

RESPONSE STRATEGIES FOR POTENTIALLY RESPONSIBLE PARTIES AT HAZARDOUS WASTE SITES

by Roger A. Stetter

More and more companies are being asked to pay the cost of cleaning up old waste sites (located at both former industrial plants and publicly operated or licensed chemical dumps and landfills) under the federal Superfund statute or similar state laws (sometimes referred to as "Baby Superfunds") dealing with the remediation of hazardous waste sites.¹ The Environmental Protection Agency (EPA) has listed the worst of these sites on the National Priorities List (NPL)² and they will often cost immense sums to clean up to federal standards; however, even state sites not included on the NPL may cost millions of dollars to restore to their original condition.³ In the past some companies believed that they could "hide in the weeds" and avoid

any financial burdens associated with site cleanup costs for years, if not forever. However, that is no longer a safe strategy for any company to follow.

Ordinarily, before EPA or a state environmental agency undertakes its own response action at a hazardous waste site, it will send a general notice letter to all parties who are potentially responsible for conditions at the site. The categories of potentially responsible parties (PRPs) usually include present and past owners of the site, persons who operated the site, and off-site waste generators (for example, petrochemical companies and manufacturing establishments) and transporters (waste-hauling firms) who contributed waste to the site. The purpose of the notice letter is to inform the PRPs of their potential liability and to encourage voluntary and privately-financed cleanups of hazardous waste sites.

Contrary to popular belief, the Superfund law is not a public works program but a "revolving fund" and the cost of government-financed cleanups should be borne ultimately by the parties who were responsible for causing the pollution.* In his testimony to a Senate panel dealing with Superfund matters, new EPA Administrator William Reilly stated that EPA would

place more emphasis on increased enforcement to force polluters, not the government, to clean up waste dumps.⁴

Often a company receiving a notice letter from EPA or a state environmental agency will not have any experience in dealing with such matters and may also lack knowledge or records to prove whether or not it did in fact send any waste to the disposal site in question. This article provides an overview of how the Superfund-type laws work and explains what to do if your company receives a notice letter from EPA or a state environmental agency alleging that it is a PRP at a hazardous waste site.

OVERVIEW OF SUPERFUND

The original Superfund law, entitled the "Comprehensive Environmental Response, Compensation and Liability Act of 1980" (and commonly known as "Superfund" or "CERCLA"), was enacted by Congress on December 11, 1980. It was prompted by public alarm over such environmental disasters as the "Love Canal" and "Valley of the Drums" and intended to remedy the problem of cleaning up old hazardous waste sites.⁵

Dissatisfied with both the pace of achieving cleanup of the nation's worst hazardous waste disposal sites and the failure of the original law to address many important issues, Congress enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA) which was signed by President Reagan on Oc-

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*State Baby Superfunds are also intended to facilitate the rapid cleanup of hazardous waste sites but which are not eligible for federal Superfund money. However, most of the state funds are cash poor or broke so that private-party cleanups are necessary in the first instance.

tober 17, 1986.⁶ SARA added many new and detailed provisions to Superfund.

Among other things, SARA requires the EPA to more rapidly achieve cleanup at Superfund sites and creates additional strong incentives for PRPs to reach early settlements with EPA and the Justice Department in Superfund cases. Not the least important is that in the 1986 reauthorization, Congress appropriated more than five times as much money for the Superfund program than during the first five years of its operation by increasing the Superfund hazardous wastes trust fund to \$8.5 billion. With \$8.5 billion jingling in its pockets, EPA is in a stronger position than ever to pay for cleanups at Superfund sites and then file a federal cost recovery action against the PRPs who declined its invitation to perform the work themselves.

Several key points should be noted about the Superfund law and parallel state laws. First, it is a "strict liability" statute. In other words, a company may be held liable for hazardous waste site cleanup costs without any proof of fault whatsoever.⁷

In fact, many Superfund sites were operated with the official approval of state and local governments and were considered safe at the time they were used as waste disposal sites. Second, these statutes are retroactive and therefore create liability for pre-enactment conduct which was perfectly lawful at the time it was engaged in by a PRP.⁸ For example, a company which shipped industrial waste to a landfill 50 years ago may be held responsible for cleanup costs under the Superfund law which was not passed until 1980. Third, liability to the government under Superfund and comparable state laws is presumed to be joint and several, which makes any party, no matter how small its contribution, potentially liable for the entire cleanup cost.⁹ In short, the odds in Super-

fund litigation are stacked heavily in favor of the government.

RESPONSE TO GENERAL NOTICE LETTER

As noted previously the general notice letter is used to inform PRPs of their potential liability and give them the opportunity to remedy conditions at a hazardous waste site rather than let EPA or a state do the work and send them the bill. How a PRP responds to the notice letter, and how it and other PRPs organize to conduct a response action, will have a significant impact on the costs and liabilities a PRP may incur under Superfund.

The general notice letter will ordinarily identify each PRP receiving the letter and, if available, provide information concerning the volume and nature of substances allegedly contributed by each PRP at the hazardous waste site. However, the letter generally does not disclose the evidentiary basis for EPA's allegation that a PRP may be liable under Superfund. A typical notice letter also includes some discussion about the merits of forming a management or PRP "Steering Committee" since the EPA refuses to negotiate individually with a large number of PRPs.

Notice letters are also routinely accompanied by so-called "information requests" which require companies to provide detailed information and business records, if available, regarding the types and volumes of waste that they generated and which were sent to the hazardous waste site in question.¹⁰ Failure to make a timely response to an information request can subject a company to administrative orders and civil penalties of up to \$25,000 per day. Furthermore, criminal sanctions can be imposed when a response to an information request knowingly contains false statements or representations or omits to state material facts. Such knowledge can be presumed when a person fails to conduct a proper

investigation.¹¹

If a PRP has conducted a thorough internal investigation and concludes that none of its wastes were sent to the site, or that its wastes which were disposed of at the site were non-hazardous (for example plant trash or construction debris), it should so advise EPA or the state environmental agency in its written response to the notice letter. A well-drafted response should also include a fairly detailed description of the company's investigation including which categories of records were reviewed and the scope and nature of employee interviews conducted.

Ordinarily, however, a PRP will find it difficult to complete its internal investigation before the time set by EPA for a reply, which is typically 30 days after the letter is received. In most cases the internal investigation will be handicapped by the fact that company records dating back to the relevant time period no longer exist.* Furthermore, it will be difficult, if not impossible, to refute evidence the government agency relied on in sending the notice letter to a PRP until the exact nature of that evidence is known by the company and its counsel.

Thus, in most cases it is appropriate to reply to a notice letter by acknowledging receipt of the letter and agreeing to produce any documents that are within the scope of a proper information request by EPA or the state environmental agency. In addition, unless it was provided in the notice letter, a PRP should include in its answer a request for all information that the agency has developed which allegedly links it with the particular waste site. It should also request copies of all site assessment studies

* Recordkeeping with respect to waste disposal practices was not mandatory until the early 1980s, when key environmental regulations went into effect. However, the vast majority of Superfund sites involve waste disposal activities that occurred prior to the early 1980s.

and the like which the environmental agency has on the site. Such documents may be especially useful to determine if a company is responsible for the particular substances at the waste site that are believed to create a serious public health risk.

Counsel may also ask the government agency that issued the information request for more specific guidance to direct a company's investigation of the facts. The agency should furnish a "tip-sheet" that narrows the time period and provides specific information and documents which evidence the company's alleged involvement with the waste site. The company can then more easily locate relevant documents and identify past or present employees who would most likely know if it was involved in transactions with the site.

It is not necessary or advisable to make any admission of liability in the reply to a notice letter from EPA or the state environmental agency.

PRP ORGANIZATION

In Superfund cases PRPs frequently organize themselves in order to negotiate effectively with EPA or a state environmental agency. A number of committees may be formed to further the interests of the PRP group in achieving a cost-effective remedy at the hazardous waste site. For example, a steering committee will usually be formed to conduct face-to-face negotiations with the agency regarding the conduct of the so-called remedial investigation/feasibility study (RI/FS) and any necessary remedial action at the site in accordance with an approved cleanup plan. A technical committee may be formed to advise the PRPs on how best to conduct the RI/FS and select the least expensive remedial action which is protective of public health and the environment. Typically, the technical committee members are plant engineers who are full-time employees of the var-

ious companies which make up the PRP group.

A special committee may also be formed, sometimes referred to as the "allocation committee," to identify other companies that may have sent waste to the disposal site. The identification of additional PRPs may be based on the former dump site operator's business records and customer lists, or, if not available, require interviews of its former employees and truck drivers who hauled various companies' wastes to the disposal site.* The steering committee may then present evidence to EPA or the state environmental agency of such additional companies' involvement with the waste site, and request that the agency issue a second round of notice letters to these new PRPs in order to spread the cost of the cleanup among as many firms as possible.

Major PRPs that sent large quantities of hazardous waste to a disposal site usually take the lead in organizing the PRP group and serving on the various committees. On the other hand, PRPs which sent a low volume, or non-hazardous substances to a site, are less interested in joining the steering committee and other committees. These "minor" PRPs may be offered "associate" membership for a small administrative fee, and can thereby be kept informed through regular status reports of the work of the various committees and the status of any settlement negotiations between the PRP Steering Committee and EPA or the state environmental agency.

In the past, negotiations between PRPs and EPA could drag on for months or even years. However, EPA came under severe criticism and in 1986 Congress mandated more rapid cleanups at Superfund sites. Congress also created new settlement procedures under Su-

perfund including "special notice" letters which EPA may issue to PRPs in order to expedite settlements.* These procedures along with EPA's new tough enforcement policy make it essential for PRPs to organize quickly and develop "good faith" settlement proposals in a relatively brief time frame, if they wish to avoid the risks and expense of government enforcement actions. Of course, prompt settlement in these cases has other advantages as well, including avoidance of adverse publicity and reduced likelihood that a company will be faced with a harsh verdict in private damage suits based on a perceived indifference to public health and the environment.¹²

RESOLVING HAZARDOUS WASTE DISPUTES

A major obstacle to achieving settlement in Superfund cases has been the inability of the PRPs to agree among themselves on a fair allocation of response costs. Although the statute does not specify any method by which responsible parties are to share the costs of cleaning up a hazardous waste site, settlements of Superfund cases usually adopt an allocation scheme based on the relative volume of waste contributed by each party to a site.¹³

One very promising method for resolving the cost allocation issue is through Alternative Dispute Resolution (ADR).¹⁴ A large group of PRPs are interested in conducting a response action at a hazardous waste site but cannot agree among themselves on a fair allocation of costs. Using the ADR technique, they would retain a retired judge

* A special notice letter triggers a "moratorium" on further EPA actions during a 60-day "period of negotiation," which cannot be extended unless EPA determines that the PRPs have submitted a "good faith offer" to conduct the RI/FS or remedial action. See 42 U.S.C. §9622(e); EPA "Interim Guidance on Notice Letters, Negotiations, and Information Exchange," 53 Fed. Reg. 5298 (Feb. 23, 1988).

* This work is often accomplished with assistance from a private investigating firm that is qualified to conduct PRP searches.

or other "pillar of the community" to resolve this issue through the process of informal information exchange among the PRPs. Each allocation participant supplies detailed information and contemporaneous business records, if any, on its waste disposal practices during the relevant time period to the mediator. This sharing of information creates a level-playing field among the PRPs and enables the mediator (or "third party neutral" as he is often called) to make informed findings and recommendations to the parties. The mediator may also conduct interviews of plant personnel under oath to test the veracity of each company's position and the accuracy of its written responses to a Generator or Waste Transporter Questionnaire, and can also address follow-up questions to any of the PRPs during the allocation process. After briefs or "advocacy statements" are submitted by the allocation participants, the mediator issues a confidential, written report of findings and recommendations on how costs should be allocated among the participants.

Although his or her recommendations are nonbinding they usually result in a settlement or "allocation agreement" among the participants, particularly if the mediator has done his job properly and was well-chosen for the particular mediation effort. Principled resolution of the allocation issue enables the participants in turn to reach a settlement with EPA or the state environmental agency to perform the RI/FS or remedial action at the waste disposal site.* Since private party response actions are almost always more cost effective than government-funded actions this approach can save the settling parties literally millions of dollars.

* A small group of major PRPs often assumes responsibility to perform the RI/FS pursuant to an "interim" (nonbinding) allocation agreement in order to achieve greater control over the substance of the actual cleanup plan.

In contrast, a responsible party who fails to settle when other PRPs do may suffer a disastrous and grossly inequitable result due to the liability presumptions of Superfund and parallel state laws.¹⁵

The allocation participants should also be in an ideal position to pursue contribution claims on a collective basis against the non-settlers, or "recalcitrant" PRPs, under federal or state environmental statutes. Better yet, if EPA has agreed to a "mixed funding" settlement with the PRPs by underwriting a substantial portion of the remedial cost with money from the Superfund, the Justice Department can (and probably will) bring suit against the non-settling PRPs to recover the Fund-financed share of response costs, plus interest and attorneys' fees.¹⁶

CONCLUSION

Former President Jimmy Carter, who signed the original Superfund law on December 11, 1980, is perhaps best remembered for his statement that "life is unfair." In many respects the Superfund law is unfair, especially due to its retroactive application and presumption of joint and several liability which opens the door to arbitrary enforcement by the government against a handful of deep-pocket PRPs. Nevertheless, there are many opportunities to minimize or avoid costs and liabilities under Superfund, just as there are many pitfalls which can easily result in a company having to pay more than its "fair share" of response costs at a hazardous waste site. For example, in the recent case of *O'Neil v. Picillo*, the United States District Court for the District of Rhode Island held that three companies which contributed a very small percentage of the total waste at a dump site were liable for the lion's share of cleanup costs, and all future reponse costs.¹⁷ This came about because the major PRPs cut a favorable settlement with the government, leaving the

few remaining PRPs holding the bag for the balance of cleanup costs under the doctrine of joint and several liability.

An early and well-conceived response strategy is essential for all companies that want to avoid costly mistakes and to be winners in Superfund cases.

FOOTNOTES

1. The federal statute is entitled the Comprehensive Environmental Response, Compensation and Liability Act of 1980, and was substantially amended by the Superfund Amendments and Reauthorization Act of 1986. See 42 U.S.C. §§9601-9657. The Louisiana counterpart is contained in Chapter 12 of the Louisiana Environmental Quality Act at La. R.S. 30:2271 to 30:2280. See also La. R.S. 30:2221-2226 dealing generally with "Inactive and Abandoned Hazardous Waste Sites."

2. 40 C.F.R. Part 300, Appendix A.

3. In a recent paper to EPA, the chief of Louisiana's Inactive and Abandoned Hazardous Waste Sites Division noted that while there are 9 NPL sites in Louisiana that are eligible for Superfund monies for remedial actions, there are about 100 hazardous waste sites in the State which will require corrective action. Most of these sites will have to be managed by the State rather than by the federal Superfund program, and the estimated remedial costs to clean up just 52 of them is \$1 billion. See William B. De Ville, "Case Histories and Patterns: Inactive and Abandoned Hazardous Waste Sites in Louisiana," presented at the U.S. EPA 5th International Congress on Solid & Hazardous Waste, Rome, Italy, May 28, 1989.

4. The Times-Picayune, June 16, 1989, at page A-7. EPA's past failure to pursue non-settling PRPs with the strong enforcement tools at its disposal created a serious disincentive to settlements. See Martin, "Encouraging Superfund Settlements: The Need to Sanction Free Riders," 2 TXLR 799 (Dec. 16, 1987).

5. The courts have held that CERCLA applies to both abandoned and "active" waste sites that are currently owned by solvent parties. See, e.g., *Chemical Waste Management, Inc. v. Armstrong World Industries, Inc.*, 669 F. Supp. 1285 (E.D. Pa. 1987); *Mardan Corp. v. CGC Music, Ltd.*, 600 F. Supp. 1049 (D. Ariz. 1984), *aff'd*, 804 F. 2d 1454 (9th Cir. 1986).

6. Pub. L. No. 99-499, 100 Stat. 1613 (1986), codified at 42 U.S.C. §§ 9601-9657.

7. See, e.g., *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F. 2d 1568 (5th Cir. 1988); *United States v. Monsanto Co.*, 858 F. 2d 160 (4th Cir. 1988); *United States v. Hooker Chem. & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988).

8. See, e.g., *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F. 2d 726

(8th Cir. 1986); *United States v. Monsanto Co.*, 858 F. 2d 160 (4th Cir. 1988). Louisiana's Baby Superfund law expressly provides that, "The court does not have to find that the defendant was negligent, knew that the hazardous substance was being improperly disposed of, or that the activity was illegal at the time of disposal." La. R.S. 30:2276B.

9. See, e.g., *United States v. Monsanto Co.*, 858 F. 2d 160 (4th Cir. 1988); *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987); *O'Neil v. Picillo*, 682 F. Supp. 706 (D.R.I. 1988); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). A PRP cast for more than its "fair share" of cleanup costs has the right, in theory, to even the score by filing contribution claims against all other potentially responsible parties. 42 U.S.C. § 9613 (f) (1); La. R.S. 30:2276G.

10. The authority of EPA to issue information requests is contained in both the Superfund law and the Resource Conservation and Recovery Act. See 42 U.S.C. § 9604 (e) (2) and 42 U.S.C. § 6927 (a), respectively.

11. The range of sanctions available to the government in these situations is dis-

cussed in Sanoff and Burt, "Responding to a Superfund Information Request," 2 TXLR 750 (Dec. 2, 1987).

12. See, e.g., *Sterling v. Velsicol Chemical Corp.*, 647 F. Supp. 303 (W.D. Tenn. 1986), *rev'd in part on other grounds*, 855 F.2d 1188 (6th Cir. 1988). See generally Ford and O'Brien, "Cooperation as a Low Cost Strategy in a Groundwater Contamination Case," 1 TXLR 620 (Nov. 5, 1986).

13. A simple volumetric settlement may be inappropriate in some cases. For example, the toxicity, mobility and persistence in the environment of particular wastes may have a direct and substantial impact on remedial costs and therefore have to be considered to achieve an equitable allocation. Similarly, although a PRP may be technically liable under CERCLA if even a miniscule portion or constituent of its waste is hazardous, see *United States v. Carolawn Co.*, 21 ERC 2124 (D. S.C. 1984), it would be unfair to count the total volume of such waste for allocation purposes. Factors other than waste volumes must be used to allocate financial responsibility among different categories of PRPs such as present or past site

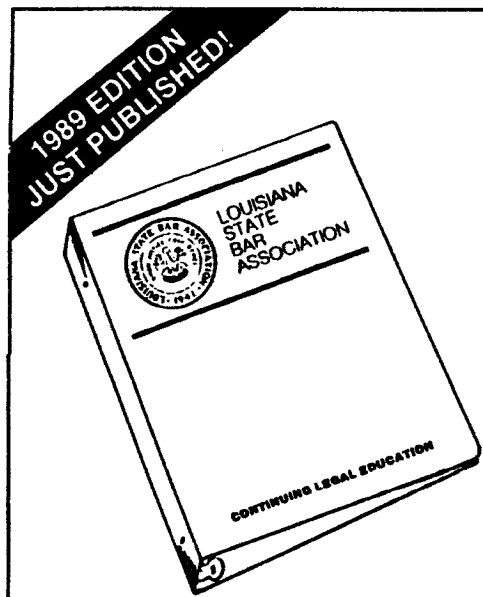
owners and transporters. See generally, Poirier, Manahan and Shay, "Allocation of Liability Among Potentially Responsible Parties," 3 TXLR 744 (Nov. 9, 1988).

14. See generally, Krickenberger and Berman, "Allocation of Superfund Site Costs Through Mediation by a Third Party Neutral," 2 TXLR 453 (Sept. 16, 1987).

15. See *O'Neil v. Picillo*, discussed on the last page of the text.

16. See Karlin, "Practical Suggestions for Negotiating Mixed Funding Under Superfund," 3 TXLR 256 (July 20, 1988).

17. Defendants were held jointly and severally liable for approximately \$1.5 million in cleanup costs, and for all future response costs, estimated at approximately \$3.5 million. 682 F. Supp. 706 (D. R.I. 1988). Two of the defendants allegedly disposed of only 88 out of 20,000 drums at the Picillo waste site; their volumetric share of cleanup costs, using drum counts, should have been less than \$7,000.00. See Brief of Appellants American Cyanimid Company and Rohm & Haas Company in *O'Neil v. Picillo*, reprinted in 3 TXLR 1121 (Feb. 15, 1989).



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