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E. Donald Elliott
Yale Law School

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Superfund: EPA Success, National Debacle?

E. Donald Elliott

Today the Superfund program is being run about as well as it can be, but its performance still is unsatisfactory:

- The pace of cleanup at contaminated sites is too slow.

- Too much money is going into the pockets of lawyers and consultants and not enough into actual cleanup work on-site.

- Billions of dollars are being spent on "cleanups" that produce only tiny benefits in risk reduction in comparison with other available environmental investment opportunities.

For all these reasons, our national Superfund policy threatens to become a major debacle, one that could discredit environmental protection programs in the United States for years to come. The problem is not that the Environmental Protection Agency (EPA) has failed to do its job properly. After an admittedly rocky start, by and large EPA is now faithfully executing congressional mandates. After years of disruption, the Superfund program is finally working the way Congress intended—and therein lies the problem.

The fundamental source of problems with Superfund is not the way EPA is doing its job; it is the nature of the nearly impossible job that EPA has been given to do. As Bob Hahn, an environmental economist with the American Enterprise Institute, wrote recently: "Superfund is frequently criticized because of what are perceived to be 'implementation' problems, [but] the problems are really structural in nature."

What follows is a summary of EPA's recent accomplishments in implementing the Superfund program, then reasons to question our current policies in Superfund and other toxic

cleanup programs are examined. Two basic structural problems underlie the current Superfund approach to cleaning up hazardous waste sites: complexity and muddled objectives. The final section discusses what can be done to improve the situation.

In 1989, William Reilly took over as EPA administrator committed to making the Superfund program work. Reilly's first step was to appoint a task force of experienced agency officials to conduct a thorough review of the administration of the Superfund program. Out of this "90-Day Management Study" grew a number of improvements, including EPA's "enforcement first policy." Rather than allow lengthy negotiations with "potentially responsible parties" (PRPs) to delay cleanups, EPA now limits the period for negotiations. If agreement cannot be reached, EPA will order one or more of the PRPs to perform the cleanup or it will do the cleanup itself.

Reilly also decided to turn administration of the Superfund program over to EPA career professionals rather than political appointees from outside government. Reilly recommended that the White House appoint one of the EPA's top career managers, Don Clay, to take charge of EPA's waste programs, including Superfund.

Under Reilly's new policies and Clay's experienced management, the Superfund program has been setting new records by every measure of performance. Settlements are up, case referrals are up and, most important, actual on-site cleanup work is way up. Since the end of fiscal year 1988 (September 30, 1988), the number of Superfund sites at which construction has begun is up 215 percent (288 versus 134). The number of sites at which remedial construction has been completed is also up an impressive 146 percent (63 versus 43). (Completion of construction is a better measure than deletion of sites from the National Priority List (NPL), because sites remain on the NPL for five years after completion of work for reassessment of the cleanup's effectiveness.) [Editor's Note: EPA has changed its policy since this article was submitted. See 56 Fed. Reg. 66,601 (Dec. 24, 1991).]

However impressive these improvements in administration of the Superfund program may be, they are dwarfed by the daunting task that lies ahead. There are presently 1,188 sites on the NPL for priority cleanup. This number may grow to almost 2,000 by the year 2000, with more to come. In addition, an estimated 12,000 sites that do not qualify for the NPL may also require some remediation. Total costs for Superfund cleanups are estimated to range from \$25 billion to over \$120 billion and Superfund is just one of several government programs to

Mr. Elliott is a professor of law, Yale Law School. From 1989 to 1991 he served as assistant administrator and general counsel, Environmental Protection Agency.

Editor's Note: The views expressed in this article are those of the author and do not necessarily represent the official position of the Environmental Protection Agency.

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clean up toxic waste sites. Other government programs include: RCRA Corrective Action; the Leaking Underground Storage Tank program; federal facilities cleanups; uranium mill tailings and abandoned mine lands cleanup programs; not to mention asbestos, radon and other state programs! When the entire national toxic waste cleanup effort is considered, costs may mushroom to \$300 billion to \$700 billion, according to the independent Office of Technology Assessment. (To put this enormous sum into perspective, it is approximately equal to a tenth of the annual gross national product of the entire U.S. economy. Of course, these cleanup costs would not be incurred in a single year, but they still represent a major investment of our country's limited resources.)

These enormous investments of our limited resources might be worth making if the American people were getting their money's worth in terms of reducing risks to health and the environment. They are not. Too large a share of the huge amounts of money that we as a society are pouring into Superfund and other toxic cleanup programs is being wasted. No one knows exactly what percentage of Superfund spending is wasted, but we do know that too much money is going into the pockets of lawyers and consultants in unnecessary transaction costs. In addition, many of the so-called "cleanups" will not work or, at best, will produce very little real benefit at high cost. Estimates of the total waste in Superfund in different studies range from one-third to two-thirds of the total amount currently being spent. Whichever percentage is correct, it is much too much. There is undoubtedly some fraud and mismanagement in any program as large as Superfund. However, most of the waste is not caused by mendacity or bureaucratic ineptitude but by two basic problems that are built into the structure of the Superfund program: undue complexity and muddled objectives.

Problem 1: Complexity and High Transaction Costs

The single most damning statistic about the Superfund program is that it takes, on average, ten years to clean up each site, *but only about three years is actual on-site construction work!* As the chart on page 13 shows, a total of twenty-eight calendar *quarters* (not months), or seven full years, is spent on a complex, legalistic and bureaucratic process of extended study and assessment of the site; review, negotiation, and compilation of the legal record; and design of the remedy. This is 70 percent of the total time

spent and a substantial, although lesser, share of the cost.

The rules that govern this process of extended study and debate about what is to be done at a Superfund site are stunning in their complexity. The master rule that governs this process, the National Contingency Plan (NCP), is over 200 pages in length. It is supplemented by countless EPA internal memos, guidance documents, precedents, policies, internal practices and other forms of arcane lore that are memorialized in roughly 12,000 "OSWER Directives" from EPA headquarters to its field offices.

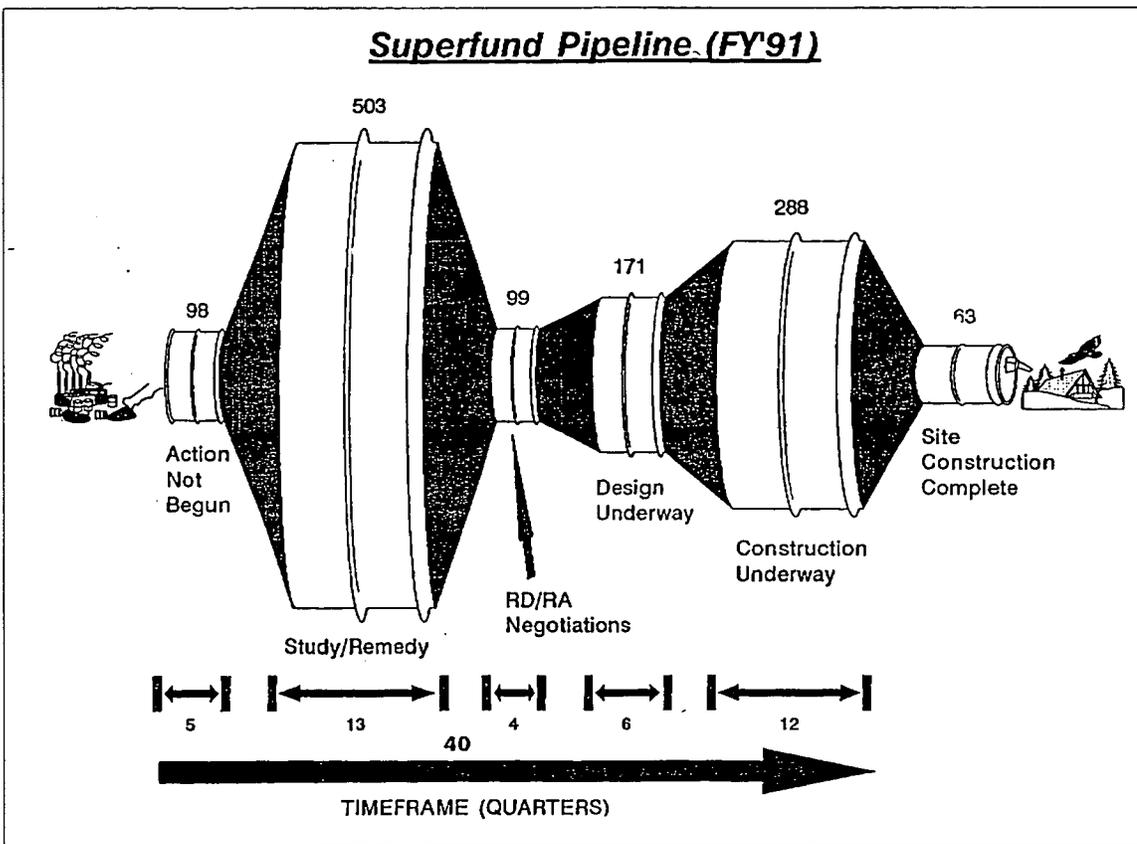
James Landis, the father of American administrative law, once wrote that developing simple "effective routines" is the key to good administration. Unfortunately, however, for all its volume and complexity, our enormous and unwieldy body of law and administrative practice under Superfund fails to provide clear guidance that can be administered efficiently and predictably. Rather, the NCP lists multiple factors that must be weighed and balanced in each individual case. Thus, each Superfund site is viewed as essentially unique, with a remedy to be custom-designed ad hoc through an extensive process of analysis conducted in an adversary setting.

This already complex process is made even more difficult, time-consuming and expensive by the necessity to involve scores (sometimes hundreds) of PRPs directly or indirectly in every decision. Former Assistant Attorney General Richard Stewart once said that Superfund's approach to implementation is like declaring everybody in town jointly liable for the construction of a new town hall and then having a mammoth lawsuit to design the building and to allocate cost shares among all the residents.

To be sure, some portion of the time is well spent in characterizing the site and designing a remedy. In addition, some form of open, participatory legal process is needed to allow appropriate opportunities for affected parties and the public to participate in making decisions. But it is unlikely that seven years of complex legal and administrative proceedings at each Superfund site are really necessary to satisfy the public's desire to participate, particularly because public hearings normally consume only a few weeks of the total time involved.

There are understandable, historical reasons why this complex, time-consuming and expensive set of Superfund procedures was adopted. Much of the complexity is required to implement the extraordinarily detailed and prescriptive statutory provisions passed in the wake of Superfund's problems in the early 1980s. Ex-

Superfund Pipeline (FY'91)



perience has shown, however, that these institutional arrangements are grossly "mismatched" to the substantive policies they are intended to serve. Superfund's unique approach to designing a site cleanup is comprehensive study and analysis in an adversary setting under bureaucratic supervision among multiple parties as a prelude to negotiation and litigation. It is little wonder that it takes seven years and at least \$4 million in transaction costs at each site to conduct the necessary studies and design remedies before the final cleanup can begin. (It is important to be clear, however, that EPA does *not* wait for this seven-year bureaucratic process to run its course before taking action to abate situations that pose imminent risks to health or the environment. EPA is about to perform its two thousandth "removal action" to remove leaking drums or otherwise stabilize the situation at a Superfund site.)

Problem 2: Muddled and Inconsistent Goals

Superfund's complexity and high transaction costs are not an accident, nor do they result

(at least to any significant degree) from bureaucratic ineptitude or the desire of the legal profession to feather its own nest. On the contrary, complexity and the high transaction costs brought in its wake are an inevitable consequence of a program with muddled, inconsistent objectives.

As a nation we have been unable to decide whether the goal of the Superfund program is:

- to clean up hazardous waste sites quickly and efficiently so that they do not pose a significant risk to health and the environment;
- to punish retroactively those who in the past dumped toxic chemicals;
- to create economic incentives to deter others in the future from releasing chemicals into the environment;
- to reassure communities that their health will be protected;
- to protect resources such as groundwater for future use;
- to restore waste sites to pristine condition; or
- to enforce state and local decisions on the appropriate level of cleanup.

Each of these policies—and many others—un-

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