

# Role of Injunctive Relief and Settlements in Superfund Enforcement

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## THE ROLE OF INJUNCTIVE RELIEF AND SETTLEMENTS IN SUPERFUND ENFORCEMENT

In December 1980, Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), commonly known as "Superfund,"<sup>1</sup> to deal with the immense and growing problem of hazardous waste disposal. Superfund's twin aims were to provide for the rapid cleanup of hazardous waste sites and to provide incentives for the careful handling of chemical waste.<sup>2</sup> To accomplish these aims, the statute created a \$1.6 billion fund<sup>3</sup> financed through new taxes on the oil and chemical industries,<sup>4</sup> appropriations from general revenues,<sup>5</sup> and damages and penalties from lawsuits arising under the statute.<sup>6</sup> Superfund permitted the federal and state governments to take immediate action to clean up hazardous waste sites and then to sue those responsible for the sites to recover cleanup costs.<sup>7</sup> Congress thus recognized the need for expedited cleanup operations and concluded that litigation regarding liability for cleanup costs could postpone remedial efforts indefinitely.<sup>8</sup>

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<sup>1</sup> Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9657 (Supp. V 1981)).

<sup>2</sup> See Note, *Joint and Several Liability for Hazardous Waste Releases under Superfund*, 68 VA. L. REV. 1157, 1173 (1982).

<sup>3</sup> See *Implementation of the Comprehensive Environmental Response, Compensation, and Liability Act of 1981: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 1st Sess. 3 (1981) (statement of Sen. Chafee, Subcommittee Chairman) [hereinafter cited as *Implementation Hearings*].

<sup>4</sup> 42 U.S.C. § 9631(b)(1) (Supp. V 1981). Fees from the chemical and oil industries finance \$1.4 billion of the Fund. See *Implementation Hearings*, *supra* note 3, at 3 (7/8's of Fund comes from industry). The Internal Revenue Service has issued temporary regulations to collect these environmental taxes. Treas. Reg. §§ 57.6011(a)-1 to .6302(c)(1) (1982). The collection procedures will be similar to those currently used to collect manufacturer's excise taxes. See *IRS Issues Temporary Regulations For Collecting Taxes to Finance Superfund*, 12 ENV'T REP. (BNA) 405 (July 24, 1981).

<sup>5</sup> 42 U.S.C. § 9631(b)(2) (Supp. V 1981). General revenue appropriations finance \$220 million of the Fund. See *Implementation Hearings*, *supra* note 3, at 3 (1/8 of Fund comes from appropriated funds).

<sup>6</sup> 42 U.S.C. § 9631(b)(1)(D)-(E) (Supp. V 1981).

<sup>7</sup> See *infra* notes 34-38 and accompanying text. See also 126 CONG. REC. H9162 (daily ed. Sept. 19, 1980) (remarks of Rep. Florio) (Superfund will "provide the authority for immediate cleanup and containment response . . . and provide the authority to then go and determine who it is that is responsible"). Superfund, however, does not cover cleanup of federal facilities. See *EPA Says Superfund Covers All Releases, Mining Sites But Not Federal Facilities*, 13 ENV'T REP. (BNA) 324 (July 2, 1982).

<sup>8</sup> See 126 CONG. REC. H9162 (daily ed. Sept. 19, 1980) (Congressman Florio, who introduced bill eventually enacted as Superfund, remarked that problem of hazardous waste, "cannot tolerate the slow pace that has been the traditional response"). See also Comment, *Generator Liability under Superfund for Clean-up of Abandoned Hazardous Waste Dumpsites*, 130 U. PA. L. REV. 1229, 1231-32 (1982) ("In theory, at least, Superfund will eliminate . . . delays be-

The Environmental Protection Agency (EPA), however, has relied upon methods of enforcement other than those originally prescribed by Congress, and has thereby partially frustrated the aims of Superfund. This Note examines the EPA's neglect of Superfund's original enforcement provisions and details the EPA's use of injunctive relief<sup>9</sup> and negotiated settlements<sup>10</sup> in lieu of government cleanup actions. The Note then focuses on the rationales behind the EPA's failure to enforce Superfund in a manner consistent with congressional intent.<sup>11</sup> Finally, the Note concludes that Congress must enact new legislation to provide the EPA and the courts with a more effective enforcement tool than Superfund to remedy America's hazardous waste problems.<sup>12</sup>

## I

### FEDERAL REGULATION OF HAZARDOUS WASTE

#### A. The Scope of the Hazardous Waste Problem

Improper handling and disposal of hazardous waste has created latent and emerging threats to our health<sup>13</sup> and environment.<sup>14</sup> The Love Canal incident in Niagara Falls, New York,<sup>15</sup> and other recent discoveries of improper waste disposal<sup>16</sup> illustrate the nature of this threat. The

cause the government will have both the authority and the funds to begin clean-up efforts as soon as the hazardous site is targeted.").

<sup>9</sup> See *infra* notes 39-83 and accompanying text.

<sup>10</sup> See *infra* notes 84-118 and accompanying text.

<sup>11</sup> See *infra* notes 119-52 and accompanying text.

<sup>12</sup> See *infra* notes 153-89 and accompanying text.

<sup>13</sup> Toxic wastes pose a variety of threats to human health, including cancer, birth defects, neurological and behavioral disorders, kidney damage, heart and lung disease, acute and chronic skin rash, and poisoning. See, e.g., TOXIC SUBSTANCES STRATEGY COMM., U.S. COUNCIL ON ENVTL. QUALITY, TOXIC CHEMICALS AND PUBLIC PROTECTION xiv (1980) [hereinafter cited as TOXIC SUBSTANCES]. See generally *Health Effects of Hazardous Waste Disposal Practices: Joint Hearing Before the Subcomm. on Health and Scientific Research of the Senate Comm. on Labor and Human Resources and the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980). Superfund created a new agency within the Public Health Service to study and monitor the health effects of toxic substances. 42 U.S.C. § 9604(i) (Supp. V 1981).

<sup>14</sup> Hazardous wastes can cause air pollution, water contamination, explosions, fire, direct poisoning, and other environmental damage. See Costle & Beck, *Attack on Hazardous Waste: Turning Back the Toxic Tide*, 9 CAP. U.L. REV. 425, 426 (1980). The EPA is currently spending \$10,000,000 to study the health and environmental effects of improper disposal of hazardous waste. See U.S. GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE SITES POSE INVESTIGATION, EVALUATION, SCIENTIFIC AND LEGAL PROBLEMS 55, 59 (1981).

<sup>15</sup> See generally M. BROWN, LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS (1980) (describing Love Canal incident which led to public recognition of seriousness of hazardous waste pollution); REPORT OF THE NEW YORK OFFICE OF PUBLIC HEALTH, LOVE CANAL: PUBLIC HEALTH TIME BOMB (1978) (same).

<sup>16</sup> See generally CONG. RESEARCH SERVICE, SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 96TH CONG., 2D SESS., REPORT ON SIX CASE STUDIES OF COMPENSATION FOR TOXIC SUBSTANCES POLLUTION: ALABAMA, CALIFORNIA, MICHIGAN, MISSOURI, NEW JERSEY, AND TEXAS (Comm. Print 1980) (citing examples of hazardous waste incidents in these states).

EPA estimates that almost 14,000 hazardous waste disposal sites exist in the United States,<sup>17</sup> but it cannot accurately estimate the costs of removal and remedial operations because of the pervasiveness of toxic contamination and seepage.<sup>18</sup> The full extent of the problem thus remains uncertain.

The federal government only recently has become concerned with hazardous waste disposal. Prior to federal legislation in the area, municipal laws and ordinances regulated the disposal of solid waste.<sup>19</sup> In the 1960s, Congress enacted comprehensive environmental statutes, such as the Clean Air Act<sup>20</sup> and the Clean Water Act,<sup>21</sup> de-emphasizing local regulation of the environment. The Clean Air Act and other similar statutes, primarily for administrative convenience, regulated only dis-

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<sup>17</sup> When the EPA released a list of over 400 of the worst hazardous waste sites targeted for cleanup under Superfund, Anne Gorsuch, then EPA Administrator, acknowledged that almost 12,000 hazardous chemical dumps existed in the United States. Shabecoff, *418 Toxic Dumps Listed in Clean Up*, N.Y. Times, Dec. 21, 1982, § 2, at 6, col. 4 [hereinafter cited as *418 Toxic Dumps*]; see also Shabecoff, *Hazardous Waste Exceeds Estimates*, N.Y. Times, Aug. 31, 1983, at A1, col. 1 (agency survey estimating 150 million metric tons of hazardous waste generated in 1981—four times higher than previously estimated). Ms. Gorsuch resigned from her position after a series of congressional investigations. See *infra* note 185.

<sup>18</sup> Estimates of the cost of proper hazardous waste disposal vary widely. The cost of establishing a chemical landfill, for example, can range from \$50 to \$400 per metric ton of waste. See U.S. COUNCIL ON ENVTL. QUALITY, 11 ENVIRONMENTAL QUALITY 219, tables 5-7 (1980). The EPA has estimated that cleaning up the 1,000-2,000 most hazardous waste sites will cost between \$26 and \$44 billion. See *Hazardous and Toxic Waste Disposal: Joint Hearings on S. 1341 and S. 1480 Before the Subcomm. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 7 (1980) (statement of Thomas C. Jorling, Assistant Administrator, Waste Water Management, Environmental Protection Agency). Proper hazardous waste disposal can cost 10 to 40 times more than improper disposal. See U.S. COUNCIL ON ENVTL. QUALITY, 8 ENVIRONMENTAL QUALITY 47-48 (1977). Thus, the present waste disposal system has spawned an increasing number of racketeers or "midnight dumpers" who illegally dispose of chemicals for profit. See *Organized Crime Links to the Waste Disposal Industry: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 1 (1981) (statement of Sen. Dingell, Chairman, House Subcommittee on Oversight and Investigations) (subcommittee found link between organized crime and illegal dumping of toxic wastes). See also *Pursue the Poisoners*, N.Y. Times, Dec. 1, 1982, at A30, col. 1; *Connecticut Plant is Accused of Illegal Dumping for Years*, N.Y. Times, Oct. 11, 1981, at A1, col. 1. In an attempt to control illegal dumping, "[t]he FBI has agreed to investigate up to 30 hazardous waste cases per year . . ." Remarks of Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, before the American Bar Association Annual Meeting, at 18 (Aug. 9, 1982) [hereinafter cited as Dinkins]. The Justice Department has recently begun a crackdown on "midnight dumpers" by bringing criminal charges before 25 grand juries in 14 states. See *U.S. Cracks Down on Waste Dumpers*, N.Y. Times, Apr. 24, 1983, at A1, col. 2.

<sup>19</sup> See Comment, *Hazardous Waste Liability and Compensation: Old Solutions, New Solutions, No Solutions*, 14 CONN. L. REV. 307, 312-13 (1982) (hazardous waste control was traditionally responsibility of local governments; initially, federal government played a minimal role); see also Meyer, *Compensating Hazardous Waste Victims: RCRA Insurance Regulations and a Not So "Super" Fund Act*, 11 ENVTL. L. 689, 692-93 (1981).

<sup>20</sup> 42 U.S.C. §§ 7401-7642 (Supp. V 1981).

<sup>21</sup> 42 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981).

tinct environmental media.<sup>22</sup> Congress ultimately realized, however, that hazardous waste pollution pervaded all aspects of the environment and required a more comprehensive solution.

## B. The Resource Conservation and Recovery Act

Congress's first attempt at a comprehensive solution to the waste-disposal problem was the Resource Conservation and Recovery Act (RCRA).<sup>23</sup> RCRA provided for "cradle-to-grave" regulation<sup>24</sup> of the generation, transportation, treatment, storage, and disposal of hazardous waste, establishing prospective standards for the handling of chemical waste.<sup>25</sup> Section 7003 of RCRA permits injunctive relief to prevent improper waste disposal whenever "hazardous waste [presents] an imminent and substantial endangerment to health or the environment."<sup>26</sup>

Although RCRA was a step in the right direction, it was not the comprehensive solution needed to remedy the hazardous waste problem. First, RCRA neither addressed past dumping practices nor mandated the cleanup of present dangerous waste sites.<sup>27</sup> Second, RCRA did not require the generators of hazardous waste to use the most desirable disposal practices.<sup>28</sup> Third, RCRA failed to provide funds for emergency

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<sup>22</sup> The four distinct environmental media are surfacewater, groundwater, land, and air. See THE SUPERFUND CONCEPT: REPORT OF THE INTERAGENCY TASK FORCE ON COMPENSATION AND LIABILITY FOR RELEASES OF HAZARDOUS SUBSTANCES 47 (June 1979) [hereinafter cited as THE SUPERFUND CONCEPT].

<sup>23</sup> Pub. L. No. 94-580, 90 Stat. 2795 (1980) (codified at 42 U.S.C. §§ 6901-6987 (1976 & Supp. V 1981)). Although RCRA was the first statute specifically addressing the hazardous waste problem, more than two dozen laws have authorized federal regulation of toxic substances. See TOXIC SUBSTANCES, *supra* note 13, at 98.

<sup>24</sup> Commentators have deemed the RCRA system a "cradle-to-grave" statutory scheme because subtitle C of the Act traces hazardous wastes from generator, to transporter, to disposal facility. See Goldfarb, *The Hazards of Our Hazardous Waste Policy*, 19 NAT. RESOURCES J. 249, 253 (1979); Note, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1047, 1049 (1981) (citing Goldfarb).

<sup>25</sup> See Di Nal, *Hazardous Waste: Environmental Issue of the Eighties*, 1981 ABA ENVTL. L. SYMP. 81, 94 ("RCRA regulations should assure that what has happened in the past will not happen in the future . . ."); see also Dinkins, *supra* note 18, at 3 ("RCRA's primary thrust is prospective regulation of existing sites.").

<sup>26</sup> 42 U.S.C. § 6973(a) (Supp. V 1981).

<sup>27</sup> See 126 CONG. REC. H9176 (daily ed. Sept. 19, 1980) (remarks of Rep. Brown) (discussion during Superfund debates concerning shortcomings of RCRA due to magnitude of hazardous waste problem).

<sup>28</sup> One commentator noted that RCRA failed to achieve its regulatory goals because it divorced the regulation of disposal practices from the regulation of waste generators. See Note, *supra* note 24, at 1051 (1981). This commentator argued that "RCRA actually encourages generators to contract for off-site disposal with independent contractors and thereby avoid the more stringent regulations that would apply if the generator disposed of its own waste." *Id.* at 1052-53. Another commentator has suggested that Superfund also encourages irresponsible disposal practices. Rea, *Hazardous Waste Pollution: The Need for a Different Statutory Approach*, 12 ENVTL. L. 443, 461 (1982) ("[The] transfer of liability to the Post-Closure Liability Fund only five years after facility closure may foster disposal in short-lived facilities and relieve those responsible for contamination of all costs of mitigative measures.").

containment or cleanup of waste disposal sites.<sup>29</sup> Finally, RCRA allowed the states to continue to regulate the siting of waste disposal facilities.<sup>30</sup>

### C. The Comprehensive Environmental Response Compensation and Liability Act of 1980 (Superfund)

Responding to the deficiencies of RCRA<sup>31</sup> and the public pressure created by the Love Canal incident, Congress enacted the Comprehensive Environmental Response Compensation and Liability Act of 1980—Superfund.<sup>32</sup> Superfund's legislative history clearly demonstrates that it was a compromise bill.<sup>33</sup>

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<sup>29</sup> See Eschwege, *Implementing the Resource Conservation and Recovery Act: Problems of the Present, Recommendations for the Future*, 9 CAP. U.L. REV. 467, 481 (1980).

<sup>30</sup> See Goldfarb, *supra* note 24, at 258 & n.42. The EPA often faces tremendous state and local opposition to the siting of hazardous waste facilities because state and local officials do not care to admit that they have a hazardous waste problem. See, e.g., *13,000 Toxic Waste Dumps Will Threaten Public Health*, Wheeling News Register, Dec. 21, 1982, at 3, col. 1 [hereinafter cited as *13,000 Toxic Waste Dumps*]. The EPA arguably could have designated priorities for site cleanup faster without state regulation of the siting of disposal facilities and with less opposition from state and local officials.

<sup>31</sup> See Comment, *supra* note 19, at 307 (Congress enacted Superfund "to alleviate some of the major deficiencies of . . . the Resource Conservation and Recovery Act"); *id.* at 315-16 ("That RCRA was not the panacea Congress had intended became apparent after Love Canal focused national attention on hazardous wastes.") (footnote omitted).

<sup>32</sup> 42 U.S.C. §§ 9601-9657 (Supp. V 1981).

<sup>33</sup> Congress considered three different Superfund bills: (1) H.R. 7020, 96th Cong., 2d Sess., 126 CONG. REC. H2490 (daily ed. Apr. 2, 1980); (2) H.R. 85, 96th Cong., 1st Sess.; (3) S. 1480, 96th Cong., 1st Sess., 126 CONG. REC. S9174 (daily ed. July 11, 1979).

Senate Bill 1480 was the most comprehensive version of Superfund that Congress considered. This bill would have imposed strict liability and included a modified joint and several liability plan that added a right of contribution for liable waste generators. S. 1480, 96th Cong., 1st Sess., 126 CONG. REC. S9174 (daily ed. July 11, 1979). The bill also would have provided for a \$4.1 billion fund over six years. *Id.*

Congress extensively debated provisions providing for a federal cause of action for persons injured by toxic wastes, but failed to adopt them. The enacted Superfund does require a report concerning "the adequacy of existing common law and statutory remedies in providing legal redress" for toxic substance related injury to persons and the environment. 42 U.S.C. § 9651(e) (Supp. V 1981). For a discussion of currently existing remedies, see Note, *An Analysis of Common Law and Statutory Remedies For Hazardous Waste Injuries*, 12 RUTGERS L. REV. 117 (1980).

While the Senate debated S. 1480, the House of Representatives passed a less comprehensive bill, applying to inactive waste sites only and creating only a \$600 million fund. H.R. 7020, 96th Cong., 2d Sess., 126 CONG. REC. H2490 (daily ed. Apr. 2, 1980). The conference committee then introduced a compromise bill, which the House considered under a suspension of its rules and passed after limited debate. H.R. 7020, 96th Cong., 2d Sess., 126 CONG. REC. H11,802 (Dec. 3, 1980).

Congress ultimately passed a bill that was substantially different from those that were considered and debated. Because Congress significantly altered the law, the numerous congressional hearings, reports, and debates concerning Superfund must be used carefully in determining legislative intent. See generally Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL L. 1 (1982) (detailing Superfund's legislative history); SUPERFUND—A LEGISLATIVE HIS-

The statute contains four major provisions designed to facilitate prompt EPA cleanup of present hazardous waste sites followed by EPA legal action to recover cleanup costs from those responsible for the wastes.<sup>34</sup> Section 104 grants the President broad authority to respond to hazardous waste problems.<sup>35</sup> Section 105 calls for the creation of a National Contingency Plan to establish guidelines for governmental response.<sup>36</sup> Section 107 identifies a class of responsible parties and defines the scope of their liability.<sup>37</sup> Finally section 111 provides that Superfund money shall cover governmental costs of cleanups under section 104.<sup>38</sup>

## II

### THE PRESENT PATTERN OF SUPERFUND ENFORCEMENT ACTIONS

#### A. The EPA's Use of Section 106: The Injunctive Relief Provision

Although under Superfund the federal government and the states were to undertake cleanup of hazardous waste sites and later be reimbursed for their efforts, EPA officials have chosen instead to seek federal court injunctions ordering private cleanup of toxic substances.<sup>39</sup> Section 106 permits the federal government to secure such injunctive relief in federal district court. Section 106(a) states in part:

[I]n addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous

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TORY (Environmental Law Institute 1982) (compiles all bills, hearings, and debates on Superfund by topic).

<sup>34</sup> See *supra* text accompanying note 7.

<sup>35</sup> The Act authorizes the President to take any responsive measure he "deems necessary to protect the public health or welfare or the environment." 42 U.S.C. § 9604(a)(1) (Supp. V 1981).

<sup>36</sup> The guidelines must include, *inter alia*, (1) methods for discovering and investigating hazardous waste sites; (2) methods for evaluating and remedying any releases of toxic substances; (3) methods for determining the appropriate extent of government removal and remedial operations; (4) methods for determining the appropriate roles and responsibilities of federal, state, and local governments in effectuating the plan; and (5) methods of assuring that remedial operations are cost-effective. 42 U.S.C. § 9605 (Supp. V 1981). See *infra* note 83 (discussion of National Contingency Plan).

<sup>37</sup> The responsible parties include owners and operators of vessels, owners or operators of waste disposal facilities, contractors who arrange for the disposal of hazardous waste, and transporters of hazardous waste. See 42 U.S.C. § 9607 (Supp. V 1981).

<sup>38</sup> 42 U.S.C. § 9611(a)(1) (Supp. V 1981).

<sup>39</sup> See, *e.g.*, *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982); *United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982); see also *U.S. Files a Suit with California over Waste Site*, N.Y. Times, Apr. 22, 1983, at A1, col. 6, B4, col. 5 (noting that "the Justice Department recently . . . sought an injunction 'to compel the defendants [waste generators] to pay all costs of removal and remedial measures.'").

substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.<sup>40</sup>

Because EPA policy has favored wide-scale application of section 106,<sup>41</sup> an analysis of that section is essential to assess the success of the EPA's enforcement of the toxic waste cleanup laws.

### 1. *Substantive Liability under Section 106*

Until the Supreme Court's recent decision in *Milwaukee v. Illinois (Milwaukee II)*,<sup>42</sup> it was unclear whether section 106 had a jurisdictional or substantive basis. Cases decided since *Milwaukee II* indicate that section 106 does confer substantive liability upon responsible parties.

Cases interpreting section 7003 of RCRA<sup>43</sup> are pertinent to this inquiry because section 7003 is very similar to section 106 of Superfund.<sup>44</sup>

<sup>40</sup> 42 U.S.C. § 9606(a) (Supp. V 1981). Section 106 also authorizes the President to issue administrative orders "to protect public health and welfare and the environment." *Id.* The President can delegate this power to the EPA administrator. *See Frost & Cross, Legal Standards Under Section 106 of Superfund*, HAZARDOUS WASTE REP. 8 (Trends & Analyses Supp. Aug. 1982). A reasonable interpretation of the administrative order provision demands that § 106's imminent and substantial endangerment requirement and its "mandate to act in the public interest consistent with the equities of the case" apply to administrative orders. *Id.* at 12. Moreover, because an administrative order is usually issued in a summary, ex parte proceeding, the EPA should issue an administrative order only when a site requires emergency action. Finally, parties subject to an administrative order have a right to de novo review in federal court if they do not receive an administrative hearing. *Id.*

Because of recent allegations that the EPA had made "sweetheart deals" with industry groups, the Agency had temporarily ordered a halt to the issuance of administrative orders. That halt is no longer in effect. *See EPA Regions to Issue Superfund Orders; Daniel's Directive Superseded by Thomas*, 13 ENV'T REP. (BNA) 2333 (Apr. 22, 1983).

<sup>41</sup> *See* Guidelines for Using the Imminent Hazard Enforcement and Emergency Response Authorities of Superfund and Other Statutes, 47 Fed. Reg. 20,664-65 (May 13, 1982) [hereinafter cited as Guidelines] ("[I]t is EPA policy to continue to pursue enforcement actions as an alternative to or complementary with Fund-financed response activities."). *See also* Dinkins, *supra* note 18, at 8 (noting that Justice Department has initiated more than 60 suits at EPA's request and has settled 20 of those cases, obtaining more than \$82 million for private-party cleanups).

<sup>42</sup> 451 U.S. 304 (1981).

<sup>43</sup> 42 U.S.C. § 6973(a) (Supp. V 1981).

<sup>44</sup> Compare § 106(a) of Superfund, 42 U.S.C. § 9606(a) (Supp. V 1981) with § 7003(a) of RCRA, 42 U.S.C. § 6973(a) (Supp. V 1981), which states:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling, storage, treatment, transportation or disposal to stop such handling, storage, treatment, transportation or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this

Early cases on section 7003 suggested that the imminent and substantial endangerment provision was only jurisdictional.<sup>45</sup> The court in *United States v. Midwest Solvent Recovery Inc.*,<sup>46</sup> for example, reasoned that section 7003 could not confer substantive liability because it appeared to contain no standards for determining the unlawfulness of conduct.<sup>47</sup> The court also found the legislative history of section 7003 too "sketchy" to support substantive liability.<sup>48</sup> Instead, the court looked to see whether it could grant injunctive relief under federal common law.<sup>49</sup>

Since the *Milwaukee II* decision, however, cases have held that section 7003 has a substantive basis.<sup>50</sup> In *Milwaukee II*, the Court found that Congress had effectively preempted the application of federal common law by adopting a comprehensive regulatory program.<sup>51</sup> Accord-

section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

<sup>45</sup> *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127, 1133-34 (D. Conn. 1980); *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138, 143-44 (N.D. Ind. 1980); see also Hinds, *Liability Under Federal Law for Hazardous Waste Injuries*, 6 HARV. ENVTL L. REV. 1, 33 (1982) (suggesting that because § 106 is so vague, courts will probably construe it as a jurisdictional statute and use the "federal common law of nuisance to flesh it out").

<sup>46</sup> 484 F. Supp. 138 (N.D. Ind. 1980).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* Because 28 U.S.C. § 1345 (1976) extends federal jurisdiction to all actions brought by the United States, § 7003 was unnecessary as a jurisdictional statute. See R. FINDLEY & D. FARBER, ENVIRONMENTAL LAW: CASES AND MATERIALS 329 (1981). The court, however, failed to consider this argument.

<sup>49</sup> 484 F. Supp. at 144-45. Under federal common law, a court may issue a preliminary injunction if (1) the plaintiff has no adequate remedy at law and will be irreparably harmed if the injunction is not issued, (2) the threatened injury to plaintiff outweighs the threatened harm the injunction may inflict upon defendant, (3) the plaintiff has a reasonable likelihood of success on the merits, and (4) the granting of the preliminary injunction will not disserve the public interest. *Id.*

<sup>50</sup> *United States v. Diamond Shamrock Corp.*, 17 Env't Rep. Cas. (BNA) 1329 (N.D. Ohio 1981); accord *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980).

<sup>51</sup> 451 U.S. at 317. The issue for the Court was whether the Federal Water Pollution Control Act Amendments of 1972 had supplanted federal common law. *Id.* at 310 n.4. The Court assumed that Congress, not the courts, should articulate the standards of federal law. *Id.* at 317. The Court then found that congressional regulation of the entire field of water pollution control had preempted federal common law remedies formerly available to the plaintiff. *Id.* at 324-25. Moreover, the Court argued that invocation of common law was "peculiarly inappropriate in areas as complex as water pollution control." *Id.* at 325.

In a dissent in which Justices Marshall and Stevens concurred, Justice Blackmun argued that "Congress intended no such extinction" of federal common law. *Id.* at 333. Moreover, the dissent found the "'automatic displacement' approach" inadequate because: (1) it did not reflect the role of federal common law in resolving disputes between the states; and (2) it ignored the fact that "federal common law may complement congressional action in the fulfillment of federal policies." *Id.* at 334.

The Court later held that the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972 also preclude federal common law nuisance actions. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). Justices Stevens and Blackmun dissented, arguing that "[d]espite their comprehensive enforcement mechanisms, both statutes expressly preserve all legal remedies otherwise available." *Id.* at 29.

ingly, courts could no longer look to federal common law for standards to apply in an action for injunctive relief. In other words, *Milwaukee II* limits federal courts to remedies specifically legislated by Congress in areas as complex as hazardous waste control.

The decision in *Milwaukee II* prompted the court in *United States v. Diamond Shamrock* to consider claims under section 7003 and common law nuisance separately.<sup>52</sup> Previously, federal common law had worked to complement congressional action to fulfill federal policies.<sup>53</sup> In *Diamond Shamrock*, no common law nuisance claims would lie because RCRA was found to be a comprehensive regulatory program within the meaning of *Milwaukee II*.<sup>54</sup> Looking solely at section 7003, however, the court found that its imminent and substantial endangerment requirement, "with rich judicial and statutory histories," provided it with sufficient standards to make it a substantive provision.<sup>55</sup> This sudden finding of standards in section 7003 appears to be a judicial construction to allow statutory injunctive relief where it had previously been allowed by common law.

Similarly, section 106 may be construed as conferring substantive liability because it contains the imminent and substantial endangerment provision<sup>56</sup> and because Superfund can be interpreted as a comprehensive regulatory program within the meaning of *Milwaukee II*.<sup>57</sup> Moreover, because as one commentator noted, "[Superfund] deprived claimants of their ability to rely on federal common law doctrines to impose liability for hazardous waste disposal conduct,"<sup>58</sup> section 106 may be expanded to allow statutory injunctive relief.

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<sup>52</sup> *United States v. Diamond Shamrock*, 17 Env't Rep. Cas. (BNA) 1329, 1332 (N.D. Ohio 1981); accord *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980) (court focused attention on whether an imminent and substantial endangerment existed and held that § 7003 was substantive).

<sup>53</sup> *Milwaukee II*, 451 U.S. at 334 (Blackmun, J., dissenting).

<sup>54</sup> 17 Env't Rep. Cas. (BNA) at 1332.

<sup>55</sup> *Id.*

<sup>56</sup> The court in *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982), found that § 106 conferred substantive liability. The court noted that the plain language of § 106(a) did not suggest that Congress intended the provision to afford a substantive basis for liability: "[S]ection 106(a) does not appear to create liability in any [party; it] authorizes lawsuits and injunctions, but it does not indicate who may be sued or enjoined; also, it does not specify what one must do to be subject to suit or injunction." *Id.* at 55. Nevertheless, the decision in *Milwaukee II*, which apparently precluded relief under federal common law, made the court reluctant to hold that the statute was exclusively jurisdictional. *Id.* at 56-57. The court concluded that, whatever the source of substantive law applicable in a § 106(a) action, it should effectuate Superfund's imminent hazard authority. *Id.*

<sup>57</sup> See Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund*, 57 NOTRE DAME LAW. 260, 272 (1981).

<sup>58</sup> *Id.* at 283.

2. *The Imminent and Substantial Endangerment Requirement: An Amorphous Condition for Relief Under Section 106*

Given the foregoing analysis, hazardous waste must pose a risk of "imminent and substantial endangerment" to the public or to the environment before a court can issue a preliminary injunction under section 106.<sup>59</sup> Because neither Superfund nor its legislative history defines "imminent and substantial endangerment,"<sup>60</sup> it is useful to examine other environmental statutes that contain similarly worded provisions.<sup>61</sup> The

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<sup>59</sup> "[W]hen the President determines that there may be an imminent and substantial endangerment" he may require the Attorney General to take action seeking abatement. 42 U.S.C. § 9606(a) (Supp. V 1981). Direct presidential authorization is not, however, a prerequisite for bringing § 106 claims. *See* *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982). The President can delegate this authority to any person or agency. *See* 42 U.S.C. § 9615 (Supp. V 1981) ("The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter."). President Reagan delegated his authority under § 106(a) to the EPA in Executive Order 12,316. *See* Exec. Order No. 12,316, 3 C.F.R. 168 (1981). This delegation, however, does not give the EPA's Administrator total discretion to determine whether to bring suit. Although the Administrator determines if there is an imminent and substantial endangerment and can recommend an abatement action "the President retains the power to compel the Attorney General to commence suit if the Attorney General has declined . . . to do so." *Reilly Tar*, 546 F. Supp. at 1113 (emphasis omitted).

Section 106 also requires the courts to find that the issuance of injunctive relief accords with the equities of the case. 42 U.S.C. § 9606(a) (Supp. V 1981). One commentator thus suggested that § 106 contains a two-prong test. *See* *Frost & Cross*, *supra* note 40, at 10. This two-prong interpretation presumably does not conflict with the Supreme Court's decision in *Milwaukee v. Illinois*, 451 U.S. 304 (1981), because that decision did not prevent Congress from preserving federal common law. *See* *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 476 (7th Cir. 1982). If the "equities of the case" provision is an admonition to the court to apply equitable principles, *see* *Frost & Cross*, *supra* note 40, at 10, courts would look to the special conditions under which equity would permit abatement actions. *See generally* Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978). These conditions would restrict the availability of abatement actions under § 106.

<sup>60</sup> The legislative history on § 106 mirrors the legislative history of the entire act. Prior bills offered in both the House and the Senate were not substantially similar to § 106. *See* S. 1480, 96th Cong., 2d Sess. § 3(b) (1980); S. 1341, 96th Cong., 2d Sess. § 603(f) (1980); H.R. 7020, 96th Cong., 2d Sess. § 3041(1)(a) (1980); (all compiled in SUPERFUND—A LEGISLATIVE HISTORY 149-62 (Environmental Law Institute 1982)). The Senate report accompanying the Senate abatement authority provision stated, "[Section 3(b)] is intended to decrease reliance on the Fund and on Federal response where responsible parties can take necessary control, removal, or remedial actions." S. REP. NO. 848, 96th Cong., 2d Sess. 63 (1980). The House report which accompanied the House abatement authority provision also commented upon its version of the section stating that "the 'emergency response authority' provided by the Administrator of EPA in H.R. 7020 is entirely too broad." H.R. REP. NO. 1016, Part I, 96th Cong., 2d Sess. 68 (1980) (supplemental views of Reps. Broyhill, Devine, Collins, Loeffler, and Stockman). Yet, the House abatement authority provision was much more detailed than § 106 as enacted. However, because the proposed sections are so dissimilar to § 106, the statements on those sections do not lend much insight into the statute.

<sup>61</sup> For example, the Resource Conservation and Recovery Act (RCRA), § 7003, 42 U.S.C. § 6973(a) (Supp. V 1981), the Clean Air Act, § 303, 42 U.S.C. § 7603(a) (Supp. V 1981), and the Clean Water Act, § 504(A), 33 U.S.C. § 1364(a) (Supp. V 1981) all require findings of imminent and substantial endangerment.

legislative histories of these provisions indicate that courts and regulatory agencies should invoke such provisions only in unusual circumstances and not for chronic or generally recurring pollution problems.<sup>62</sup> The district court, in *United States v. Wade*,<sup>63</sup> restricted the use of section 106 to emergency situations,<sup>64</sup> and was thus consistent with the interpretations of analogous environmental statutes.

Nevertheless, courts have failed to confine consistently the application of the imminent and substantial endangerment provisions of environmental statutes to emergencies. For example, one court permitted an abatement action under section 7003 of RCRA "to eliminate any risks posed by toxic wastes."<sup>65</sup> Similarly in *United States v. Reilly Tar & Chemical Corp.*,<sup>66</sup> the court broadly applied section 106 where a recurring groundwater contamination problem threatened to develop into an imminent and substantial threat to health or the environment.<sup>67</sup> These conflicting court decisions reflect the uncertainty attending section 106's imminent and substantial endangerment requirement.

### 3. *Potential Defendants in Section 106 Abatement Actions*

Section 106 also fails to clearly identify the potential defendants in an abatement action. Although section 107(1)-(4) lists numerous possible defendants,<sup>68</sup> section 106 contains no such list, nor any reference to section 107.<sup>69</sup> Because section 107 is the sole provision in the Act identifying possible defendants, section 107 defendants are arguably liable under other provisions of the Act, including section 106. The *Reilly Tar*

<sup>62</sup> Cf. H.R. REP. NO. 728, 90th Cong., 1st Sess. 119, reprinted in 1967 U.S. CODE CONG. & AD. NEWS 1938, 1954 (statements made regarding § 108(K) of Air Quality Act of 1967, the original imminent hazard provision); S. REP. NO. 1196, 91st Cong., 2d Sess. 35-36 (1970) (amendments to Clean Air Act suggesting that government must clearly establish potential for harm before it can use imminent hazard authority).

<sup>63</sup> 546 F. Supp. 785 (E.D. Pa. 1982).

<sup>64</sup> *Id.* at 794.

<sup>65</sup> *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982); see also *Two District Courts Decide Differently on Waste Generators' Liability Under RCRA*, 13 ENV'T REP. (BNA) 689 (Sept. 17, 1982) (noting difference between *Wade* and *Price* decisions).

<sup>66</sup> 546 F. Supp. 1100 (D. Minn. 1982).

<sup>67</sup> *Id.* at 1114. The recent case of *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982), added to the confusion surrounding the definition of "imminent and substantial endangerment" by following *Reilly Tar's* broad reading of § 106. *Id.* at 57. The *Outboard Marine* court acknowledged that it could not reconcile the *Reilly Tar* interpretation with the narrow construction given § 106 in *United States v. Wade*. *Id.* at 58 n.3. The court rejected the defendant's contention that the two cases could be distinguished because in *Reilly Tar* the government sued the defendant under both §§ 106 and 107, whereas in *Wade* the government sued the defendant only under § 106. *Id.* The failure of the court in *Outboard Marine* to reconcile these divergent interpretations of § 106 emphasizes the uncertainty attending the "imminent and substantial endangerment" requirement.

<sup>68</sup> 42 U.S.C. § 9607(a)(1)-(4) (Supp. V 1981). For a list of the potential defendants under § 107 of Superfund, see *supra* note 37.

<sup>69</sup> See *Hinds, supra* note 45, at 32 (noting that absence of cross-reference in either § 106 or § 107 supports this argument).

court, for example, relied on section 107's identification of potential defendants, and on section 106's reference to the "equities of the case" to justify its invocation of section 106 against the defendants.<sup>70</sup>

Other courts, however, have rejected this approach. In *United States v. Wade*,<sup>71</sup> the court refused to find that section 106 applied to parties that had been offsite generators but were no longer generating hazardous wastes.<sup>72</sup> In support of this narrow application of the statute, the *Wade* court pointed to "the absence of any evidence that Congress intended section 106 to [apply to such defendants] and . . . the clear and carefully detailed legislative provision of another route to the same result."<sup>73</sup>

#### 4. Relief Available Under Section 106

Section 106 also fails to clearly define the relief that it allows. The district court and court of appeals decisions in *United States v. Price*,<sup>74</sup> interpreting section 7003 of RCRA, reflect the court's confusion concerning the relief available under that provision. Given the similarities between sections 7003 and 106,<sup>75</sup> the decisions suggest similar uncertainties under section 106.

In *Price*, the EPA sought an injunction ordering the defendant to fund a diagnostic study of the site's toxic waste effects on a city's water supply and to provide an alternate water supply to affected homeowners.<sup>76</sup> The district court noted that it must determine the appropriate relief on a case-by-case basis to achieve the purposes of RCRA, which in turn involves consideration of traditional equitable criteria.<sup>77</sup> Applying equitable criteria, the court found that "[a] plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money" and denied the request for the injunction.<sup>78</sup>

The Court of Appeals for the Third Circuit affirmed,<sup>79</sup> but stated that the district court had "an unduly restrictive view of its remedial

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<sup>70</sup> 546 F. Supp. at 1113. However, if the reference in § 106 to equity is an admonition to courts to apply traditional principles of equity, those principles could limit the potential class of defendants under § 106. For example, parties who bear a remote relationship to and have no knowledge of the prescribed conduct are not proper defendants in equitable actions. *See, e.g.,* Naughton v. Bevilacqua, 605 F.2d 586, 589-90 (1st Cir. 1979).

<sup>71</sup> 546 F. Supp. 785 (E.D. Pa. 1982).

<sup>72</sup> *Id.* at 792-94.

<sup>73</sup> *Id.* at 794.

<sup>74</sup> 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

<sup>75</sup> *See supra* note 44 and accompanying text.

<sup>76</sup> 523 F. Supp. at 1067.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (quoting *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979)). The court in *United States v. Wade*, 549 F. Supp. 785, 792 (E.D. Pa. 1982), also approved of *Jaffee* with regard to § 7003 claims.

<sup>79</sup> 688 F.2d 204 (3d Cir. 1982).

powers . . . under traditional equitable doctrines."<sup>80</sup> The court found that Congress intended to invoke "nothing less than the full equity powers of the federal courts" under RCRA when toxic wastes threatened the public health or the environment.<sup>81</sup> The court indicated, however, that denial of the preliminary injunction might have been the fairest solution because the requested relief would bind only a few of the more than thirty-five defendants.<sup>82</sup>

Determining the relief available under section 106 involves a similar "balancing of statutory goals and other public interests."<sup>83</sup> The relief available will often depend largely on the factual situation before the court.

## B. The EPA's Use of Settlement Agreements To Clean Up Toxic Wastes

### 1. *A Glimpse at the Mechanics of Settlement*

Before initiating enforcement activity, the EPA attempts to notify potential defendants in an effort to develop a satisfactory cleanup agreement.<sup>84</sup> Toward this end, the EPA recently released a prioritized list of over 400 hazardous waste sites found in the United States.<sup>85</sup> The hazard ranking system<sup>86</sup> permits the EPA to proceed on a worst-first basis acting against the most dangerous sites first.

After identifying the sites, the EPA targets the largest generators of

<sup>80</sup> *Id.* at 211.

<sup>81</sup> *Id.* at 214.

<sup>82</sup> *Id.*

<sup>83</sup> Frost & Cross, *supra* note 40, at 11. Section 105 of Superfund might also have limited the nature of injunctive relief available under § 106. *See id.* Section 105 calls for a National Contingency Plan to establish procedures for dealing with release of toxic substances and requiring that "actions to minimize damage from hazardous substances releases" shall comply with the strictures of the plan. *See* 42 U.S.C. § 9605 (Supp. V 1981). This language and congressional statements at the time of enactment indicate that abatement actions under § 106 must also follow the guidelines of the plan to the greatest extent possible. *See* Frost & Cross, *supra* note 40, at 11; 126 CONG. REC. S215,008 (daily ed. Nov. 24, 1980) (remarks of Sen. Stafford) ("[W]e would expect the courts to examine the particular orders or expenditures from the fund to determine whether they were proper, given the standards of the act and of the national contingency plan."). However, the plan that the EPA actually published specifically denied that it applied to § 106, ignoring congressional intent. *See* National Oil and Hazardous Contingency Plan, 47 Fed. Reg. 31,180 (1982).

<sup>84</sup> *See* Guidelines, *supra* note 41, at 20,666. A notice letter, however, is not a legal prerequisite for cost recovery. *See Partis Liable For Superfund Response Cost Despite Timing of Notice Letters, EPA Says*, 13 ENV'T REP. (BNA) 721 (Sept. 24, 1982).

<sup>85</sup> *See 418 Toxic Dumps, supra* note 17. The dumps are scattered from Maine to American Samoa although two-thirds are located in a dozen states led by New Jersey, Michigan, and Pennsylvania. *Id.*

<sup>86</sup> Appendix A of the National Contingency Plan, *see supra* note 83, delineates the hazard ranking system. Commentators have criticized the system because it factors in population density, thereby giving little health protection to sparsely populated areas with high levels of contamination. *See EPA's Superfund Policy Criticized By OTA In Testimony to House Panel*, 12 ENV'T REP. (BNA) 898 (Nov. 20, 1981).

waste at those sites for settlement negotiations.<sup>87</sup> The large waste generators consist primarily of companies that arrange for the disposal or treatment of hazardous wastes created by their production processes. Although smaller, less identifiable generator companies, transporters, landfill owners, and operators are also liable for cleanup costs under Superfund,<sup>88</sup> the EPA has not focused on these potential defendants for settlement negotiations,<sup>89</sup> partly because of the low volume share contributed by these polluters.<sup>90</sup> Administrative costs and the inconveniences of litigation also dissuade the EPA from contacting such minor participants.<sup>91</sup>

Once the EPA has chosen a generator for settlement negotiations, it allows the generator to propose remedial action.<sup>92</sup> An administrative order or a judicial consent decree must then accompany any settlement agreement adopting such private remedial operations.<sup>93</sup> For example, in *United States v. Hooker Chemical & Plastic Corp.*,<sup>94</sup> the court, after noting the "clear policy in favor of encouraging settlements,"<sup>95</sup> approved a private settlement agreement to clean up a chemical dumpsite in Niagara, New York,<sup>96</sup> and issued a corresponding consent

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<sup>87</sup> See Dinkins, *supra* note 18, at 9. The EPA recently announced that it had reached approximately 20 settlements creating \$82 million in privately financed cleanups. See *Government's Update on Carrying Out Superfund Meets with Criticism at Hearing*, 13 ENV'T REP. (BNA) 469 (Aug. 6, 1982) [hereinafter cited as *Government's Update*].

<sup>88</sup> See 42 U.S.C. § 9607(a)(2)-(4) (Supp. V 1981) (stressing that "any person" is liable if he meets certain causal conditions subject to specific defenses outlined in § 9607(b)).

<sup>89</sup> See Dinkins, *supra* note 18, at 9. Assistant Attorney General Dinkins noted that seeking recovery from minimal participants would overextend the doctrine of joint and several liability and waste the government's resources. *Id.*

<sup>90</sup> See Dinkins, *supra* note 18, at 11. Although volume share is the primary consideration in EPA settlement agreements, the toxicity of the chemicals contributed to the dump site and other factors may affect those agreements. *Id.* The EPA's negotiation costs may also affect its settlement agreements. See *£38 Million Dollar Pact*, N.Y. Times, Nov. 19, 1982, at A18, col. 1, [hereinafter cited as *£38 Million Dollar Pact*]; see also *Record Voluntary Cleanup Settlement Reached For Velsicol Site Under Superfund*, 13 ENV'T REP. (BNA) 1165 (Nov. 26, 1982). Defendants' past cleanup activity at a site does not affect the settlement agreements because the EPA refuses to award credit for that activity. See Dinkins, *supra* note 18, at 11 (arguing that EPA cannot consider past voluntary activity because "only future expenditures and undertakings . . . form the basis of the relief" government seeks).

<sup>91</sup> See Dinkins, *supra* note 18, at 9.

<sup>92</sup> See *id.* at 16; see also Guidelines, *supra* note 41, at 20,666 (if these settlement efforts prove "unsatisfactory," EPA then decides whether to use Superfund for site cleanup or to use some other enforcement method).

<sup>93</sup> "The reason for this should be obvious. It would be unwise for EPA to allow cleanup activity to proceed if the government could not enforce its agreement quickly if disputes arise." Dinkins, *supra* note 18, at 16. For an example of a consent decree, see *United States v. Solvents Recovery Serv.*, No. 79-704 (D. Conn. Dec. 9, 1982).

<sup>94</sup> 540 F. Supp. 1067 (W.D.N.Y. 1982).

<sup>95</sup> *Id.* at 1072 (quoting *Patterson v. Newspaper & Mail Deliverers Union*, 514 F.2d 767, 771 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976)).

<sup>96</sup> *Id.* at 1079-80. In approving the settlement, the court considered the fairness and adequacy of its terms and to what extent the settlement was not unlawful, unreasonable, or against public policy. *Id.* at 1072. The court found that the agreement satisfied these condi-

decree.<sup>97</sup> Such judicial action is an integral component of the mechanics of settlement agreements.

## 2. *The EPA's Inconsistent Use of Dual-Track Procedure and Bifurcated Settlements*

The EPA has stated that it is employing a "dual-track" procedure,<sup>98</sup> in which it pursues voluntary cleanup negotiations with generators while simultaneously planning to undertake the cleanup itself using Superfund. Despite such claims, the current administration has pursued a policy of negotiating with large industries to have them undertake cleanup operations, thus enabling the EPA to avoid its own Superfund cleanup operations.<sup>99</sup>

The EPA has also maintained that it is negotiating bifurcated settlement agreements, whereby the EPA preserves the right to sue the larger settling companies more than once by settling with regard to only particular phases of the cleanup operations.<sup>100</sup> The bifurcated settlement reached at the Chem-Dyne site in Hamilton, Ohio, is a recent example.<sup>101</sup> The EPA negotiated a \$2.4 million settlement with various generators at the site and released them from only one phase of cleanup responsibility.<sup>102</sup> The EPA emphasized that additional remedial work would require additional settlements.<sup>103</sup>

The EPA has been inconsistent in this area as well. In a recent \$38 million negotiated settlement with Velsicol Chemical Company, the

tions and addressed the hazardous waste problem "to the fullest extent of currently existing technology." *Id.* at 1080.

<sup>97</sup> *Id.* at 1080.

<sup>98</sup> See Dinkins, *supra* note 18, at 14.

<sup>99</sup> See *\$38 Million Dollar Pact*, *supra* note 90; see also *New EPA Land Disposal Regulations 'Workable'*, *Bar Association Panel Told*, 13 ENV'T REP. (BNA) 528 (Aug. 20, 1982) [hereinafter cited as *New EPA Land Disposal Regulations*]. Steven Ramsey, Chief of the Environmental Enforcement Section of the Department of Justice's Land and Natural Resources Division noted that even if responsible parties cannot be found or are insolvent, the fund will not be used. *Id.* at 529.

<sup>100</sup> See Dinkins, *supra* note 18, at 12-13. William A. Sullivan, EPA Enforcement Counsel, has issued a guidance memo stating that

[a]bsent highly unusual circumstances, a total release from future liability should not be granted unless the party commits to undertaking total cleanup or until the agency understands the full scope and expense of the required cleanup and is able to determine that a settlement offer represents a responsible party's fair share of the total cleanup.

*EPA Official Says Settlement Agreements Appropriate for Short-Term Waste Cleanups*, 12 ENV'T REP. (BNA) 1055, 1055 (Jan. 1, 1982) [hereinafter cited as *EPA Official*].

<sup>101</sup> See *112 Companies Agree To Provide \$2.4 Million for Chem-Dyne Cleanup*, *EPA Sues 25 Non-settling Parties*, HAZARDOUS WASTE REP. 2 (Sept. 6, 1982).

<sup>102</sup> *Id.* at 2-3. Two hundred eighty-nine potentially responsible parties were identified. The parties decided how to apportion their costs. *Id.* at 2. The EPA asked for an injunction against the nonsettling parties for cleanup and reimbursement for monies the agency had already spent as well as for future expenses. *Id.* at 2-3.

<sup>103</sup> *Id.* at 3.

EPA released the company from all liability for cleanup operations at four waste sites in St. Louis, Michigan,<sup>104</sup> instead of pursuing the bifurcated settlement approach.<sup>105</sup>

### 3. *The Plight of Small Generators Under the EPA's Settlement Scheme*

The EPA's policy of settling first with the larger generators and possibly releasing them from all future liability has created controversy among the smaller generators of hazardous waste.<sup>106</sup> The smaller generators have accused the EPA of not treating the generators equally and of undermining the solidarity of all generators by fostering the formation of small alliances of large companies that receive special treatment from the EPA.<sup>107</sup>

The smaller generators argue in particular that the EPA's settlement policy enables the larger companies to avoid liability for groundwater damage. Some EPA-negotiated settlements, for example, cover only the cost of studies and surfacewater cleanup.<sup>108</sup> The groundwater cleanup, however, is by far the most expensive and long-term type of operation that needs to be undertaken.<sup>109</sup>

Moreover, settlements that release larger generators from the liability accompanying groundwater cleanup operations may heavily burden

<sup>104</sup> See *§38 Million Dollar Pact*, *supra* note 90.

<sup>105</sup> One commentator has stated on the subject of government settlements that [t]he government has indicated its willingness to give a release to a company for liability for cleanup costs paid, and may be willing to indicate that the amounts expended were reasonable based on information then available. It is not currently the policy of the government to give either an unconditional release from all future liability or an indemnification against possible subsequent liability for contribution to other joint tortfeasors.

Hall, *The Problem of Unending Liability for Hazardous Waste Management*, 38 BUS. LAW. 593, 604-05 (1983). It is difficult to determine whether the EPA has used a consistent settlement agreement approach because the parties rarely disclose the terms of settlement agreements. *United States v. Petro-Processors of La., Inc.*, 548 F. Supp. 543 (M.D. La. 1982) clearly demonstrates the secretiveness surrounding these agreements. The opinion stated that the parties had told the news media that a court order prohibited their disclosure of the agreement. *Id.* at 546. Judge Polozola clarified the record, stating that the parties chose to keep the information secret and that the court had no objection to releasing the information to the public. *Id.* at 545. The judge found that "public officials and private industry have intentionally misled the public and the news media by not fully disclosing facts in order to promote their own selfish gains." *Id.* at 543.

<sup>106</sup> See Moore, *Proposed Pact on Toxic Dumps Called Unfair*, *Legal Times*, Oct. 18, 1982, at 1, col. 4.

<sup>107</sup> *Id.*

<sup>108</sup> Reported examples of settlements covering only removal action include sites in Seymour, Indiana, St. Louis, Michigan, and Hamilton, Ohio. See *id.*; *Hamilton, Ohio, Struggles with Massive Toxic Waste Cleanup*, *Washington Post*, Nov. 3, 1982, at A10, col. 1; *§38 Million Pact*, *supra* note 90. Hugh M. Kaufman, Assistant to the Director of the Environmental Protection Agency's division on Hazardous Site Control, argued that the St. Louis, Michigan settlement "sen[t] out a clear signal that companies could negotiate and wind up paying only administrative costs." *Id.*

<sup>109</sup> See Moore, *supra* note 106.

smaller nonsettling generators who may lack a right of contribution against their larger, jointly liable, settling counterparts.<sup>110</sup> Federal courts will recognize and enforce a right to contribution only if Congress has authorized it.<sup>111</sup> The Justice Department has argued that section 107(e)(2) of Superfund provides this necessary authorization.<sup>112</sup> When examined more closely, however, in light of Superfund's tortured legislative history,<sup>113</sup> the language of section 107(e)(2) supporting this position appears inconclusive.<sup>114</sup> Some commentators have further argued that

<sup>110</sup> See *Largest Voluntary Cleanup Settlement Announced for Seymore Site Under Superfund*, 13 ENV'T REP. (BNA) 877, 878 (Oct. 19, 1982). (James Rogers, a lawyer for one of the small generators, noted that as a result of such settlement with a larger generator, "it appears that the small generators, who probably had far less opportunity to know of any of the activities being conducted . . . will each pay . . . twice that which the largest generators will pay on a percentage basis.")

<sup>111</sup> See *Texas Indus. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981).

<sup>112</sup> The Department of Justice has interpreted § 107(e)(2) of Superfund as creating a right of contribution among parties liable under § 107. Subsection 107(e)(2) provides:

Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

42 U.S.C. § 9607(e)(2) (Supp. V 1981). The Department of Justice has contended that "[t]his provision . . . confirms that a defendant held liable for response costs has the right to seek contribution from any other person responsible for a release or threat of release of a hazardous substance." 126 CONG. REC. H11,788 (daily ed. Dec. 3, 1980) (statement submitted on behalf of the Department by Rep. Florio).

<sup>113</sup> In an earlier Senate bill, the Senate showed clear intent to create a right of contribution. The language it used to create this right is instructive:

In any action brought under this section or section 6(c) of this Act [the section imposing joint and several liability for damages and removal costs], a person held jointly and severally liable with one or more other persons is entitled to seek contribution from such persons to the extent of the proportionate liability of such persons.

126 CONG. REC. S14,941 (daily ed. Nov. 24, 1980). If the Senate had intended to create a right of contribution in the Superfund compromise eventually enacted, it arguably would have used language as specific and clear as the language it had used in this earlier bill. Cf. Rodburg & Percell, *Contribution Among Defendants in Hazardous Waste Litigation*, 3 CHEMICAL & RADIATION WASTE LIT. REP. 591, 600 (1982). On the other hand, congressional compromises are notorious for omitting substantive sections of laws that Congress intended to enact. For example, even though Congress omitted statutory language imposing strict liability, courts still may interpret the statute as imposing strict liability. See Faron & Feldman, *Superfund Liability Outline*, 3 CHEMICAL & RADIATION WASTE LIT. REP. 133, 149 (1982).

<sup>114</sup> The cogency of the procontribution argument based on § 107(e)(2) of Superfund, see *supra* note 112 and accompanying text, fades when that subsection is analyzed in conjunction with the subsection immediately preceding it. Subsection 107(e)(1) provides:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

42 U.S.C. § 9607(e)(1) (Supp. V 1981). The first part of this subsection applies strictly to indemnification agreements and not to contribution. The plain language of the second sentence of this subsection, however, arguably denies the right of contribution between responsi-

if courts impose joint and several liability under Superfund,<sup>115</sup> they will, in effect, recognize a right of contribution.<sup>116</sup>

An alternative for small generators is to institute a class action suit against the larger generators and the EPA for the cost of the more expensive groundwater cleanup. The smaller companies' optimal remedy would be a declaratory judgment stating that the larger settling companies and the EPA will be responsible for any future liability imposed upon them.<sup>117</sup> Indeed, in at least one settlement agreement, the EPA agreed to defend the settling company against claims for contribution.<sup>118</sup> Although the EPA disavowed this agreement as a general precedent, the EPA is likely to become involved in further litigation over settlement agreements and liability for the cost of cleanup operations. Moreover, actions instituted by smaller generators will diminish the EPA's ability to negotiate further settlement agreements with any generator—large or small.

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ble parties. Subsection 107(e) viewed in its entirety, apparently addresses specific, related issues. A party can enter into an agreement whereby another person agrees to indemnify him against any liability imposed under § 107 but he remains personally liable, regardless of the agreement. However, § 107 does not preclude a party from enforcing an agreement to indemnify him once he has satisfied liability under the section. Because the scenario of multiple generators potentially liable under § 107, and the issue of contribution among them, do not fit within the language of § 107(e), one can argue that the section implicitly precludes contribution.

<sup>115</sup> See Note, *supra* note 2, at 1194.

<sup>116</sup> See 126 CONG. REC. H11,788 (daily ed. Dec. 3, 1980) ("A right of contribution is only of value to a defendant who has been held jointly and severally liable.") (statement submitted on behalf of the Justice Department by Rep. Florio). See also Faron & Feldman, *supra* note 113, at 151-52 (If courts impose joint and several liability, "the Government will be able to proceed against the 'deepest pocket' to recover damages. The 'deepest pocket' would then have a cause of action against other responsible parties for reimbursement of a proportionate share of the costs."). If courts ultimately recognize a right of contribution under Superfund, that right will probably conform to the principles of comparative negligence determined by federal common law. See *United States v. Waste Indus., Inc.*, No. 80-4-Civ.-7, slip op. at 40 (E.D.N.C. Apr. 17, 1981) ("Considering the strong federal interest in preventing and abating groundwater pollution and in having a uniform body of applicable law, the federal law should be applied to claims of contribution and indemnity."); see also Rodburg & Percell, *supra* note 113, at 601 ("[W]here liability is determined to be joint and several in hazardous waste litigation under federal statutes, one would expect the federal courts to preserve the right of contribution among joint tortfeasors, and probably to apply a federal rule in which contribution is calculated in accordance with comparative negligence principles.").

<sup>117</sup> See Moore, *supra* note 106. Allied brought a declaratory judgment action against Chem-Dyne and other settling companies that had been using the dumpsite in Hamilton, Ohio, arguing that the defendants should be responsible for any liability imposed on Allied. *Id.*

<sup>118</sup> See Rodburg & Percell, *supra* note 113, at 602. This settlement was with Inmont Corp. for cleanup at the General Disposal site in Santa Fe Springs, California. *Id.* The EPA rejected this settlement agreement as a general precedent. *Id.* (noting that EPA's "Settlement Guidelines" issued Dec. 18, 1981 disavowed *Inmont*).

## III

RATIONALES BEHIND THE EPA'S USE OF ALTERNATIVE  
ENFORCEMENT MEASURES

Several reasons underlie the EPA's use of abatement actions and settlement agreements to combat toxic waste pollution in lieu of federal-response operations with the statutory fund. First, use of fund monies is conditioned on the President securing an agreement from the particular state to pay either ten percent of the long-term remedial action costs or fifty percent of the response costs if the facility was at any time state-owned.<sup>119</sup> In addition, the state must establish an acceptable disposal facility and assume maintenance of future remedial actions.<sup>120</sup> Although state sharing of cleanup costs entails certain benefits,<sup>121</sup> the states currently lack funding for these costly projects.<sup>122</sup> Without the

<sup>119</sup> 42 U.S.C. § 9604(c)(3) (Supp. V 1981).

<sup>120</sup> *Id.*

<sup>121</sup> State involvement in hazardous waste cleanup aids in establishing priorities among waste sites and provides additional money and manpower. See THE SUPERFUND CONCEPT, *supra* note 22, at 103.

<sup>122</sup> See *EPA Controversy, State Ability to Raise Money Seen Impeding Superfund Work*, 13 ENV'T REP. (BNA) 2030 (Mar. 11, 1983) ("[forty-two] states are having difficulty coming up with the 10 percent cost share required under the law for Superfund-financed cleanups.").

Congress recognized that the states lacked money for the cleanup of hazardous waste sites and that the states would look to the federal government for necessary funds. See 126 CONG. REC. H9163 (daily ed. Sept. 19, 1980) (remarks of Rep. Moore). R.J. Scudato, director of the research center of the State University of New York at Oswego, testifying before the House Public Works and Transportation Subcommittee on Investigations and Oversight, noted: "Oswego County is currently economically stressed and cannot afford long-term site monitoring and/or site maintenance." *Hearing Witnesses, Final GAO Report Fault EPA Activities Under Superfund*, 13 ENV'T REP. (BNA) 403 (July 23, 1982) [hereinafter cited as *Hearing Witnesses*]; see also Mott, *Defenses Under Superfund*, NATURAL RESOURCES L. NEWSLETTER, May 1981, at 1, 18 ("The inability of a state to provide [for the costs of removal in remedial actions] . . . should legally deprive the federal government of the ability to take remedial actions."); *EPA Guidance Memorandum on Establishing National Priorities Under Superfund Law*, 13 ENV'T REP. (BNA) 339 (July 2, 1982) ("In some cases, Federally funded remedial actions may not be conducted under [Superfund] at a particular site . . . because a State is unable/unwilling to cost share . . .") [hereinafter cited as *Guidance Memorandum*].

Some states have raised the money for Superfund cleanup. For example, in 1982 the state of Washington received \$718,000 to clean up its Commencement Bay site. *\$11 Million Approved Under Superfund for Cleanup of 10 Hazardous Waste Sites*, 12 ENV'T REP. (BNA) 1753 (Apr. 30, 1982).

A bill in the last session of Congress would have loosened state contribution requirements by making only state owned and operated facilities incur 50% of the cleanup costs. H.R. 6307, 97th Cong., 1st Sess. (1982). The bill passed the House, see 128 CONG. REC. H6777 (daily ed. Sept. 8, 1982), but the Senate took no action. See *House Approves RCRA Reauthorization, Endorses Regulation of Small Generators*, 13 ENV'T REP. (BNA) 627 (Sept. 10, 1982).

Even though Congress has not reduced the state contribution requirements, some support for changing the requirement still exists. For example, George Tyler, New Jersey Assistant Commissioner for Environmental Management, felt that Congress should amend the law "to give the government some flexibility in establishing the appropriate state share of superfund cleanups without a mandatory limit." See *Government's Update*, *supra* note 87, at 470. Nevertheless, the EPA would oppose such an amendment. See *Administration, Chemical Group Oppose House RCRA Bill; Senate Working on Changes*, 13 ENV'T REP. (BNA) 687, 688 (Sept. 17,

requisite presidential agreement, Superfund limits federal governmental cleanup spending to \$1 million per site.<sup>123</sup> In light of the high cost of response and remedial operations,<sup>124</sup> an expenditure of \$1 million would constitute incomplete and ineffective action. State participation requirements thus pose a significant obstacle to federal cleanup efforts.<sup>125</sup>

Second, federal cleanups are subject to greater regulation than efforts by private companies. Federal cleanup under Superfund must comply with the National Contingency Plan and numerous other federal regulations, including RCRA.<sup>126</sup> Federal regulations may also require more detailed environmental impact statements before federal-response operations begin.<sup>127</sup> In contrast, cleanup actions commenced pursuant to a court-ordered injunction or a settlement agreement face less stringent requirements.<sup>128</sup> The government also prefers private industry cleanup actions because they negate the possibility of future challenges to the necessity and scope of similar government operations.<sup>129</sup>

Third, federal cleanup operations may be more expensive. Generators are often better equipped to undertake more cost-effective and efficient operations. Indeed, avoiding the cost of federal cleanup actions is a potential incentive for private industry to initiate solutions to the problem.<sup>130</sup>

Fourth, the EPA seeks abatement actions and settlement agreements because of the highly political nature of the hazardous waste issue. When the EPA obtains a preliminary injunction, the public perceives that the EPA has responded swiftly to hazardous waste problems, and the government gains popular approval. In *United States*

1982) (“[W]hen a public agency owning a site had a degree of responsibility for activities at the site,’ it should shoulder a large share of the burden for hazards created by those activities.”) (quoting Rita Lavelle, former EPA Assistant Administrator).

<sup>123</sup> 42 U.S.C. § 9604(c)(1)(B) (Supp. V 1981).

<sup>124</sup> See *supra* note 18.

<sup>125</sup> See Mott, *supra* note 122, at 18.

<sup>126</sup> 42 U.S.C. §§ 9604(a)(1), (c)(4), 9605 (Supp. V 1981); see also *Guidance Memorandum, supra* note 122, at 339 (EPA noted that it may conduct Superfund cleanups “because the cost balancing provisions of the trust fund would preclude federal response”).

<sup>127</sup> See S. REP. NO. 848, 96th Cong., 2d Sess. 55 (1980); see also Mott, *supra* note 122, at 18 (“[S]ome federally funded cleanups may require an Environmental Impact Statement beyond the program EIS contemplated by EPA.”).

<sup>128</sup> See *supra* note 96 and accompanying text; see also Guidelines, *supra* note 41, at 20,644.

<sup>129</sup> See Mott, *supra* note 122, at 17. (“Refusal of private parties to undertake actions beyond ‘cost-effective’ cleanup may lead to legal showdowns on the scope of the ‘proper’ remedy at a specific site.”) The EPA will not apply the cost balancing considerations discussed in the National Contingency Plan to proposed cleanup.

<sup>130</sup> See Mott, *supra* note 122, at 1 (noting that important obstacle to Superfund enforcement is “the unwillingness of private parties to sit by idly while the government incurs a huge cleanup bill on their behalf”); cf. Dinkins, *supra* note 18, at 13 (“The savings in litigation costs and negative publicity as a result of becoming a defendant in the litigation over a hazardous waste site represented real incentives to the settling parties.”).

*v. Petro Processors*,<sup>131</sup> the court noted that "taking a public stand on . . . [hazardous waste] issues . . . is politically expedient to certain public officials involved."<sup>132</sup> Reduced Superfund expenditures also make the administration's budget deficit appear smaller.<sup>133</sup> Moreover, fewer federal cleanups advance the current administration's policy of reducing governmental regulation.<sup>134</sup>

In contrast, federal cleanup actions can be politically troublesome. Delays and excessive regulation, which prevent swift and necessary action, create public criticism.<sup>135</sup> Designating hazardous waste priority sites across the country places the EPA in a political no-win situation; rarely are all the groups involved satisfied with a particular location.<sup>136</sup> Moreover, although Congress intended Superfund to create cooperation between the EPA and state environmental agencies,<sup>137</sup> quarrels often erupt between the EPA and the states over the use of Superfund mon-

<sup>131</sup> 548 F. Supp. 543 (M.D. La. 1982).

<sup>132</sup> *Id.* at 546.

<sup>133</sup> See *Former EPA Officials Said to Curtail Superfund Spending to Retain Current Law*, 13 ENV'T REP. (BNA) 2307 (Apr. 15, 1983) ("[O]fficials slowed Superfund expenditures to create the impression that the \$1.6 billion Superfund is adequate and need not be renewed by Congress."); *Report Says Reagan Budgets Less Than Half EPA Found Necessary in 1980 for Superfund*, 13 ENV'T REP. (BNA) 884 (Oct. 29, 1982) [hereinafter cited as *Reagan Budgets Less*] ("This is like balancing your checking account with poker chips that can only be spent in a casino.") (quoting Sierra Club staffmember).

<sup>134</sup> See, e.g., Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (requiring cost-benefit analysis before agency undertakes any regulatory action). One commentator noted that this cost-benefit approach markedly slowed the pace of regulatory activity during the Reagan Administration. See Costle, *Environmental Regulation and Regulatory Reform*, 57 WASH. L. REV. 409, 409 (1982). Professor Costle also argued that the Reagan administration's promised reduction of regulation was not the genuine regulatory reform desired by the public. *Id.* See generally Reagan, in *First Policy Statement, Asks for an Environmental Review*, N.Y. Times, July 21, 1982, at A18, col. 1.

<sup>135</sup> See, e.g., *Environmental Defense Fund v. Gorsuch*, No. 881-2083 (D.D.C. filed Feb. 12, 1982) (environmental group sued EPA for its delay in issuing National Contingency Plan required by 42 U.S.C. § 9604 (Supp. V 1981)); *supra* note 30 (discussing delays encountered in designating priorities for hazardous waste sites).

<sup>136</sup> For example, if the EPA designates a certain waste site as 50 on its priority list, some politicians will argue that the site should have had a higher priority, whereas others will deny that the EPA should have given the site any priority. See *13,000 Toxic Waste Dumps*, *supra* note 30; see also *Government's Update*, *supra* note 87, at 470 (Jeffrey R. Diver, Senior Environmental counsel for Waste Management Inc., expressed concern about "political or publicity motivations" for designating sites for emergency response).

<sup>137</sup> See Guidelines, *supra* note 41, at 20,664. See generally Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307, 323 (1982) (noting that "in order to bring sites up to applicable environmental regulations, states may be forced to spend their own money to continue work at sites at which cleanup began under Superfund."). The EPA also needs the cooperation of other federal offices to successfully carry out its Superfund mandate. See *Lavelle Says Most Second Quarter Targets Under Superfund Law Being Met or Exceeded*, 13 ENV'T REP. (BNA) 101 (May 28, 1982). EPA has already entered into six interagency agreements with five federal entities involving over \$7 million in funds to support Superfund activities. The governmental units are the Departments of Justice, Treasury, Health & Human Services, the Coast Guard, and the Federal Emergency Management Agency.

ies.<sup>138</sup> The EPA's use of abatement actions and settlement agreements can help avoid these political disputes.

Fifth, the EPA's use of abatement actions and settlement agreements indicates the urgency of the problem that hazardous waste sites present. Congress recognized the gravity of the problem when it enacted Superfund.<sup>139</sup> When lack of state commitment and administration policies thwart the use of Superfund monies,<sup>140</sup> EPA abatement actions and settlement agreements are often the most realistic and immediate responses to hazardous waste problems.<sup>141</sup>

Sixth, the EPA prefers to use preliminary injunctions because they avoid some of the flaws in application of Superfund. The statute, for example, does not explicitly impose strict liability<sup>142</sup> or joint and several liability,<sup>143</sup> even though both ideas were proposed in Congress.<sup>144</sup> Additionally, the size of the Fund restricts its use, thus encouraging the EPA to seek alternative enforcement methods.<sup>145</sup> The original Senate Superfund bill provided for a \$4.1 billion fund, but legislative compromise decreased the fund to \$1.6 billion.<sup>146</sup> The EPA has estimated that

<sup>138</sup> Disputes concerning Superfund monies arise between the states and the EPA because the states do not work with the EPA to designate priority waste sites. See *Guidance Memorandum*, *supra* note 122, at 339. Rather, they are given the opportunity to modify the scores in the EPA's priority lists only after they are published. *Id.* at 340.

Further controversy may ensue at the state level when competition between money claims for in-state waste sites occurs. See Mott, *supra* note 122, at 18. This competition will usually occur when the cleanup cost for a site exceeds \$1 million because at that point Superfund requires the state to fund a share of the cleanup costs before federal remedial operations begin. See *supra* notes 119-24 and accompanying text.

<sup>139</sup> See *supra* note 8 and accompanying text.

<sup>140</sup> See *supra* notes 119-24, 132-34 and accompanying text.

<sup>141</sup> See *13,000 Toxic Waste Dumps*, *supra* note 30. An estimated 1,200 to 2,000 sites creating recognized health hazards exist in the United States. *Id.*

<sup>142</sup> See Dore, *supra* note 57, at 275-78; see also Hinds, *supra* note 45, at 33 (scope of liability not clear); Comment, *supra* note 8, at 1278-79.

<sup>143</sup> See Note, *supra* note 2, at 1158; Comment, *supra* note 8, at 1273.

<sup>144</sup> S. REP. NO. 480, 96th Cong., 1st Sess. (1979), 126 CONG. REC. S14,938-40 (daily ed. Sept. 23, 1980).

<sup>145</sup> See Comment, *supra* note 8, at 1232 ("The importance of replenishing the fund under the Superfund scheme should not be minimized. The fund is of limited size, and its monies will be exhausted quickly, thwarting future cleanup efforts, unless Superfund's new liability-assessing provisions succeed.") (footnote omitted); see also *New EPA Land Disposal Regulations*, *supra* note 99, at 529 (Steven Ramsey states that if EPA uses fund as backup to settlement efforts, "we quickly will exhaust it").

There are proposals pending in Congress to extend the Superfund legislation for five additional years and to provide for five percent increases in funding levels after September 30, 1985. See H.R. 1615, 98th Cong., 1st Sess. (1983); see also *Lafalce Introduces Bill to Extend Superfund Through 1990, Increase Monies*, 13 ENV'T REP. (BNA) 2010 (Mar. 4, 1983).

<sup>146</sup> See *supra* note 33 and accompanying text. Senator Stafford admitted that the compromise eliminated "75 percent of what we were seeking." *Senate Passes \$1.6 Billion Superfund; No Compensation Provided for Victims*, 11 ENV'T REP. (BNA) 1097 (Nov. 28, 1980). The decrease in the Fund's size especially helped industry because industry finances the Fund through taxes. See *supra* note 4 and accompanying text. Indeed, a report by Public Citizen's Congress Watch examined the money received by Congressmen relating to the Superfund maneuvering and

cleanup of the projected 1,200 to 2,000 waste disposal sites, which threaten health and the environment, would cost between \$26 and \$44 billion.<sup>147</sup>

Finally, the lack of standards in section 106 encourages the EPA to obtain preliminary injunctions under that section. The clear intent of Congress to develop immediate responses to the hazardous waste problem,<sup>148</sup> in combination with the vague standards of the section, encourages broad application of injunctive relief.<sup>149</sup> Section 106's equitable provision, for example, could permit injunctions against off-site nonnegligent generators, the most remote defendants possible in this type of litigation<sup>150</sup> and authorize the most flexible, costly remedies.<sup>151</sup> Under section 106, courts can also assess a \$5,000 per day fine against a defendant who fails to comply with an EPA administrative order.<sup>152</sup>

#### IV

##### PREDICTED DIRECTIONS FOR SUPERFUND ENFORCEMENT

###### A. The Courts' Broad Interpretation of Section 106

Hazardous waste cleanup may continue under abatement actions and settlement agreements if federal courts adopt the government's interpretation of Superfund. Liberal construction of Superfund, and particularly section 106, is advantageous to the extent that it enables the EPA to seek cleanup by the parties responsible for hazardous waste problems before recourse to either extensive litigation or the Fund.<sup>153</sup> In addition, public abatement suits offer the best means of spreading the cost of hazardous waste cleanup.<sup>154</sup>

Nevertheless, courts must overcome certain obstacles before they can broadly apply section 106. Courts must refute the logic of both the

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found that "large campaign contributions by the chemical industry illustrate their heavy-handed efforts to thwart this critical legislation." *See Group Says Chemical Funds Recipients Lead Opposition to Superfund Proposal*, 11 ENV'T REP. (BNA) 668 (Sept. 5, 1980) (quoting Ralph Nader).

<sup>147</sup> *See supra* note 18.

<sup>148</sup> *See supra* notes 7-8 and accompanying text.

<sup>149</sup> *See supra* notes 65-67 and accompanying text.

<sup>150</sup> *See supra* notes 70, 80 and accompanying text.

<sup>151</sup> The most flexible remedies would include diagnostic studies financed by the generator. *See supra* notes 76-82 and accompanying text.

<sup>152</sup> 42 U.S.C. § 9606(b) (Supp. V 1981). Section 106 also permits the assessment of treble damages if a defendant disobeys an administrative order. 42 U.S.C. § 9607(c)(3) (Supp. V 1981); *see also* Dinkins, *supra* note 18, at 15.

<sup>153</sup> Commentators have noted the importance of the interpretation of § 106 to the government's entire enforcement scheme. *See* N. Orloff & K. Rubin, *Superfund and the Courts*, 1 ENVTL. L.F. 5, 8 (1983) ("[T]he interpretation of section 106 . . . will substantially affect both the pace and reach of the Superfund program.").

<sup>154</sup> *See Note, Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584, 603-04 (1981).

court in *United States v. Wade*<sup>155</sup> and some commentators<sup>156</sup> advocating a narrower interpretation of section 106. The strict constructionists argue that preliminary injunctions have traditionally been available only in the most limited circumstances.<sup>157</sup> Moreover, they contend that even if congressional intent implies liberal use of abatement actions, such use is inconsistent with the comprehensive scope of Superfund; liberal application of section 106 obviates the need for sections 104 and 107<sup>158</sup> and avoids expending fund monies.<sup>159</sup> The *Wade* court thus found that Congress intended sections 104 and 106 to serve specific purposes<sup>160</sup> and held that section 106 was not an alternative route for EPA cleanup of hazardous waste sites.<sup>161</sup> The availability of sections 104 and 107, in lieu of traditional equitable principles,<sup>162</sup> limits the scope of section 106.<sup>163</sup> Because Congress permitted the EPA to commence cleanup action immediately and subsequently recoup the monies used, courts should arguably compel the EPA to take that course of action, rather

<sup>155</sup> 546 F. Supp. 785 (E.D. Pa. 1982).

<sup>156</sup> See Frost & Cross, *supra* note 40, at 12.

<sup>157</sup> See *supra* note 49 (federal common law standards under which preliminary injunctions are issued). See generally Leubsdorf, *supra* note 59.

<sup>158</sup> See *United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982); cf. Frost & Cross, *supra* note 40, at 10 ("The establishment of the Fund and presence of an alternative means for cleaning up hazardous waste sites in section 104 makes a liberal standard for section 106 less essential for public health protection."). Liberal use of § 104's lower imminent-and-substantial-danger standard permits the use of fund monies for the protection of public health and the environment. Congress intended § 104 to work in tandem with § 107, which replenishes the Fund by placing liability on private parties for cleanup costs. See H.R. REP. NO. 1016, 96th Cong., 2d Sess. pt. 1, at 33, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6119, 6136 ("Section [107] would establish a federal cause of action for liability for the costs of emergency assistance, removal, and containment action undertaken pursuant to section [104]."); see also *United States v. Wade*, 546 F. Supp. 785, 793 (E.D. Pa. 1982). However, in *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1118 (D. Minn. 1982), the court held that liability under § 107 was independent of the cooperative agreement called for by § 104.

<sup>159</sup> See *United States v. Wade*, 546 F. Supp. 785, 794 (E.D. Pa. 1982). In any event, parties have rarely used the money available under § 107. Neither of the two cases filed under § 107 involved a claim seeking recovery from the Fund. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1136 (E.D. Pa. 1982). Also, in *United States v. Petro-Processors Inc.*, 548 F. Supp. 543 (M.D. La. 1982), the court encouraged the parties to solicit money from Superfund so that cleanup of the site could commence immediately. *Id.* at 546. Yet, "the State of Louisiana failed or refused to request superfund money to be used for the site in question." *Id.* The court, "never received a satisfactory explanation why." *Id.*

<sup>160</sup> 546 F. Supp. at 794.

<sup>161</sup> *Id.* One court also applied this reasoning in construing § 311 of the Clean Water Act. *United States v. Burns*, 512 F. Supp. 916, 919 (W.D. Pa. 1981) ("If the Government could get an unlimited recovery under other statutes, the balance of section 311 would be meaningless."). The court in *Burns* relied on *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 748 (5th Cir. 1980) which held that § 311 of the Federal Water Pollution Control Act is the government's exclusive means of recovering cleanup costs. The court in *United States v. Price*, 688 F.2d 204 (3d Cir. 1982), presumably applied similar reasoning.

<sup>162</sup> See *supra* notes 49, 59.

<sup>163</sup> See *United States v. Wade*, 546 F. Supp. 785, 794 (E.D. Pa. 1982).

than allowing it to seek injunctive relief under section 106.<sup>164</sup>

Courts must also overcome the argument that the use of section 106 as a source of regular, substantive liability may be unconstitutional. At least one commentator has suggested a "void for vagueness" attack on section 106 given the broad and uncertain reach of the section.<sup>165</sup> Given such an unclear mandate from Congress, expansive use of section 106 might also be void as an unlawful delegation of legislative powers.<sup>166</sup> In finding substantive, flexible standards in section 106, the courts may indeed be using it to legislate solutions to hazardous waste problems.

## B. Congressional Action

The EPA's neglect of Superfund's "revolving-door" fund suggests a need for further congressional action.<sup>167</sup> The limited amount of the Fund, which prevents the EPA from undertaking the majority of necessary cleanup operations,<sup>168</sup> together with state contribution requirements<sup>169</sup> and EPA policy has stymied the use of fund monies in enforcing Superfund's provisions. For example, the EPA failed to appropriate all the fund monies available to it for fiscal years 1981-82.<sup>170</sup> Further, the EPA's failure to publish statutorily mandated regulations on time has slowed its enforcement of Superfund.<sup>171</sup>

<sup>164</sup> *Id.*

<sup>165</sup> See Hinds, *supra* note 45, at 33 n.256; *cf.* United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982). In interpreting § 7003 of RCRA, the court noted that "[m]ore fundamentally, a court may not base a decision to impose liability on such a potentially vast group of defendants . . . on the basis of the conflicting and fragmentary legislative history of section 7003." *Id.* at 791 (citing United States v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138, 143-44 (N.D. Ind. 1980)).

<sup>166</sup> During the Superfund debates, Congressman Stockman introduced a substitute bill for H.R. 7020, hinting that H.R. 7020 would constitute an unlawful delegation. See 126 CONG. REC. H9439 (daily ed. Sept. 23, 1980). He argued that H.R. 7020 contained "an enabling act that delegates open-ended, unlimited, undefined powers to the [EPA]." *Id.*

<sup>167</sup> One can view Superfund as a "revolving-door" fund because Congress intended that monies obtained from future lawsuits under § 107 would replenish the funds available for use under § 104. See *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1313 (N.D. Ohio 1983) ("Congress [intended] that the fund would be maintained as a revolving fund for advancing the costs of these clean up operations while litigation progressed."). Government action taken under § 104 does not, however, explicitly depend upon a future lawsuit under § 107. *Id.* at 29 ("This Court concludes that a [§ 107] action might be brought where Superfund response authority does not exist under [§ 104]."). Nevertheless, once the EPA has used the \$1.6 billion fund provided for in § 104, Congress must either appropriate more money to the Fund, or the EPA must receive the money from § 107 suits. See also *supra* notes 6, 8 and accompanying text.

<sup>168</sup> See *supra* notes 145-47 and accompanying text.

<sup>169</sup> See *supra* notes 99, 121-25, 134 and accompanying text.

<sup>170</sup> A congressional oversight committee found an unused \$180 million surplus. See *Implementation Hearings*, *supra* note 3, at 4 (statement of Rep. Florio). The EPA, nevertheless, referred more cases under Superfund to the Justice Department in October 1982 than in the entire first quarter of fiscal 1982. *EPA Superfund Referrals to Justice in October Top First Part of Fiscal 1982*, 13 ENV'T REP. 1029 (Nov. 12, 1982).

<sup>171</sup> For example, the EPA published the National Contingency Plan mandated by § 105

The infeasibility of the "revolving-door" fund has prompted the EPA to use section 106 injunctions and settlement agreements.<sup>172</sup> These enforcement methods, however, have shortcomings of their own,<sup>173</sup> including the obstacles to a liberal interpretation of section 106.<sup>174</sup>

Congress can provide a partial solution to Superfund's enforcement problems by legislating more effective provisions for the EPA and the courts to implement.<sup>175</sup> In particular, new legislation would clarify the present ambiguities in section 106<sup>176</sup> and largely eliminate the uncertainty surrounding application of that section.<sup>177</sup>

With these problems in mind, Congress should enact new legislation specifically authorizing extensive abatement actions against generators, transporters, and disposal site operators. That legislation should *explicitly* impose strict liability on these parties for the cost of remedying waste hazards, as long as those hazards exist.<sup>178</sup> The new statute should

only after considerable delay, in response to a court order. *See* Environmental Defense Fund v. Gorsuch, No. 881-2083 (D.D.C. filed Feb. 12, 1982). One commentator suggested that the legislative veto in the Act delayed its implementation. *See* James, *infra* note 175, at 344. The EPA also has implemented health commissions and studies under Superfund inadequately. *See Government's Update, supra* note 87, at 469 ("[T]he five or six health studies currently underway began before the law was enacted, and that disease registries, literature surveys, and health surveys have not been established.") (paraphrasing Sen. Stafford, Chairman of the Senate Environmental and Public Works Subcommittee on Environmental Pollution).

<sup>172</sup> *See supra* notes 119-47 and accompanying text.

<sup>173</sup> *See supra* notes 39-83, 106-18 and accompanying text; *see also infra* note 182. Extensive litigation is one major disadvantage of seeking injunctive relief. The EPA refers cases to the Department of Justice and then four agencies must approve the decision to seek injunctive relief—the Department of Justice, the EPA, the regional EPA, and the state environment agency. Presentation by Erica Dolgin, Attorney, Dep't of Justice, Land & Natural Resources Division (Cornell School of Engineering May 2, 1983). Moreover, litigation is resource-intensive: it consumes time and money. The limited number of lawyers in these agencies will be unable to handle numerous § 106 actions unless Congress streamlines those actions by removing barriers to liability.

<sup>174</sup> *See supra* notes 155-65 and accompanying text.

<sup>175</sup> Other commentators have also suggested further congressional legislation regulating hazardous waste disposal. *See* Note, *supra* note 24, at 1058 ("Neither the superfund nor the other modern environmental statutes place the costs of waste management squarely upon those who need the financial incentive to oversee and to ensure proper hazardous waste disposal."); *see also* James, *Developments in Hazardous Waste Management*, 22 URB. L. ANN. 330, 345 (1981) ("Still needed . . . are devices to assure that those responsible for hazardous substance injuries will bear the costs and that those harmed will receive compensation.").

Senator Stafford, Chairman of the Senate Committee on the Environment and Public Works, commented that "the same tragedies which led to enactment in the first place will likely lead to second, third, or fourth enactments until, finally the law is fully implemented and enforced." *Superfund Must Be Implemented or Face Multiple Reenactments Stafford Warns*, 13 ENV'T REP. (BNA) 282 (June 25, 1982); *see also* United States v. Wade, 546 F. Supp. 785, 794 n.22 (E.D. Pa. 1982) ("Congress, and not this Court must legislate a remedy adequate to the scope of the problem.").

<sup>176</sup> *See supra* notes 39-83 and accompanying text.

<sup>177</sup> *See supra* notes 155-65 and accompanying text.

<sup>178</sup> *See* Note, *supra* note 24, at 1080; *see also* Note, *supra* note 154, at 588 ("All firms associated with the generation or handling of hazardous wastes should be strictly liable for costs shown to have been caused by those wastes."); Note, *Strict Liability for Generators, Transporters,*

also authorize modified joint and several liability plans<sup>179</sup> to determine the liability of all parties involved in abatement actions.<sup>180</sup> Additionally, the new legislation should not contain a statute of limitations for abatement actions because the full extent of damages to human health and the environment may not be known for many years.<sup>181</sup>

New legislation would necessarily entail two immediate policy changes for the EPA. First, the EPA should use settlement agreements only sparingly in conjunction with its abatement actions.<sup>182</sup> Moreover, any new settlement agreements that are negotiated should not release the polluters absolutely from liability; the EPA should instead pursue a consistent policy toward bifurcated settlements.<sup>183</sup> The new legislation should further require the EPA to issue a detailed annual report concerning its enforcement activities so that Congress can more closely scrutinize those activities.<sup>184</sup> Such a provision would not only relieve

*and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949, 985 (1980) ("Strict liability offers the only viable method of providing common law compensation to victims" of improper disposal of hazardous wastes.).

<sup>179</sup> A modified joint and several liability plan is one that provides for a right of contribution. For a discussion of joint and several liability and the right of contribution under the existing statute, see *supra* notes 110-16 and accompanying text.

<sup>180</sup> See Rodburg & Percell, *supra* note 113, at 601; see also Comment, *supra* note 8, at 1279 (advocating adoption of uniform and detailed federal rule on joint and several liability, and arguing that "[t]he courts should not seize isolated interpretations of the ambiguous statutory language on this issue to justify strict adherence to either the old or the modern common law rule regarding joint and several liability"). *But cf.* Note, *supra* note 2, at 1195 (advocating "adoption of a joint and several strict liability standard as a principle of federal common law").

<sup>181</sup> See Note, *supra* note 154, at 589 ("[A] waste generator's liability for costs stemming from its activities should be coextensive with the hazardous life of the wastes plus the time reasonably necessary to discover the injuries caused by the wastes."); *cf.* Panel Told All Landfills Leak, *EPA Rules On Hazardous Waste Land Disposal Inadequate*, 13 ENV'T REP. (BNA) 1276 (Dec. 3, 1982) (panel of scientists, technicians and EPA official recently told House subcommittee that EPA regulations are inadequate because all hazardous waste landfills eventually leak contaminants).

<sup>182</sup> In addition to the drawbacks to settlement agreements discussed earlier, *supra* notes 106-18 and accompanying text, such agreements also have the following disadvantages: (1) a court cannot prescribe statutory monetary penalties as it can under administrative orders; (2) if an agreement is not fulfilled, the agency cannot obtain immediate injunctive relief and must start new legal proceedings without the legitimacy of an administrative order; and (3) settlements do not insulate parties from citizen suits. See *EPA Official*, *supra* note 100, at 1055. *But cf.* Ruckelshaus Assures Senate Committee He Has Full Authority to Enforce the Laws, 14 ENV'T REP. (BNA) 3 (May 6, 1983) ("The agency cannot afford to settle every pollution cleanup case in court . . . . [S]ettlements should be set up, however, to be sure they are being carried out in the public interest . . . .") (paraphrasing Ruckelshaus in testimony before the Senate Committee on the Environment and Public Works).

<sup>183</sup> See *supra* notes 100-05 and accompanying text.

<sup>184</sup> A. Blakeman Early, lobbyist for the Sierra Club environmental group, made this suggestion after a Club report determined that only 98 sites would be cleaned up by October 1983 instead of a projected 265. See *Report Says Reagan Budgets Less than Half EPA Found Necessary in 1980 for Superfund*, 13 ENV'T REP. (BNA) 884-85 (Oct. 29, 1982). Rita Lavelle, former EPA Assistant Administrator for Solid Waste and Emergency Response, called the Sierra Club report "totally inaccurate," but conceded that Superfund "frankly is taking a lot longer

Congress of its need to subpoena EPA documents, but would facilitate cooperation between the two bodies.<sup>185</sup>

Congress should thus recognize the unworkability of the present statutory scheme and modify it to allow more extensive abatement actions. These actions, however, will not work in all cases. Where the EPA cannot find the responsible party or one that is solvent, it must immediately undertake cleanup at that site under section 104. The government should maintain a fund for such cleanup through direct appropriations or taxes on generators,<sup>186</sup> rather than through damages received from future lawsuits under section 107.

Congress should, however, retain some aspects of the present statutory scheme, particularly in the area of state activity. Even if Congress abolishes or lowers the state contribution requirements,<sup>187</sup> state enforcement activity is still crucial to effective environmental regulation.<sup>188</sup>

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than we thought it would." *Id.* at 885. Similarly, a GAO report noted "[w]e believe that EPA will have few cleanup experiences to report by December 1984." See *Hearing Witnesses, supra* note 122, at 404.

<sup>185</sup> Superfund required "a comprehensive report on experience with [its] implementation." 42 U.S.C. § 9651(a)(1) (Supp. V 1981). Nevertheless, to discover how the EPA enforced Superfund, Congress had to subpoena the EPA for over 700,000 documents that discussed and assessed hazardous waste enforcement, litigation, and settlement strategies. See *Attorney General Cites Executive Privilege on Superfund Documents to Two House Panels*, 13 ENV'T REP. (BNA) 1275 (Dec. 3, 1982). When the EPA failed to comply with the subpoena, Congress held EPA Administrator Anne Gorsuch in contempt. See *House Votes to Find Gorsuch in Contempt; Justice Sues House to Block Further Action*, 13 ENV'T REP. (BNA) 1435 (Dec. 24, 1982). The documents were subsequently released and Anne Gorsuch, who married to become Anne McGill Burford, resigned. See *After Burford—What Next for EPA?*, U.S. NEWS & WORLD REP., Mar. 21, 1983, at 25-26.

<sup>186</sup> The EPA's draft Economic Impact Analysis of the RCRA hazardous waste regulations identified 17 major waste generating industries. Yet chemical and oil industry taxes supply the major portion of the Fund. Thus, the Fund arguably imposes liability on a narrow group of industries that have less of a causal nexus with the creation of the hazardous waste problem than other waste generating industries.

Recently, the Supreme Court scrutinized more closely industry-based fees for this causal nexus. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Court upheld the Black Lung Benefits Act, which taxed the coal industry for the medical expenses of black lung disease victims. The Justices upheld the compensatory scheme as a rational allocation to the producers of an "actual, measurable cost of [their] business." *Id.* at 19. The industry nexus between generators of hazardous waste and site disposal problems is in some cases more tenuous than the connection between the coal industry and black lung disease. If the court were to find an insufficient nexus, administration of the Fund might raise due process concerns and thus be considered unconstitutional. This does not seem likely, however, given the broad reading of nexus in *Turner Elkhorn Mining*. *Id.* at 19-20; see also Comment, *supra* note 8, at 1247 (due process argument lacks real merit). But see *Railroad Retirement Bd. v. Alton*, 295 U.S. 330 (1935); *State Dep't of Env't Protection v. Exxon Corp.*, 151 N.J. Super. 464, 479, 376 A.2d 1339, 1344 (1977) (legislature intended act and causative nexus to be present between discharger and dischargee in New Jersey Spill Control Act).

<sup>187</sup> See *supra* note 122.

<sup>188</sup> See Eichbaum, *State and Federal Environmental Enforcement*, in ENVIRONMENTAL ENFORCEMENT 8 (1978) (Selected Readings prepared in Conjunction with the Seventh Annual Conference on the Environment by the American Bar Association's Standing Committee on Environmental Law) (noting declining role of states in environmental enforcement, detailing

States should continue to participate in removal and remedial actions by joining their claims against defendants in EPA abatement actions and negotiating in EPA settlement agreements. Congress should also encourage state legislatures to adopt their own laws regulating disposal of hazardous wastes.<sup>189</sup>

### CONCLUSION

In enforcing Superfund, the EPA has not followed Congress's intended plan—cleanup of hazardous waste dumps using a fund replenished with awards from litigation involving waste generators. Because this "revolving-door" fund has proved unworkable, the EPA has brought abatement actions under section 106 and has negotiated settlement agreements to force private cleanups.

These enforcement methods, however, have major drawbacks of their own. The ambiguities of section 106 have allowed some courts to interpret the section broadly and grant injunctive relief, while other courts have chosen to construe the section strictly and force the EPA to use its limited resources to clean up waste sites under sections 104 and 107. Generators of hazardous wastes are left justifiably confused over the scope of their liability under Superfund. Further confusion is likely to result from challenges questioning the basis of the EPA's settlement agreements and its litigation policies.

Congress could let courts continue to struggle with the ambiguities in Superfund. This course of action, however, would take too much time; hazardous waste pollution is a serious threat calling for immediate action. Congress therefore should enact new legislation dispelling the present uncertainties in Superfund enforcement and mandating extensive abatement actions. The EPA could then design its policy to enforce effectively the legislation and remedy the problems created by hazardous waste.

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many reasons why continued state involvement is vital, and suggesting that federal government assume full funding of state environmental agencies).

<sup>189</sup> The New York state legislature recently adopted a state superfund which will raise \$10 million annually to clean up inactive waste dumps. Hazardous Wastes—Remedial Funds To Clean Up Inactive Waste Sites, 1982 N.Y. Laws ch. 857 (codified at N.Y. ENVTL. CONSERV. LAW 27-1303 to -1319 (McKinney Supp. 1983-84)). The New Jersey legislature has also enacted a state superfund. *See* Hazardous Discharge Bond Act, 1981 N.J. Sess. Law Serv. ch. 275 (West).