MACK MCLARTY

Feb. 2, 1994

To: John Podesta:

Mack asked that you provide him with a 1-page summary regarding Superfund -- the NEC position and the legislative (Pat Griffin) issue -- where it stands politically.

Mack would like the summary in his hands Friday.

Thanks,

Patty

Attachment (FYI)

94 FEB 2 P7:38

"USA TODAY hopes to serve as a forum for better understanding and unity to help make the USA truly one nation."
—Allen H. Neuharth
Founder, Sept. 15, 1982

THE NATION'S NEWSPAPER
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Today's debate: CLEANING UP SUPERFUND

Burnd

Superfund needs reform to speed toxic cleanup

OUR VIEW **Superfund needs to be reformed, if only to control the almost criminal cost of the litigation it inspires.**

After more than a dozen years and more than a dozen billion dollars, the toxic truth is that Superfund, created to clean up hazardous waste sites, still doesn't work very well. The number of sites requiring action grows by 100 a year, but of the 1,289 currently identified, only 220 have been cleaned.

Reason: Superfund is absurdly expensive, hideously complex and sometimes patently unfair. As a result, it invites litigation the way dung attracts flies: not by seeking, but just by being.

Reform isn't easy; efforts have been ongoing since 1986. But reform starts with an easy premise:

The process by which Superfund gets polluters to pay the cost of cleanups needs to be overhauled.

Currently, Superfund relies on the threat of "joint and several liability," which means that even if you contributed only 1% of the waste, you can be liable for 100% of cleanup, which averages tens of millions of dollars per site.

This provokes a staggering array of legal actions — by and against insurers, dumpers, waste-site owners and operators, "successor corporations" and government agencies. An estimated $400 million a year goes to lawyers alone.

But lo, relief may be in sight. Upcoming legislation to re-authorize Superfund will adjust the way liability is allocated. Instead of sticking the total on whoever is in sight, responsible parties would negotiate a fair-share payment. If they contribute 20% of the waste, they pay 20% of the cleanup. Only if they refuse to settle will they face greater liability.

Some other Superfund reforms make good sense. Not every site need be clean enough for kids to eat dirt, and at every site, community involvement needs to be amplified. Other ideas, though, are as hazardous as acid. A plan to end retroactive liability could cost taxpayers billions of dollars and should be squelched.

Of course, every interest group has a different interest in Superfund. But there's broad agreement on this much: Reform must cut the criminal amount of litigation that Superfund inspires. That means putting "joint and several" liability far in the background.

▶ Focus on environment, 4A

Beware Superfund 'reform'

OPPOSING VIEW **Opening up the law could result in even slower and less effective cleanup.**

Reform of Superfund sounds like a good idea. But whose "reforms"?

For the victims of pollution who live near the sites, "reform" would open a Pandora's box that could result in even slower and less effective cleanup, as polluters mount a full-court press to weaken Superfund.

By Rick Hind, legislative director of the Greenpeace toxics campaign, Washington.

Since Superfund became law, Congress and the Environmental Protection Agency have turned a blind eye to the people of communities whose plight inspired the law.

This neglect of the victims is most pronounced in communities of color, where it amounts to nothing less than racism. But these are not the issues being debated in Washington today.

Instead, cries rise from Congress, industry lobbyists and editorialists that Superfund is "unfair" to polluters. They claim that more money is spent on lawyers than cleanup.

But according to the Rand Corp., the government spends only 11% of its Superfund budget on lawyers, mostly for enforcement. The only lawyers getting rich from Superfund are the polluters' attorneys, hired to get their clients off the hook for cleanup costs.

According to the EPA, 60% of the cleanups are done by the polluters, with the rest covered by Superfund. But 86% of Superfund comes from a special tax on polluting industries.

The bottom line: Almost all of the program is funded by the polluters themselves, so "reform" could remove the best financial incentive for companies to clean up their act.

EPA can make Superfund better without meddling by Congress and special interests. Reform should start by asking the 40 million people living near toxic waste sites what they think.

February 4, 1994

MEMORANDUM FOR MACK MCLARTY

FROM: JOHN PODESTA
TODD STERN

SUBJECT: Superfund

Background

The Superfund law expires at the end of this year and needs to be reauthorized and reformed. Internally, there has been a fair amount of pulling and tugging on the substance between the environmental shops (EPA and OEP) and the economic shops (NEC, Treasury and others). An initial consensus was hammered out in December, but the Vice President advised that it was too far to the right, especially in light of the work being done by the private Keystone Commission (made up of business and environmental leaders). After discussions with Keystone, a new Administration consensus was reached that Keystone and others, including key Members on the Hill, see as a decent start.

The Legislative Situation

EPA transmitted the Administration proposal to Congress Wednesday night. The relevant Committee and Subcommittee Chairmen -- Baucus, Lautenberg, Dingell and Swift -- held a press conference Thursday morning and Swift held a hearing the same day. Ways and Means will have a part of the bill, and Rostenkowski is on board.

The prognosis for passage this year is better than it was a few weeks ago, before the new consensus was reached, but still not very good. First, this is extremely complex legislation. Whether the initial consensus will hold together in the clinches is an open question. Second, the legislative calendar presents a formidable problem, especially in the House. Dingell, whose Energy and Commerce Committee has the main jurisdiction over Superfund, doesn't want anything to interfere with health care and is thus is not optimistic about Superfund's chances. Ways and Means, the other committee with jurisdiction, will also be busy on health care.

The calendar problem is not as bad in the Senate. Baucus, in Public Works, wants to do Clean Water first, but that is not the obstacle that health care is. In addition, since Baucus also sits on Finance, which has a piece of Superfund as well as health care, he can be helpful in moving the bill in that Committee. **Bottom line: final passage this year will be very tough.**

January 29, 1994

MEMORANDUM FOR THE PRESIDENT

FROM KATIE MCGINTY
BO CUTTER

SUBJECT: CHANGES TO THE ADMINISTRATION PROPOSAL FOR THE REAUTHORIZATION OF SUPERFUND

The purpose of this memo is to secure your approval of several changes in our original Superfund reform proposals.

We are moving toward our goal of introducing a strong Superfund reform package. As a result of extensive discussions with Congress, industry, states, communities, and environmentalists, we have made several changes to our original package. While most of our earlier proposed reforms remain in tact, these changes will help engender the broadest possible support for the package and thereby help ensure action on Superfund reauthorization this Congress.

Our initial memorandum to you focussed on two distinct areas: 1) reforming the liability system, and 2) reforming the standards and processes governing the cleanup of Superfund sites.

Key changes made over the last month have: strengthened liability reforms; eliminated cost considerations in selecting health-based risk ranges and cleanup levels; removed a requirement that states pay incremental costs involved in achieving a state clean up level that is more protective than a comparable federal requirement; and recognized that certain severe types of contamination must, eventually, be treated. Overall, the thrust of the package is quite similar to our initial proposal, and if enacted, our reforms will reduce the cost of cleanups, minimize litigation, improve fairness, and fully involve communities in local decisions.

Liability System

In amending our proposal to reform the liability system we have addressed two major issues:

- Industry representatives urged us to introduce a binding allocation system for assigning liability, rather than the non-binding system we had proposed. The Department of Justice argued strongly against such a system, however, on constitutional grounds and on the grounds that such a system would be quite costly. We resolved the issue by making it difficult, though not impossible, for the government to reject the allocation.

- We have worked through the details of the Insurance Settlement Fund (ISF) with the representatives of the insurance industry and responsible party community. The ISF would replace the current insurance-litigation system with a settlement fund financed through a tax[1] on property and casualty insurers. (The idea of such a tax was originally suggested by the insurance industry.) Under the proposal, the Fund would offer to settle insurance claims with PRPs at an established rate based on the likelihood of recovery by PRPs from insurers under each state's insurance law. PRPs would have the option of participating in the ISF if they settle their Superfund liability with the government.

Anticipated Reaction of Constituencies

With regard to the allocation process, responsible parties will be supportive of our proposal, but will likely continue to seek a system that is binding on the government through the legislative process.

With regard to reform of the insurance litigation system, the insurance companies and responsible party companies who helped to develop the proposal will respond to it as a positive first step to address a difficult problem. Insurance companies who lobbied for a complete elimination of liability, however, will continue to push for such reform. In addition, those responsible parties who feel that their insurance policies cover Superfund liabilities will also oppose our proposal. You should be aware that Ben Chavis has joined forces with these interests and is trying to organize a coalition. We have had several meetings with Dr. Chavis and his group and expect that, while they will not endorse our bill, they will commend your effort to bring change and reform to the program. Key committee chairmen in the House and Senate have written you in opposition to the Chavis coalition approach.

Remedy Selection

We have made three significant changes to our previous proposal with regard to remedy selection. We do not believe that these changes will significantly reduce the savings that we anticipated from the implementation of the reforms we originally proposed to you.

- EPA will not consider costs in developing national cleanup levels. The proposal continues to call for the consideration of costs, however, in selecting cleanup remedies at particular sites. This change responds to views strongly expressed by Congress and a diverse coalition of industry, environmental, and community groups that clean up levels should be purely health-based, while cost savings should be realized in selecting the appropriate remedy.

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[1] See Appendix A for a more thorough description of the financing mechanism involved here.

- States will not have to pay any incremental costs that may be involved in achieving a state-imposed cleanup standard that is more stringent than a comparable federal cleanup standard. However, we have provided waivers from compliance with an overly stringent state standard and have added new provisions requiring the states to base their standards on the best science and develop them in a public proceeding. This change reflects the strong view expressed by Senator Mitchell and others that our original proposal needed to better respect state prerogatives to protect health and safety.

- Instead of eliminating the statutory preference for treatment and permanence in all cases, we will explicitly retain the preference for treating "hot spots," i.e.; contaminated sites that can not reliably be contained and therefore must be treated in order to protect human health and the environment.

Anticipated Reaction of Constituencies

With regard to the consideration of cost in remedy selection, our proposal should be generally supported by the Congressional leadership and other key constituencies. Some groups may still find our cost considerations to be overly rigorous, however, while others will argue for a more rigorous cost analysis. Our proposal represents a solid middle ground.

With regard to state standards, the Congressional leadership will likely find our proposal to be overly restrictive of state prerogatives in this area, but will not consider this iteration, unlike our earlier proposal, to amount to a pre-emption of the states.

With regard to the treatment of "hot spots"; some groups will fear that this exception will swallow the rule, otherwise established by our proposal, that containment of contaminants, rather than treatment, is acceptable. Other groups will find our definition of a "hot spot" to be too narrow; raising the possibility that some dangerously contaminated sites will be left untreated. Overall, our response is a solid starting point.

Citizens' groups and environmental groups will be critical of our failure to set in the statute a standard of achieving less than one in a million risk of mortality. While not precluding a one-in-a-million standard, our proposal allows for the possibility of setting a less protective standard. Their criticism will be less harsh than previously anticipated, however, because we have removed the consideration of cost from the list of factors that could lead to the selection of a less protective standard and because we will expressly recognize the premise that all communities are entitled to the same levels of protection.

Recommendation

We recommend that you authorize us to present this package as the Administration's initial bill.

_____ Agree _____ Disagree _____ Need to Discuss

APPENDIX A

The reform proposal to reduce environmental insurance litigation would be financed by two new assessments on the insurance industry. The first funding source would be an assessment on historical premiums from certain commercial insurance policies issued between 1971 and 1985. This assessment would apply to insurers and reinsurers subject to U.S. tax. Foreign insurers and reinsurers may elect to pay this assessment or an alternative assessment based on commercial insurance currently written. This approach is intended to approximate, without litigation, the private settlement of Superfund liabilities between insurance companies and their insureds. It requires contributions from insurance companies that reflect the benefits they will receive from insurance litigation reform.

The second funding source would be an assessment on premiums from commercial insurance currently written by domestic and foreign insurers. Reinsurers would not require a direct assessment because insurers would reflect their assessments in the pricing of reinsurance. Pricing adjustments would also cause purchasers of commercial insurance to bear a portion of this assessment through higher premiums.

The revenue allocation to each funding source is under discussion. Both assessments would be scored on-budget and counted as excise taxes or miscellaneous receipts. It is uncertain whether the proposal would increase the budget deficit under the paygo rules and thus require additional revenues. However, we are reviewing the budget rules to make an appropriate determination. We are also consulting with the health care team to ensure that the budget scoring of these assessments does not create an undesirable precedent for the treatment of premiums under the Health Security Act.

THE PRESIDENT HAS SEEN

DPJ

THE WHITE HOUSE

WASHINGTON

December 23, 1993 93 DEC 23 P7:57

MEMORANDUM FOR THE PRESIDENT

FROM: Katie McGinty & Bo Cutter LB for KM

SUBJECT: Administration Proposal for the Reauthorization of Superfund

Looks good — Does VP agree — If so, go forward If not, tell me his position — B

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

I. Action-Forcing Event

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

II. Background

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

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

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

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

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

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

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

III. Proposed Initial Administration Position on CERCLA Reauthorization

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

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

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

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

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

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

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

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

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

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

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

50 cents on the dollar).[2]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. COST IMPLICATIONS AND BUDGET IMPACT OF THE PROPOSED REFORMS

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

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

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

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

V. RECOMMENDATION

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

__✓__ Agree   ____ Disagree   ____ Need to Discuss

The New York Times

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2/7/94

Not So Super Superfund

It is hard to think of a government program with a wider gulf between ambitions and results than Superfund, the program enacted in 1980 to clean up thousands of toxic waste dumps across America. The Clinton Administration now advances a promising plan to redo that law. With health care on the agenda, Congress may not have the political stamina to address Superfund. But it should; every day that the present law is in operation represents another day of misdirected resources.

Hastily written by Congress in response to the Love Canal disaster in upstate New York, where 20,000 tons of chemical wastes buried by the Hooker Chemical Company were suspected of causing miscarriages, birth defects and cancer, Superfund has failed on nearly every count.

It has failed the performance test: of 1,289 sites with serious health risks, only 217 have been cleaned up in 14 years. It has failed the efficiency test: of the $13 billion spent by governments and companies, one-fourth has gone to what are euphemistically known as "transaction costs" — fees to lawyers and consultants, many of them former Federal officials who spun through Washington's revolving door to trade their Superfund expertise for private gain. Finally, it has failed the cost-effectiveness test: time and again, slightly contaminated soil that might have been paved over or otherwise quarantined at modest cost has been dug up and incinerated at great cost.

But one cannot simply walk away from Superfund. The people who live near toxic wastes deserve to have them cleaned up. And the fact that polluters must pay for their past sins — the bedrock principle of Superfund — is a continuing reminder not to make the same dumb mistake again.

The trick, therefore, is to fix Superfund. The Administration offers a lot of fixes, but two are of great importance.

First, remedies for cleaning toxic sites would be based partly on "probable future use." A landfill slated for a day care center would require thorough cleaning; less restoration would be required if the site was to be used for industry or a municipal parking lot. As Carol Browner, director of the Environmental Protection Agency says, "there will be different levels of clean."

Congress actually built such flexibility into the program back in 1980. But along came the laissez-faire attitudes of Ronald Reagan and his feckless E.P.A administrator, Anne Gorsuch, and Ms. Gorsuch's pliant Superfund director, Rita Lavelle. Apart from throwing some cleanup money at a few favored Congressmen, the Gorsuch-Lavelle team let one industry after another off the hook. In Mr. Reagan's eight years, according to a G.A.O. report, only 16 of the 799 Superfund sites then identified were cleaned up, and only $40 million of a potentially $700 million in recoverable cleanup funds from polluters were collected.

A justifiably furious Congress then allowed anger to override common sense. In 1986, it amended Superfund so that the E.P.A. was virtually required to approach every dump as if it were a Love Canal, to be dug up and transported elsewhere. The Administration would now change that pathology.

The second big change would reduce wasteful transaction costs. Under Superfund's existing liability provisions, every company that dumped wastes into a Superfund site, at any point in the site's history, can be held responsible for the entire cleanup. This has encouraged companies to sue one another or their insurance carriers in an attempt to shift the blame and the cleanup costs elsewhere.

The result has been interminable litigation that delays action. Ms. Browner suggests a new approach under which all parties would agree to arbitration by a "neutral professional" like an administrative law judge. She also proposes a Federal "orphan fund" to cover the costs of cleaning up pollution whose origins cannot be traced.

These and other sensible ideas germinated in Ms. Browner's staff and in a private task force, the National Commission on Superfund, set up by the nonprofit World Resources Council. That the task force was composed of people who have been at war over Superfund for years — industrialists, environmentalists, insurers, and state and local officials — suggests that a rare consensus exists for needed change. But given Superfund's contentious history, and the sums at stake, the lobbyists are sure to be out in full force when a finished proposal reaches Capitol Hill. Ms. Browner will need all the help she can get from an already busy Bill Clinton.

Storm Warnings on Health Care