crimes;
- ▶ Modify statutes of limitation to allow additional time for prosecution (not to exceed a total of eight years from the date of the violation) where a criminal tries to conceal an environmental crime

3. We should strengthen environmental law enforcement partnerships.

Background. Local law enforcement agencies often lack the resources to support environmental crimes prosecutions or to train their officers on detection and handling of environmental crimes. This problem hampers joint federal-state prosecutions, and has been made more urgent by the government shutdown and other efforts to cut EPA's enforcement budget and take the environmental cop off the beat.

Legislative Proposal

- ▶ President Clinton's bill would provide that state and local officials would be able to receive an award of their costs in joint prosecutions with federal authorities of environmental crime, and the cost award would be added to the criminal fine the defendant would have to pay.
- ▶ President Clinton will seek \$1,000,000 in new money for training and support of state and local law enforcement officials.

4. We should provide for restitution of those victimized by environmental crimes.

Background. The authority of courts to require environmental criminals to provide "restitution" to communities victimized by environmental crime should be clear. The communities that are victims of environmental crime should the right to have their environment and natural resources restored.

Legislative Proposal

- ▶ President Clinton's bill would clarify the law to ensure that the courts may order convicted criminals to pay restitution for their crimes, by making payments to remediate or restore the quality of the environment to the full extent that it is damaged by an environmental crime.

Potential Negatives

Maybe concern in industrial community about aggressive enforcement.

Protecting All Communities From Toxic Pollution

(DRAFT - August 19, 1996, 1:00PM)

"No child should have to live near a toxic waste dump. No child should have to drink water contaminated with chemicals. No child should have to eat foods poisoned with pesticides."

President Clinton, 3/11/96

- President Clinton is announcing a new national commitment to protect all communities from toxic pollution by the year 2000 -- by making our water safer and cleaner, accelerating cleanup of toxic waste, expanding families' right-to-know about toxic pollution in their neighborhoods, and getting tougher on criminal polluters.

1. Making Water Safe and Clean for All Americans.

President Clinton is announcing a new comprehensive program to stop toxic pollution from entering our rivers, lakes and streams, and contaminating our beaches.

- The President is directing all agencies to focus their existing programs on reducing toxic pollution, and to take the following new steps to make our waters safer and cleaner for Americans across the country:
 - EPA will expand its efforts to protect drinking water sources and eliminate toxic runoff in our communities;
 - Interior and USDA will clean up hundreds of abandoned mines releasing toxics into our waters, and restore thousands of miles of rivers to productive use;
 - NOAA will expand its partnerships with state and local governments to control polluted runoff and manage coastal areas; and
 - USDA will specifically target the authority and funding in the 1996 Farm Bill to the elimination of toxic pesticides and herbicides from our waters.
- President Clinton is issuing [will issue] an executive order to protect our waters by giving agencies new authority to make polluters clean up toxic pollution.

This is in contrast to the actions of the Dole-Gingrich Congress. President Clinton blocked regulatory "reform" and "takings" bills from the Contract with American and sponsored in the Senate by Bob Dole, that would have rolled back every kind of clean water safeguard. President Clinton vetoed the Dole-Gingrich budget that would have cut clean water funding by 29 percent and drinking water funding by 45 percent until the Congress restored almost all of it. The House passed a lobbyist-written "Dirty Water Bill" to dramatically roll back the Clean Water Act.

2. Accelerating Superfund Toxic Waste Cleanups in our Communities.

President Clinton is announcing a bold new commitment for toxic waste cleanup, pledging to clean up at least two-thirds of the 1387 toxic sites now on Superfund's national priorities list (NPL) by the year 2000.

- President Clinton is issuing an executive order to provide agencies with new authority to make polluters clean up toxic waste sites they created.
- President Clinton is calling for legislation to keep the Superfund funded and available for cleanups by reinstating the expired corporate taxes that support it, expand the current cleanup effort, and provide tax incentives for Brownfields cleanups.
- In three years, the Administration has cleaned up more Superfund toxic sites than in the previous 12 years combined. Under President Clinton, EPA has streamlined cleanups, reduced litigation and bureaucracy, and made common sense improvements to the Superfund program. These steps have made it possible for the President to commit to today's major acceleration of Superfund cleanups.

The Dole-Gingrich Congress waged a concerted effort to let toxic polluters off the hook by repealing the Superfund provisions that make polluters pay. President Clinton blocked the regulatory "reform" bill contained in the Contract and sponsored by Senator Dole that would have brought Superfund cleanups to a halt. President Clinton vetoed the Dole-Gingrich budget to cut Superfund by 25 percent until Congress restored all of his add-back proposal.

3. Expanding Americans' Right-to-Know About Toxics in Their Community.

President Clinton believes that every American has the right-to-know about pollution in their neighborhood, and he is committed to expanding the information available to families and making it easier for them to use it.

- President Clinton is calling upon Congress to increase publicly-available information about their air, water, and lands, by:
 - Letting families know more about the toxics transported and stored in their communities;
 - Making sure that communities can enforce their rights of access to information when polluters don't comply;
 - Requiring companies to disclose major potential health threats in their products.
- President Clinton is announcing two new executive actions to enhance right-to-know:
 - By 2000, EPA will make local environmental information -- which for citizens can often be impossible to find -- available on a timely basis for American communities. This will include a new "one-stop-shopping" site on the Internet.

] NO

- By the year 2000, the Administration will double the local water quality information available in libraries, schools, and on the Internet. This will give Americans nationwide the right-to-know about the quality of their lakes, streams, and waters, and will give them tools they need to make sure pollution is stopped.

President Clinton defended our communities' right-to-know about toxic substances against an array of legislative onslaughts, and twice expanded community right-to-know by executive action. When the Dole-Gingrich Congress attempted to use the budget to block right-to-know, President Clinton fought back with a "pollution disclosure" executive order and forced them to drop the measure. The Senate regulatory "reform" bill would have specifically rolled back the public's right-to-know -- and when Democrats offered an amendment to restore right-to-know, the Republican leadership sponsored a successful motion to take it out of consideration.

4. Getting Tough on Criminal Polluters.

Illegal dumping of toxics and other environmental crimes are real crimes, and our families are the victims. Prosecutors, police, and investigators need better tools to protect our communities from the toxic threat posed by environmental criminals.

- President Clinton is today calling upon Congress to enact his Environmental Crimes Bill, which will strengthen community protection against environmental criminals.
 - This bill will ensure that the assets of environment criminals can be secured quickly, and can be used to restore the communities they victimize.
 - The bill would impose stronger penalties for the worst environmental crimes, and strengthen our partnership with state and local prosecutors.
 - By outlawing attempted environmental crimes, the President's bill will make it possible to conduct undercover operations and otherwise to make an arrest before toxics are released into the environment. Current law does not allow prosecutors to stop environmental crime until the damage is done, and makes it easy for criminals to shelter the proceeds of their crimes.
 - The bill will authorize prosecutors to get a prejudgment order making placing criminal defendants' assets within the control of the court, to make sure those assets are available to clean up the environment.

The Dole-Gingrich Congress would have tied the hands of law enforcement, and given new rights to special interest polluters. President Clinton vetoed the Republican budget that cut EPA's enforcement by 25 percent until the Congress restored almost all of the President's add-back request. President Clinton and Democrats in Congress blocked a series of special interest budget measures to give well-connected polluters enforcement loopholes, such as one to allow oil refineries to avoid air toxic standards.

[**note: more specific contrasts and citations will be available]

THE WHITE HOUSE
WASHINGTON

August 16, 1996

TO: CAROL RASCO
BRUCE REED
LAURA TYSON
GENE SPERLING

FROM: DIANE REGAS (DPC)

CC: PAUL WEINSTEIN

SUBJECT: STATUS OF ENVIRONMENTAL INITIATIVE

Ongoing discussions to develop a bold, innovative environmental initiative are proceeding and I expect will lead to a proposal on Monday focussed on protecting American communities from toxic pollution. The initiative will include significant acceleration of toxic cleanups; expanded efforts to get toxics out of rivers, lakes and drinking water; innovative expansions of community right to know; and a proposal to get tough on environmental crime. The initiative is very positive, and would set out an aggressive agenda in these areas. The total cost of this initiative is likely to be at least \$1-\$2 billion per year.

A more focussed and less expensive alternative would announce a commitment to give people information about their local environment and give law enforcement agencies the tools they need to protect families and communities from toxics. The proposal would include providing access to environmental information for the biggest 50 cities and a proposal to get tough on environmental crime. While I do not have a final estimate from the agencies with the total cost of this initiative, with OMB's help I have estimated that the cost should be in the range of 35 million per year over the next 4 years (20 million for EPA and 15 million for DOI).

Provide Americans Access to Information that will Help Keep them Safe

By the year 2000, the Clinton Administration would ensure that Americans have one-stop access to timely, safety and health-related information about local air and water in the largest 50 cities, about products, food and drugs. For the first time Americans will easily find out whether the air and water in their community is healthy through computer links to schools, libraries, community centers, and home computers.

The information available will help families and communities make more informed choices about their health, and the protection of their communities. For example, timely air

quality information can mean the difference between hospitalization and a healthy day for an asthmatic child. Asthma is now the leading cause of hospitalization for young children in the United States.

The actions we would fund include creating a new system in cities to track and transmit information about air pollution--currently the information is limited and can not be accessed in real time. This initiative would expand water monitoring to include the nation's largest cities and would make all of the water information accessible--current water monitoring is limited to less than half of the country and is not generally accessible. In addition information and warnings about products would be included. This information would complement Toxics Release Inventory through which EPA collects only limited chemical data from some manufacturing facilities.

Getting Tough on Environmental Crime

President Clinton is challenging Congress to strengthen the hand of law enforcement when it comes to fight environmental crimes that threaten our communities with toxics.

Criminal prosecution of egregious violations of environmental laws is reserved for the most serious threats to public health and the environment, and depends heavily on close partnership between the federal government and state and local environmental, public health, and law enforcement agencies. Unfortunately, due to gaps in the current environmental laws, and the limited resources of state and local law enforcement agencies, too many environmental crimes now go undetected or inadequately punished. Too often, communities are unable to get criminal polluters to pay restitution for the damage they cause.

The President is calling upon Congress to enact, targeted reforms to the laws against environmental crime that meet three basic goals:

- *Strengthen the current law*, so that federal, state, and local prosecutors can more effectively pursue environmental criminals, and get their assets when they threaten our communities.
- *Strengthen our partnership with State and Local law enforcement*, by providing additional resources and training to state and local prosecutors and investigators who work to prosecute environmental crimes.
- *Empower communities to restore resources injured by environmental crime*, by clarifying the authority of courts to require convicted criminals to pay for cleaning up and restoring the environment they damage.

Potential Negative to a Narrow Initiative

A narrow initiative like this one would be appropriate for a locally-focussed announcement. It would be very difficult, however, to present this narrow initiative as "bold" or as representing the Administration's top priorities for accomplishments in the next few years. It precludes any claim that the Administration is committed to measurable progress on cleaning up rivers, air or water--and by omitting those elements may generate criticism that

the Administration does not have a vision for progress in the environment. If this initiative is significantly narrower than others being announced the same time, it could further feed the perception that the environment is a low priority for the Clinton Administration—undermining the existing strong message on the environment.

THE WHITE HOUSE

WASHINGTON

November 16, 1993

MEMORANDUM FOR CAROL RASCO
BRUCE REED
KATHI WAY

CLOSE HOLD
DPC BACKGROUND MEMO

FROM: BRIAN BURKE BB

SUBJECT: SUPERFUND REAUTHORIZATION

The purpose of this memorandum is to provide a background discussion about the Superfund program, the Interagency Policy Committee's (IAPC) legislative recommendations and the unresolved issues which may be elevated for Presidential resolution. The Superfund program is extremely complex and not easy to summarize without leaving out important sections. I have attempted to focus on those issues and aspects of the program which most directly relate to the ongoing debate about whether to abolish the present liability scheme (strict, joint, several and retroactive liability). Another issue for Presidential decision concerns municipal liability.

I have not included a detailed discussion about the specific private and public cleanup costs, transaction costs, or benefits associated with the Superfund program because the IAPC is still working with those numbers.

I. THE HISTORY OF SUPERFUND

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA) to regulate ongoing hazardous waste disposal. But when contamination from abandoned hazardous waste sites was discovered at sites such as Love Canal, Congress recognized that there was no federal law available to ensure the cleanup of such sites. Thus, in 1980 Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or the "Superfund") to clean up the nation's worst abandoned hazardous waste sites.

It was then anticipated that there would be a small number of high risk sites that could be cleaned up at low costs. However, numerous sites were discovered, most the result of careless chemical disposal practices. Old municipal landfills (that accumulated pesticides, cleaning solvents, batteries, paints and other chemicals found in trash), and other abandoned sites were also discovered. Consequently, it became clear that program costs would be higher than expected.

The Superfund law had a dismal beginning under the Reagan Administration (i.e., few cleanups as EPA Administrator Anne Gorsuch sought to gut the program, and EPA Superfund chief Rita Lavelle was convicted of perjury and sent to jail). But when Congress reauthorized the law in 1986 (the Superfund Amendments and Reauthorization Act of 1986, known as "SARA"), it toughened the enforcement program, established cleanup standards known as ARARs (discussed in program overview section) and boosted funding from \$1.6 billion to \$8.5 billion.¹ SARA set the groundwork increased cleanup efforts that has culminated over the last three years in annual cleanup commitments by responsible parties of between \$1.1 and \$1.5 billion, and a total of \$7.5 billion of ongoing or committed work at a majority of the 1275 sites on the National Priorities List.²

Recently, the Superfund program has generated a remarkable degree of agreement that the program is seriously flawed and not working well. The President articulated this sentiment in his State of the Union Address when he stated "So I want to bring a new spirit of innovation into every government Department...I'd like to use the Superfund to clean up pollution for a change and not just pay lawyers...." The present reauthorization process offers this Administration a critical opportunity to reform (as opposed to reinvent) the program with administrative and legislative measures. Almost everyone agrees that the goals of Superfund should be to eliminate any unreasonable risks to the public and the environment, as quickly as possible, using cost-effective cleanups, with public participation. The problems arise in trying to get all parties and the public to agree on what is an unreasonable risk and what is the best way to address the risk.

II. How Superfund Works: The Superfund Cleanup Program and Its Enforcement Mechanism

In general, Superfund provides a federal response to uncontrolled contamination of hazardous substances primarily from inactive and abandoned sites, but also from actively managed sites. It does this through a scheme of strict, joint and several liability imposed on a broad category of Potentially Responsible Parties (PRPs), and the establishment of a \$13.7 billion Fund created to provide for Federal financing for cleanups and remedial

¹ Superfund reauthorization in 1985 and 1986 was a long and messy process which left the program short on funds while Congress debated how to amend the program.

² The Omnibus Budget and Reauthorization Act of 1990, extended appropriations authorization through September 30, 1994, and the taxes that support the Superfund through December 31, 1995.

actions. The fund is financed primarily with a tax on crude oil, commercial chemicals, a corporate environmental tax, general revenues and interest.

In addition to the Superfund tax, the Superfund program consists of a cleanup program and an enforcement program (discussed below) to assure that PRPs pay for or perform the cleanup (the "polluter pays" principle). Under Superfund, the government can use money in the Superfund to initiate cleanups, called Fund-lead sites (although there is not enough money in the Fund to cover all cleanup costs), or they can order PRPs to cover the costs, called enforcement lead sites (70% of the cleanup work is presently being done by PRPs and reflects the one most successful component of the program).

A. The Superfund Cleanup Program

The cleanup program is divided into two responses: short term "removals" to deal with largely emergency containment and removal situations; and long-term "remedial actions" to permanently clean up sites.

EPA maintains an inventory of all toxic waste sites that they discover. The inventory is called CERCLIS (Comprehensive, Environmental Response, Compensation, Liability Information System) and includes almost 37,000 sites of which over 30,000 have been evaluated; the most risky have been addressed through response actions, and others are being addressed through remedial actions. The CERCLIS inventory is by no means exhaustive or rigorous; it generally includes what is brought to EPA's attention from States, communities and the public.

1. Removals

Removals may be performed at any site that comes to EPA's attention. With few exceptions such removals (called response actions) cannot exceed two years in duration and \$2 million in total costs. These removals are performed either by responsible parties under EPA oversight, or by EPA or the State using monies from the Fund.

EPA has performed over 3,000 removals to date. The consensus of responsible parties and environmentalists alike is that the removal program has been largely successful in reducing immediate health threats at a reasonable cost and in a timely manner. Actions taken include soil removals, containment (e.g., capping waste or enclosing it in buildings), and institutional controls such as providing bottled water and relocating neighborhoods.

2. Remedial Actions

Remedial Actions are taken at sites that are listed on the

National Priorities List (NPL) for the purpose of long-term cleanup. These include sites where response actions have already been taken but further cleanup is needed, or at sites that have not yet been addressed.

B. The Enforcement Mechanism

When Congress first enacted the Superfund cleanup program in 1980, it decided not to put the burden of paying for that cleanup on the average taxpayer, or even on a certain industry. In an attempt to approximate the common law principle of "polluter pays," Congress created a site-by-site liability scheme that would place the burden of paying for cleanup on those with an economic nexus to the site.³

Thus, Superfund has four categories of liable parties: owners of sites, operators of sites, and generators and transporters of hazardous substances that were sent to those sites. Very few defenses to liability are available to a person who falls into one of those four categories.

These parties are liable to either pay for the cleanup (called "cost recovery" claims) -- if the United States, a State, or another responsible party performs the cleanup; or to actually perform the cleanup, if ordered by EPA under Section 106 of the statute.

They are also liable to a state, federal, or Indian tribe trustee of natural resources for any damages to natural resources caused by contamination at the site. The Department of Interior and National Oceanic and Atmospheric Administration are the Federal government natural resource damage trustees. Determining the amount of natural resource damages has been controversial. For example, how do you define the value of a river.

Congress gave the strongest authority to EPA: if EPA brings an enforcement action against a responsible party, that party's liability is strict, joint and several, and retroactive. Thus, theoretically, the most stringent application of the law would hold a party who sent a thimbleful of hazardous substances to a 100 square mile site before Superfund was even enacted liable for cleanup of the entire site -- unless that party can show that the harm caused by its thimbleful can be distinguished from other harms at the site. (If the party can demonstrate the "divisibility" of its harm, it need only pay EPA or perform cleanup as to the harm that its waste caused). In practice,

³ Consistent with the polluter pays principle, the American taxpayer will pay \$300-500 billion to cleanup the nuclear/hazardous waste generated during forty years of Cold War.

however, a circumstance like that mentioned above could not happen because prosecutorial discretion prevents such cases from being filed and judicial sentiment would reject such an outcome.

In addition, EPA was given exclusive authority under Section 106 of the statute to compel a party to cleanup all or part of a site, through either a court order or an agency administrative order. The only defense to complying with a Section 106 order is if the party had a good faith belief that it was not liable, or that the cleanup required by EPA's order was not consistent with EPA's own regulations. A party refusing to comply with a Section 106 order is liable for up to \$25,000 a day in civil penalties, and, most significantly, a treble damages award. This means that if EPA issues a Section 106 order against a liable party to perform a \$10 million cleanup, and that party refuses without having a good faith belief that it was not liable or the cleanup required was improper, EPA can obtain a court judgment of 3 X \$10 million = \$30 million in treble damages.

The stakes involved in resisting a 106 order have resulted in few court challenges to such orders -- most companies will comply with a 106 order. Their compliance does not preclude them, however, from challenging EPA following the cleanup, or from seeking contribution from other parties for the costs of compliance.

Congress gave States similar authority for imposing strict, joint and several, and retroactive liability. However, States do not have Section 106 authority to compel cleanup -- although some states have enacted state laws authorizing Section 106-type administrative orders that also have the force of treble damages sanctions.

Congress mitigated the harsh effects of strict, joint and several liability by allowing private responsible parties to sue one another to determine their respective fair shares of liability. Thus, even if EPA or a State obtains 100% of a site's cleanup costs from a single responsible party (under the theory of joint and several liability), that party is empowered to bring a "contribution suit" against any other responsible party at the site and have a court determine each party's fair share of the total cleanup bill. In essence, by choosing a scheme that allows the government to seek joint and several liability, but then allowing responsible parties to sue each other for a fair share, Congress put the cost of allocating fair shares on private parties, rather than on the government. The result, after private litigation, would be that each responsible party would only have to pay its fair share, even if it initially was found liable to the government for 100% of site costs. While such private contribution litigation does not interfere with the actual cleanup, the public perception is that such lawsuits contribute to cleanup delays. Part of the concern stems from the way that large

PRPs are exercising their this authority by filing contribution lawsuits against municipalities, de minimis contributors and lenders. (This issue is discussed more fully below).

III. Principal Criticisms and Reauthorization Issues

The Superfund Program is enormously complex and expensive to society. Its weaknesses are recognized by virtually every stakeholder and are separated into the following six categories:

- High Cleanup Costs/Remedies are too expensive⁴
- High Transaction Costs
- Unfair Liability Scheme
- Unclear Federal/State Relationship
- Insufficient Community Involvement
- Imposes Impediments to Economic Development

In his first State of the Union address, the President recognized the need for Superfund reform. Consequently, with the Presidents mandate to reform the program, the IAPC has developed recommendations which address the major criticisms of the Program and will greatly improve the Superfund. Those consensus recommendations are discussed below.

A. Improve Remedy Selection: The following recommendations address the high cleanup costs and often inappropriate remedy selections associated with the Superfund cleanup program:

- Establish national cleanup standards;
- Incorporate future land use into cleanup decisions;
- Establish new statutory provisions that would define a range of acceptable technologies that could be used at typical sites ("presumptive remedies");
- Encourage the development and use of innovative, less expensive cleanup technologies.

B. Reduce Transaction Costs/Increase Fairness: the following recommendations are aimed at reducing transaction costs and improving fairness:

⁴ The average cost of cleanup has increased from about \$12 million to \$27 million and these costs are expected to grow as the more complex sites begin cleanup. Some believe these large costs reflect the fact that expensive Cadillac remedies are being required because of ARARS and the preference for permanence when a Model-T remedy will provide as much protection.

- Implement a streamlined system that would use neutral arbitrators with Superfund expertise to allocate costs among parties and to strongly encourage early settlement among responsible parties:
- Exempt from liability generators and transporters of the smallest amounts of waste ("de micromis parties");
- Allow generators and transporters of small amounts of waste ("de minimis parties"), and parties that have little or no ability to pay for Superfund (often small businesses), to settle their liability very quickly;⁵
- The federal government would provide limited funding for the share of cleanup costs attributable to parties that could not be found, or were no longer in business ("orphan" shares).
- Relieve from liability lenders and trustees, under specified circumstances.

C. Improve the Federal/State Relationship:⁶ The following

⁵ Industrial parties began suing pizza parlors, the Girl Scouts, churches, and other sympathetic non-industrial institutions based on household or commercial garbage that these groups sent to Superfund sites. The theory was that the waste these groups sent did contain hazardous substances (at very low concentrations) and thus these groups were theoretically jointly and severally liable for the entire cleanup of the site. De minimis parties sent very small volume, as well as very low toxicity, waste to these sites, but industrial parties found it advantageous to bring these types of suits, both because they could extract "protection money" (by suing and then settling with a pizza parlor for a few thousand dollars), and because they could create pressure on Congress against the liability scheme from a class of parties much more sympathetic than the typical industrial polluter.

⁶ States have been dissatisfied with the limited role in remedy selection afforded them by the statute, and are likely to seek an expanded state role during reauthorization. They would like to see Superfund become a delegated program like other Federal environmental programs. The question of whether to delegate the Superfund program to qualified states involves a number of significant issues. Most importantly, the willingness of states to assume the primary responsibility for administering a federal cleanup program largely hinges on the level of funding that will be made available. Furthermore, there are questions about the way federal funding would be made available (e.g., block grants, cost sharing), and what formulas would be used to differentiate between

legislative proposals for Superfund would enhance the state role in the program, and limit the overlap between the federal and state governments at specific sites:

- Offer States the responsibility and authority to clean up specific sites within their boundaries;
- Offer States access to federal cleanup funds under certain conditions (a state would be required to have in place a cleanup program substantially consistent with the federal program.)

D. Improve Community Involvement: The following recommendation seeks to involve the affected communities earlier and more effectively in Superfund decision making:

- Establish community workgroups to function as advisory bodies at Superfund sites regarding remedy selection, and defining future uses of restored sites;

E. Encourage economic redevelopment at restored sites: The IAPC proposals are designed to reduce current Superfund-related obstacles to the development of contaminated sites. These and other amendments would increase the incentive to invest in development projects at or near cleanup sites:

- Limit the liability of prospective purchasers of Superfund sites. Developers would have the option of being released from liability after meeting certain financial and legal conditions.
- Give protection from liability to lenders and trustees to remove the current disincentive to make loans on potentially contaminated property.

IV. ISSUES TO BE RESOLVED BY THE PRESIDENT

A. Whether to Eliminate Retroactive Liability:

1. Background

Claims Against Insurance Companies -- One of the most important dimensions of the liability issue is the litigation by responsible parties against their insurance companies to obtain indemnity for Superfund liability. As early as the 1940s, most insurance companies issued standard form "Comprehensive General

states that take on greater responsibilities and have more sites to address.

Liability" insurance policies -- with identical terms used for hundreds of policies throughout the country.

As a result, responsible parties have sought coverage for their liability under the terms of these policies. These policyholders have pointed to insurers' representations, made to the state insurance commissions whose approval was necessary for these policies to be issued, that they in fact intended to cover the type of pollution which characterizes much Superfund contamination. Nonetheless, the courts have split roughly evenly in deciding whether those policies cover Superfund liability.

Many responsible parties believe that the insurers made a policy decision early in such litigation to 'litigate to the death', given the enormous exposure that they would face if they admitted coverage for Superfund liability. A recent study by the RAND Corporation confirmed that 88% of the expenditures by the insurers studied were spent on litigation and site investigation costs, and only 12% on actual cleanup expenses. Conversely, transaction costs spent on litigation between responsible parties and the government represent only approximately 20% of the responsible parties costs (20% is significant and should be reduced, however, it is clear that the insurers costs are high because they have decided to not pay on their policies).

2. the Treasury Proposal--Eliminate Retroactive Liability

Department of Treasury, working closely with the insurance industry, has proposed that the Administration eliminate strict, joint, several and retroactive liability and replace it with proportional liability and a no-fault public works fund. Specifically, the proposal would (1) abolish retroactive liability (before 1980) so long as actions not unlawful at the time they took place; (2) apportion liability (after 1980) based on party's contribution to site; (3) exempt generators whose waste is accepted by a site operating under a RCRA permit; (4) have the orphan share at all sites picked up by Superfund; and (5) preempt State laws governing these sites.⁷

The proposal would provide a bail-out for the insurance industry leaving the American taxpayer, and industry paying the tab.⁸ The most obvious problems are described below:

⁸ The proposal would require that the Superfund revenues be increased. The fund is presently financed primarily with a tax on crude oil, commercial chemicals, a corporate environmental tax, general revenues and interest.

- Increased government costs: The government would have to pick up at least \$16 to \$18 billion of the cost of cleanup that is now being paid by PRPS, over the next ten years according to EPA's estimate. The Treasury proposal does not identify how that amount would be raised;
- Would increase lawsuits and transaction costs by creating many new sources of litigation: Even a cursory reading of this scheme indicates a drastic increase in the complexity of the already complex Superfund program. It creates five different liability schemes, with five different evidentiary scenarios (which can easily overlap). This would be a "windfall" for litigators. PRPs would sue the government more (1) over eligibility for cutoff date, stimulating extensive discovery/litigation over who sent what waste when to a site; (2) to reduce their proportion of liability, and (3) over whether and how to refund the \$7.5 billion spent by or committed by thousands of parties over the history of the program. (Without such a refund, the Treasury proposal would send a message that rewards parties who refused to clean up under the "old" Superfund system and penalizes companies that stepped forward and did the cleanup under prior law);
- Exchanges the "unfairness" of the current joint and several liability scheme for another unfairness: Relies on an arbitrary cutoff date that unfairly penalizes parties who sent wastes one day after the cutoff date, yet were similarly or even better situated (e.g., complied with laws to a greater extent) than parties who sent wastes prior to the cutoff;
- Creates pressure for fewer and less protective cleanups: By creating a finite cleanup fund (for the pre-1980 sites, which would cover about 60% of the current sites that doesn't draw upon the resources of PRPs in an open manner, proposal will create competition among sites based on cost, not just threat; Cleanups for pre-1980 sites will be determined by the amount the appropriations committees provide out of the Trust Fund, and face competition with deficit reduction and other tradeoffs;
- Compounds potential for waste, fraud and abuse and expands rather than contracts the federal bureaucracy: EPA has recently gotten PRPs to perform cleanups at about 70% of sites. For the 60% or more of pre-1980 sites for which liability is abolished under the Treasury approach, there will be a presumably publicly-run cleanup program, which will require massive staff increases to the bureaucracy needed to run such a program and multiply the potential for waste, fraud and abuse by poorly managed government cleanup contractors;

- Abolishes incentives for pollution prevention: generators whose liability evaporates once they send waste to a RCRA permitted site will have less of a continuing incentive to reduce the quantity or toxicity of their wastes. Why would anyone want to curtail bad practices when they know that the public trust fund will cover the cleanup costs;

In short, the proposal attempts to utilize Superfund reauthorization to pre-empt state contract law and to abrogate the insurers contractual obligations to its corporate policyholders. Insurance companies want to reduce the money they may have to pay at Superfund sites.

B. How to handle Municipal Liability

Another important area of liability that is particularly politically important and remains unresolved by the IAPC concerns Municipal Liability

1. Background

In 1989, EPA issued a policy indicating that it would not even name as a "potentially responsible party" any generator or transporter of municipal solid waste -- akin to household garbage -- if there was no specific evidence that the waste sent to the site in question actually contained hazardous substances.

Nonetheless, other responsible parties did not hesitate to sue such municipalities, based on generic studies of municipal solid waste showing the presence of between 0.5 and 2% hazardous substances (household cleaners, ink, batteries, etc.). If a municipality sent to a landfill any household garbage which theoretically contained hazardous substances, it was theoretically jointly and severally liable for the entire cleanup of the landfill.

Municipally owned or operated landfills, however, fall into a different category. Many municipalities owned or operated landfills which later became Superfund sites. Both EPA and private responsible parties have sued those municipalities, even when the municipalities operated the landfills in accordance with the best practices or regulations of the time, received state-sanctioned operating permits, and were discharging a public service function.

Approximately 25% of the sites on the NPL are sites where municipal solid waste was disposed along with industrial waste. Therefore, the potential for municipalities, whether as owner/operators or generators and transporters of municipal solid waste, to be brought into the Superfund liability scheme is enormous. Municipalities have asked for relief through: a cap on liability not to exceed 4% of total site costs, protection from

private contribution suits, and an expedited and favorable settlement regime with EPA.

2. Option I

The IAPC has two options which may be sent to the President. Option I proposes to amend the law to establish a separate settlement process for Municipal solid waste generators and transporters. Their aggregate share of cleanup costs at any site would be limited to 4-10 percent of total cleanup costs, depending on site specific factors. All agencies except CEA support this option.

3. Option II

CEA believes that municipalities should not be allowed special treatment under Superfund. Rather, the relatively low toxicity of municipal solid waste should be considered when cleanup costs are allocated among responsible parties.

CONCLUSION

The purpose of this memorandum was to provide a brief discussion of the Superfund Program, its criticisms and the controversial and unresolved IAPC options that will be sent to the President. There are additional, lesser, recommendations that I have not discussed. I am available to discuss these issues at your convenience.

THE WHITE HOUSE

WASHINGTON

January 24, 1994

MEMORANDUM FOR T.J. GLAUTHIER
KATIE MCGINTY

FROM: BRIAN BURKE **BB**

CC: CAROL RASCO
BRUCE REED ✓
MARCIA HALE
PAT GRIFFIN
CHRISTINE VARNEY

SUBJ: Draft Superfund Reauthorization Bill

As I have mentioned, the Administration's Superfund reauthorization bill contains one amendment which is wholly inconsistent with this Administration's Tribal policy, would cause severe financial hardship to tribes and tribal governments, and is not in the President's best interest politically. Specifically, the Administration Bill¹ seeks to amend Superfund section 101(21) to include "Indian Tribes"² within the definition of "person" under the Superfund law. The practical effect of this amendment is that Tribal governments (Indian Tribes and perhaps individual tribe members) could become liable for millions of dollars in response costs and natural resource damages resulting from hazardous substance releases on tribal lands. At present, Indian tribes, tribal governments and tribal corporations are not specifically included under the definition of persons in CERCLA. The proposed amendment represents a radical and unwarranted departure from the status quo. It is this Administration's policy to work with tribal governments in their effort to improve the well being of their populations.

The costs associated with making tribes and tribal governments liable for response costs and natural resource damages are uncertain and were never discussed by the Interagency

¹ See Title VII -- State And Tribal Roles; Subtitle B -- Indian Tribes; p. 83, line 4-7. (Attached).

² The actual amendment adds "Indian Tribes" to the class of liable parties. As a legal matter this term is vague and may be interpreted even more broadly than intended, extending liability to individual tribe members.

Policy Committee. Any such calculation would depend on a variety of variables including the number of claims brought, the number of other Potentially Responsible Parties, and the scope of tribal liability. Thus, any cost calculation would be highly unreliable and speculative. Nevertheless, it is beyond dispute that given the character of the Superfund program, particularly with respect to the highly controversial and unknown natural resource damage costs, the amount at issue would be well into the multi-million dollar range. These costs should not be shifted from PRPs or the Federal government, to tribal governments or Indian tribes.

Politically, this would be vigorously opposed by the Tribal community. It would be interpreted as a betrayal of administration policy and as an encroachment on tribal sovereignty. Additionally, it would be unconscionable to impose the highest standard of liability (and huge costs) on the same tribal entities that have historically received a disproportionate share of this country's environmental resources, including money for infrastructure, compliance, etc. Consequently, the amendment would raise doubts about the Vice President's, the EPA Administrator's and the Administration's commitment to environmental justice issues.

The DPC recommends strongly that this amendment be removed from the Administration's Superfund Reauthorization Bill. DPC is not opposed to amending the definition of liable persons to include those tribal corporations that are not alter egos of the tribe.

TITLE VII -- STATE AND TRIBAL ROLES

SUBTITLE B -- INDIAN TRIBES

Sec. 711. DEFINITIONS.--

(a) The definition of the term "person" in section 101(21) is amended by inserting after the word "State" and before the word "municipality":

"Indian tribe"

(b) The definition of the term "owner or operator" in section 101(2)(D) is amended by inserting the following at the end of the first sentence of the subsection:

"or Indian tribe that would be a liable party under section 107(a) solely because it holds an ownership interest in the property on which there is a release or threatened release of a hazardous substance."

(c) Section 101 is amended by inserting a new subsection 101(39):

"(39). The term "Indian cultural resource" means archeological, historical, and burial sites, and such other resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by an Indian tribe, or if such resources are subject to a trust restriction on alienation, any member of an Indian tribe. An Indian cultural resource may also be a natural resource, as defined in subsection 101(16).

Sec. 712. DAMAGES TO INDIAN CULTURAL RESOURCES.--Section 107(a)(4) is amended by adding the following new subsection 107(a)(4)(E) following subsection (D):

THE WHITE HOUSE
WASHINGTON

December 23, 1993

MEMORANDUM FOR CAROL RASCO

FROM: BRIAN E. BURKE ^{BF}

CC: BRUCE REED
KATHY WAY
BILL GALSTON

SUBJECT: MEMORANDUM FOR THE PRESIDENT
CONCERNING SUPERFUND REAUTHORIZATION

After six months of vigorous and contentious debate, the Superfund Interagency Policy Committee ("IAPC") has reached consensus on a Superfund legislative reform package. John Podesta sent a short version of the proposed package to the President on December 23, 1993 (Attached at Tab A). John has asked for our comments. My comments, set forth below, focus on those sections of the decision memo that are problematic.

As background, it is essential to note that early in the IAPC deliberative process it was agreed that "pure policy" would be discussed, without consideration of politics. Thus, political considerations must now be analyzed.

SECTION I. Action-Forcing Event

This section does not convey the urgency of moving quickly on Superfund. Virtually all interested parties agree that it is imperative to reauthorize CERCLA during this Congress. Failure to reauthorize Superfund would likely trigger a ramping down of the program and without a renewed, assured source of funding, the government would be precluded from signing contracts for site cleanups several months prior to expiration of the current tax authority. The political implications would be enormous. Consequently, the administration's goal must be to introduce a bill by no later than January 25, 1994. The message from Capitol Hill¹ remains clear and unequivocal; they must hold Superfund hearings in the first two weeks of February, and they need a vehicle to do so. Consequently, they will introduce a bill on

¹ Staffers for Lautenberg, Minetta, Dingell, Swift and Baucus have been sounding the alarm during negotiations on the Hill.

January 25 whether it is the Administration's bill or the keystone Commission's² to avoid wasting yet another month. The Hill can not afford to wait any longer for the Administration. They have been urging us to act quickly for more than six months and can no longer jeopardize their own circumstances. This is a good example of the political reality that the IAPC opted not to consider.

It would be politically embarrassing if the Administration does not timely introduce the Superfund reauthorization package/vehicle, especially in light of the President's Superfund reform comments.

Once the President has approved the legislative reform package, the administration must give EPA clearance to draft the legislative language expeditiously. The concern is that despite the fact that this is an EPA regulated, DOJ enforced program, the IAPC will expect to be actively involved in the legislative process. This unproductive level of micro-involvement by the IAPC would undoubtedly result in sizeable delay. Considerable time and energy has already been wasted in this process, and the potential for political embarrassment, especially during the coming election year, looms larger as each month passes.

SECTION III. Proposed Initial Administration Position On CERCLA Reauthorization

The Proposed Reform of the Insurance-Litigation System (page 3)

This aspect of the IAPC Superfund reform package has considerable potential for political embarrassment. For the following reasons, I feel strongly that the administration should not include an insurance-litigation allocation scheme in its Superfund reauthorization package:

- **Insurance Litigation is Private Sector Matter.** Insurance coverage litigation is an exclusively private sector matter involving sophisticated private sector parties and complex contracts which are governed by state law. Specifically, the federal government does not have any expertise to offer in such complicated legal matters, and intrusion may unnecessarily complicate the process of deciding coverage questions. To address the skyrocketing transaction costs associated with protracted coverage

² The National Commission on Superfund (Keystone Commission) includes CEOs from manufacturing, chemical, petroleum, insurance, and banking industries, as well as environmental, scientific, community, and labor leaders. They have reached consensus on many of the same issues that they administration has been in prolonged debate.

litigation,³ the federal government should instead facilitate dialogue between the insurers and their policy holders. There are no benefits gained by doing this. ;

• **The \$ 500 Million Tax Is An Underestimate and Is Highly Speculative.** The annual costs associated with the Superfund related cleanup program are uncertain and speculative. Nobody knows what the costs of clean-up will be in the future because some of the largest sites have not been studied and have not had remedies selected. Additionally, natural resource damage remediation costs are highly uncertain (e.g., how much does it cost to restore a contaminated river or aquifer). For these reasons the \$ 500 amount is not verifiable, reliable, or certain number. Therefore the tax would be random and although already leaked to the Wall Street Journal, should not be further publicized, and most certainly should not be part of any administration legislative package.

• **The \$ 500 Million Tax May be A Political Risk.** Despite the fact that the insurance industry has privately agreed to be taxed in the amount of \$ 300 million annually (for only ten years), the administration's imposition of such a large tax may be an unnecessary political risk, particularly since the number is so speculative and would most likely have to be increased. Instead the Administration, as noted above, should facilitate a dialogue between the insurers and their policy holders to develop a mechanism for allocation of cleanup liability and for considering potential taxation amounts.

SECTION III. B Reforming the Remedy Selection Process (page 5)

I am also concerned that the decision memorandum does not explain that several components of the proposed reform measures will render the program less protective of human health and therefore will be opposed on Capitol Hill, with environmental and community groups.

Specifically, (1) for the first time in the history of the country the Administration's proposal would establish (by statute) a risk range for non-cancer health risks or "other health effects" (e.g., birth defects, liver disease, kidney disease, etc.). Each of the health agencies, and OSTP have stated emphatically that such a range for protectiveness can not be achieved, particularly where there are additive effects which result from commingling of multiple contaminants. Additionally, (2) the proposed legislative package advocates developing

³ Regarding transaction costs, there is a common misunderstanding that delays in site cleanups are caused by Superfund resources being used to pay attorney fees. That is not correct.

national cleanup levels for the most common contaminants using several factors including costs. This veiled cost/benefit proposal is to the right of the Keystone Commission, the Hill, the environmental groups and community organizations and accordingly will be opposed.

RECOMMENDATION

I am available for any questions regarding these issues. I recommend that the insurance allocation scheme be removed from the legislative reform package and that the remedy selection section be reworked to address the issues discussed above.

WHITE HOUSE STAFFING MEMORANDUM

DATE: 12-29 ACTION/CONCURRENCE/COMMENT DUE BY: 1-4 noon

SUBJECT: Supersfund Reauthorization

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	PASTER	<input checked="" type="checkbox"/>	<input type="checkbox"/>
McLARTY	<input checked="" type="checkbox"/>	<input type="checkbox"/>	QUINN	<input type="checkbox"/>	<input type="checkbox"/>
NEEL	<input type="checkbox"/>	<input type="checkbox"/>	RASCO	<input checked="" type="checkbox"/>	<input type="checkbox"/>
PANETTA	<input checked="" type="checkbox"/>	<input type="checkbox"/>	RUBIN	<input type="checkbox"/>	<input type="checkbox"/>
BAGGETT	<input type="checkbox"/>	<input type="checkbox"/>	SEGAL	<input type="checkbox"/>	<input type="checkbox"/>
EMANUEL	<input type="checkbox"/>	<input type="checkbox"/>	SEIDMAN	<input type="checkbox"/>	<input type="checkbox"/>
GEARAN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	STEPHANOPOULOS	<input checked="" type="checkbox"/>	<input type="checkbox"/>
GERGEN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	TYSON	<input checked="" type="checkbox"/>	<input type="checkbox"/>
GIBBONS	<input type="checkbox"/>	<input type="checkbox"/>	VARNEY	<input type="checkbox"/>	<input type="checkbox"/>
HALE	<input checked="" type="checkbox"/>	<input type="checkbox"/>	WATKINS	<input type="checkbox"/>	<input type="checkbox"/>
HERMAN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	WILLIAMS	<input type="checkbox"/>	<input type="checkbox"/>
LAKE	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
LINDSEY	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
McGINTY	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
MYERS	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
NUSSBAUM	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS:

RESPONSE:

JOHN D. PODESTA
 Assistant to the President
 and Staff Secretary
 Ext. 2702

✓

THE WHITE HOUSE
WASHINGTON

December 23, 1993 **DEC 23 P7:57**

MEMORANDUM FOR THE PRESIDENT

FROM:

LBH KM
Katie McGinty & Bo Cutler

SUBJECT:

Administration Proposal for
the Reauthorization of Superfund

This memorandum sets forth for your approval a proposed Administration position on reauthorization of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)--commonly known as "Superfund." While this memorandum represents a consensus among the many agencies concerned with Superfund, that consensus will inevitably be revised and amended in response to the concerns of Congress and interested groups. In short, this memorandum sets forth our *initial* position in what will be a complex legislative negotiation.

I. ACTION--FORCING EVENT

CERCLA expires at the end of this fiscal year; the Superfund taxes on the oil and chemical industries expire a year later. Virtually all interested parties agree that it is imperative that CERCLA be reauthorized in this Congress. Our goal is to introduce a new CERCLA bill, with the support of Congressional leaders, in February 1994.

II. BACKGROUND

CERCLA was enacted in 1980 in response to widespread concerns that improperly disposed wastes threatened human health and valuable natural resources, such as groundwater aquifers. Under CERCLA, 200 disposal sites have been fully restored and 3,500 actions to remove wastes have been completed.

The costs of CERCLA have been underestimated since the program's inception. When enacted in 1980, CERCLA was widely regarded as a program of modest size: most believed that the Act would involve several hundred waste sites and less than \$2 billion in federal funds. By 1992, however, 1,300 sites had been placed on CERCLA's National Priorities List (NPL) for Superfund cleanup and annual costs to the economy of the program totaled almost \$7 billion, including:

- \$1.6 billion in Superfund costs;
- \$3.2 billion in CERCLA-mandated cleanups by other federal agencies (primarily DoD and DoE); and
- \$2.0 billion in costs to private parties, which directly perform cleanups at 70 percent of the sites.

While estimates vary widely, the total costs of cleaning up the 3,000 sites projected to be included in the NPL over the next 30-40 years will likely total \$130-150 billion. Cleanup costs for federal facilities will likely total an additional \$200-300 billion.

Government officials, business leaders, environmentalists, academics, and others have sharply criticized CERCLA. In particular, these criticisms have focused on:

- Unnecessarily expensive cleanups--The average cost of remediation at an NPL site is \$27-29 million.
- Excessive transaction costs--CERCLA has generated massive amounts of litigation--enforcement litigation, contribution litigation, and insurance litigation. A widely-cited RAND study found that transaction costs total 19-27 percent of all CERCLA costs.
- Unfair liability rules--The broad reach of CERCLA's retroactive, strict, joint and several liability scheme has been criticized as unfair and inefficient.
- Inadequate community involvement--CERCLA has been criticized for providing inadequate opportunity for input from those most likely to be affected, namely, the local community.

Our proposed plan to reform CERCLA, set forth below, addresses all of these concerns.

III. PROPOSED INITIAL ADMINISTRATION POSITION ON CERCLA REAUTHORIZATION

Given the complexity of the CERCLA regime--with its impact on everything from federal facilities management to abandoned mines, from insurance law to cancer-risk assessment--our consensus package is intricate. This memorandum focuses on the two most contentious and fiscally most significant areas of reform: the process for assigning and financing liability under CERCLA, and the standards and processes governing the cleanup of NPL sites.

A. Reforming the Liability and Allocation Systems: Reducing Transaction Costs While Enhancing Fairness

The Status Quo. In general, CERCLA currently involves three classes of litigation:

- enforcement litigation, in which EPA pursues the major potentially responsible party (PRP) or parties;
- contribution litigation, in which the initial potentially responsible party seeks partial recoveries from other PRPs; and finally,
- insurance litigation, in which each PRP seeks to recover from its insurer.

In each class of litigation, there is substantial uncertainty--about both the facts and the law; accordingly, litigation costs tend to be large.

The Proposed Reform of the Allocation System. We propose reforms that would essentially bring together the first two classes of litigation into a single process and, at the same time, enhance the fairness of the current regime. The highlights of this system include:

- Parties that contributed very small amounts of waste would either be exempted from liability or offered early settlements.
- The remaining parties would then participate in an "allocation proceeding" in which a neutral third party would assign each PRP a share of liability based on several factors including the quantity and toxicity of its wastes.
- The allocation decision would then serve as the basis of a settlement offer by EPA to each PRP.
- Any settling PRP would both surrender its right to pursue contribution litigation and receive protection from contribution litigation. More importantly, the settling PRP would, subject to certain conditions, be offered protection from future liability for newly discovered harms.
- As an additional incentive to settlement, the Government would pay for the "orphan share"--the share of liability attributed to an identified but insolvent party--when the other parties at a site settle.
- The Government could sue any non-settling party under the rule of joint and several liability, rendering that party potentially liable for part or all of the "orphan share."

We believe this scheme will significantly reduce contribution litigation and related transaction costs, while at the same time enhancing the actual and perceived fairness of CERCLA.

The Proposed Reform of the Insurance-Litigation System. We also propose replacing the current insurance-litigation system with a settlement fund, financed through a tax or fee on property and casualty insurers.¹ (The idea of such a tax was originally suggested by the insurance industry.) Under this system,

- A tax would be imposed on insurers in order to establish a new Insurance Settlement Fund.
- The statutory objectives of the Fund would be (i) to ensure settlement of insurance claims by at least 95% of all PRPs who have CERCLA liability and who participate in the new allocation process, and (ii) to ensure substantial interstate equity in such settlements.
- The Fund would offer to settle insurance claims with PRPs at an established rate (e.g.,

¹ We currently estimate that the tax would be \$500 million per year; however this may be an underestimate, as natural resource damages and other factors have not yet been taken into account.

50 cents on the dollar).²

- Any party accepting this settlement would waive its insurance claims; any non-settling party could sue its insurers, with the Fund reimbursing the insurer for up to the amount of the original offer.

In part because insurance litigation is governed by state law, insurer liability is highly uncertain. These uncertainties--and the insurers' obligations to reinsurance companies--fuel extraordinary transaction costs: studies estimate that more than 80% of all insurer CERCLA costs are attorneys' fees. Our proposed reform seeks to take advantage of that situation by settling claims at a level higher than most PRPs would receive through litigation, but at a cost less than or equal to insurers' current expenditures. Accordingly, we believe that this proposed reform will not only reduce transaction costs, it will also redirect monies that are currently being spent for attorneys' fees toward the cleanup of hazardous wastes.

Views of Interested Groups. Comprehensive Superfund reform recommendations have been issued by two groups: the National Commission on Superfund (Commission) which includes CEOs from manufacturing, chemical, petroleum, insurance, and banking industries, as well as environmental, scientific, community, and labor leaders, and the National Advisory Council on Environmental Policy and Technology (NACEPT), which was convened by EPA and involves a wide range of interested parties. The recommendations of these groups provide a strong indication of where the political center exists on Superfund reform issues.

With regard to reform of the allocation process, the Commission and NACEPT, as well as some PRP groups, favor a more formal, binding, and elaborate administrative-adjudication system, most likely because such a scheme would function as a proportional liability system that would reduce their liability. We believe such a scheme would both be more expensive to administer and increase Superfund's liability. Congressional leaders are likely to view the proposed reforms of the allocation system as generally positive, but be somewhat skeptical of the budgetary impacts of a federally funded "orphan share."

With regard to reform of the insurance-litigation system, the Commission has not endorsed the concept but has indicated its willingness to pursue it. With respect to our specific proposal, the insurance companies have generally supported this approach, but urge several revisions, most designed to encourage settlement and reduce the level of settlement offers. Reactions by individual PRPs have been mixed, reflecting the varying strength of the PRPs' claims against their insurance carriers. Obviously, the appropriate level of settlement offers (and the total amount of the tax) is a matter of great sensitivity. With your approval, we will discuss these issues further with both insurers and PRPs. Our goal would be for the insurers and the major PRPs to negotiate these issues and propose to us acceptable numbers. Several major

² Our initial position is that the amount that the Fund would offer to PRPs in settlement of insurance claims would be capped at 80% of a PRP's total costs.

players have indicated their interest in this kind of approach. Finally, Congress and environmental groups are likely to respond favorably to this solution, so long as this reform reduces neither the speed of, nor the monies available for, cleanups.

The principal issue presented by this proposal concerns its financing. Our proposal, we believe, offers a plausible resolution of insurance-litigation problems, but requires a tax or fee on the insurance industry. Some on Capitol Hill and in the industry may well criticize this, however, as "yet another tax." While we could hope to secure significant industry support for this proposal, we will not be able completely to avoid this criticism because it is nearly certain that not *all* of industry will be supportive.

**B. Reforming the Remedy Selection Process:
Protecting Human Health and the Environment While Reducing Costs**

The Status Quo. In general, the cost of cleaning up sites is viewed as unnecessarily high for the following reasons:

- The statute does not specify a standard national level of cleanup and instead establishes a complex framework based on other state and federal standards, as well as other factors, which sometimes leads to excessive cleanup requirements, protracted site-by-site evaluation and debate over goals.
- CERCLA establishes a preference for treating, as opposed to containing, contaminated materials at all sites.
- There is no mechanism for weighing future land use in cleanup decisions at individual sites, which has meant that almost all sites are cleaned up to very protective residential standards.

The Proposed Reform of the Remedy Selection Process. We propose reforms that would protect human health and the environment while at the same time substantially reducing cleanup costs and inefficiencies. Highlights of our proposed reforms include:

- EPA would develop national health standards in the form of a range of protectiveness for cancer risks and for other health effects.
- EPA would develop national cleanup levels for the most common contaminants found at sites. The levels would fall within the protective range of the national health standards and would be developed using several factors including cost.
- Realistic, as opposed to overly conservative, assumptions and practices concerning risk would be used to establish the national standards and cleanup levels.
- Cleanup levels and remedies would be based on post-cleanup land uses (e.g., residential or industrial) that would be determined with substantial community input.
- The current complex framework of state and federal standards ("applicable, relevant, and appropriate requirements") would be eliminated in favor of uniform national health standards.

- At each site, a comparison of the benefits and costs of alternative remedies would be a factor in choosing the appropriate remedy, consistent with the approach of your Executive Order on Regulatory Planning and Review.
- The preference for waste treatment and permanence as a requirement in selecting remedies would be replaced with long-term reliability as one of several balancing factors in making such selections.

Views of Interested Groups. Most groups generally agree that costs should be recognized more explicitly in cleanup decisions. The Commission and NACEPT have not, however, recommended using cost as a factor in setting national cleanup levels, which they believe should be strictly health based. The public health community and some members of Congress agree. In short, we will be criticized by some groups for "placing a price on lives." While we recognize the potential for this criticism, the agencies participating in this process agreed that the high cost of the Superfund program requires that cost be included when decisions are made concerning the level of risk that will be tolerated.

Instead of weighing cost as factor in setting national cleanup levels, NACEPT and the Commission would include cost as a factor in selecting remedies at individual sites. However, they have not gone so far as to state that costs and benefits should be compared.

The Commission recommends that 10^{-6} (a one-in-a-million added risk of contracting cancer) should be the health protection goal in remedy selection. This is at the most stringent end of EPA's current range for cancer risk of 10^{-4} to 10^{-6} for Superfund. Our proposal is to retain the flexibility of a range for cancer risk and to introduce a range for other health effects. Because setting a range for other health effects is not current practice, we will face a hurdle, both technical and political, in adopting it.

There is general agreement that the current statutory preference for permanence and treatment should be modified, but replacing it with long term reliability as a factor in remedy selection may be controversial. The Commission and NACEPT propose limiting the preference for treatment to "hot spots" or areas with high levels of contamination. Some Congressional staff would prefer to keep the preference for permanence in some form to ensure EPA requires treatment in circumstances they consider appropriate. We believe that our proposal will protect human health and the environment but allow EPA the discretion to use other than treatment remedies where appropriate. Elimination of applicable state standards in favor of uniform national standards (unless states fund the incremental cost) will be controversial with states and some members of Congress.

IV. COST IMPLICATIONS AND BUDGET IMPACT OF THE PROPOSED REFORMS

Final cost data on the proposed reforms are currently not available. At this time, however, OMB estimates that the proposed reform of the allocation and remedy selection systems would reduce public and private costs at NPL sites by 9 to 14 percent per year, including:

- a reduction in private costs of \$600 to \$730 million per year (a reduction of 27% to 33%);
- an *increase* in public costs (due primarily to orphan share funding) of \$180 to \$250 million per year (an increase of 10% to 14%).

In addition, NEC staff estimate that the proposed reform of the insurance-litigation system would reduce total costs by an additional 4 to 5 percent (by reducing private transactions costs by \$150 to \$200 million). We also anticipate proportional reductions in the costs to other federal agencies charged with cleaning up federal facilities (better estimates of these savings will be completed in the next few weeks).

Overall, this proposal would be budget- and deficit-neutral, as increases in public expenditures would be offset by increases in tax revenues (generated by reduced corporate deductions for cleanup costs).

V. RECOMMENDATION

We recommend that you authorize us to present this package as the Administration's initial position in the reauthorization of CERCLA. We are establishing a process for managing continuing negotiations with Congress and with other interested parties.

___ Agree

___ Disagree

___ Need to Discuss