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## **The Strengths and Weaknesses of Current Superfund Law**

Testimony Prepared for Presentation to  
Subcommittee on Superfund, Waste Control and Risk Assessment  
Committee on Environment and Public Works  
U.S. Senate  
March 10, 1995

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By Katherine N. Probst, Senior Fellow, Resources for the Future

Chairman Smith and distinguished members of the subcommittee, thank you for inviting me to testify before you today. My name is Katherine N. Probst and I am a senior fellow in the Center for Risk Management at Resources for the Future (RFF). RFF is an independent, nonprofit research and educational organization located here in Washington, D.C. For forty years, RFF has been conducting research on a wide variety of issues related to energy, natural resources, and the environment. RFF does not lobby and does not take positions on legislation, regulations, or policy matters as an organization. Unlike many other "think tanks," we have never been characterized as Republican or Democratic, liberal or conservative, a distinction of which my colleagues and I are very proud.

I want to stress that the views I present today are mine and mine alone, based on the research I have conducted on the Superfund program over the past eight years. I will try to keep my oral remarks brief; however, I would appreciate it if you would include my full written statement in the record.

In the past few years, Resources for the Future has published two major studies of the implications of alternative Superfund liability schemes. My colleague Paul Portney and I published our first report *Assigning Liability for Superfund Cleanups: An Analysis of Policy Options*, in June of 1992. This research provides an analysis of the pros and cons of the current liability scheme and four alternative liability approaches—some of which mirror the proposals being made in Congress today. This past January, we released our second major study on alternative Superfund financing schemes: *Footing the Bill for Superfund Cleanups: Who Pays and How?* This book is an examination of the financial implications of alternative Superfund liability schemes and tax mechanisms, which Dr. Portney and I coauthored with Don Fullerton of the University of Texas and Robert Litan, formerly of the Brookings Institution (where the work was done), now at the Office of Management and Budget. The book was published jointly by Resources for the Future and the Brookings Institution. I would be happy to provide members of this subcommittee with copies of these studies, if that would be helpful.

The subcommittee has requested testimony today regarding a broad range of issues regarding the Superfund program. In my testimony today I will focus on two key areas: the current liability scheme and the implications of eliminating retroactive liability, and the need for clearer cleanup goals in the Superfund law.

## **The Current Liability Scheme and the Implications of Eliminating Retroactive Liability**

Congress created Superfund in 1980 in response to contamination at places like Love Canal, New York, and Times Beach, Missouri. There was little appetite even then for using general revenues to finance these cleanups. Instead, Congress enacted new excise taxes on both the chemical and oil industries and later added a broad "corporate environmental income tax," earmarking the revenues for a cleanup trust fund. It also gave the Environmental Protection Agency (EPA) the right to hold liable for cleanup those referred to as "responsible parties"—virtually anyone having any connection to the site, including current and past owners of the site, as well as those who generated the hazardous substances in the first place. Insurers have been brought into the Superfund liability net as well, as responsible parties have sued their insurers for reimbursement under their insurance policies, generating sizable legal costs.

Superfund's liability standards have been criticized because, critics say, the liability scheme is unfair, slows cleanup, and results in unnecessary transaction costs. Under the law, potentially responsible parties (PRPs) may be held liable for actions taken before Superfund was enacted that were in accord with the rules and regulations in effect at the time. It is understandable that some would find this unfair and seek changes to the law's liability provisions. As we are now fifteen years into the program, however, it is crucial that we examine the implications of changing the current liability scheme on needed trust fund revenues and the pace and protectiveness of the site cleanup program. In addition, changing the rules now could have a lasting negative effect on future compliance with environmental laws.

In many ways, the current liability scheme *is* working as intended. Many credit the liability system with "bringing PRPs to the table," encouraging the cleanup of sites not on the National Priorities List (NPL), and encouraging those who handle hazardous substances to take greater care to avoid future liability. In addition, while some may decry the liability scheme as a fundraising tool, EPA has successfully used its enforcement powers to get responsible parties to pay for site studies and cleanup. Over the past few years, commitments for future work have averaged over \$1 billion, and PRPs are increasingly taking the lead for implementing cleanups at NPL sites.

How should Congress evaluate conflicting charges about the effectiveness of the current liability scheme? These charges may not actually be contradictory, but may instead be the result of different effects of liability on different kinds of sites.

It turns out that the effect of Superfund's liability standards differs greatly if one is talking about multiparty waste handling and disposal facilities (such as landfills where industrial waste has been codisposed with municipal waste or where batteries or used oil were recycled) than if one considers the effect of liability on industrial facilities, which tend to have few parties (such as chemical plants, wood-preserving or electroplating sites, or other manufacturing operations), where the owner or operator at the site is usually also

the only "generator" (see [note 1](#)). This distinction between multiparty and single-party sites is extremely important in thinking about the strengths and weaknesses of the liability system.

At the risk of oversimplifying, there are three basic types of sites on the NPL: industrial facilities, which tend to have few potentially responsible parties and where it is relatively easy to identify who should pay; waste handling and disposal facilities, including recycling facilities, where there tend to be multiple parties, sometimes hundreds, and where cost allocation is much more difficult; and finally, sites that are contaminated areas and do not have "facilities" as such on-site and where there may be few PRPs, but identifying the party(ies) responsible may be difficult. Industrial facilities account for the largest percentage of nonfederal sites on the NPL (38%), followed closely by the broad category of waste handling and disposal operations, which account for 36% of the total number of sites. Only 13% of nonfederal NPL sites have more than 100 PRPs. The majority of sites (42%) have from two to ten PRPs, while 17% have only one PRP (see [note 2](#)).

In our recent book, *Footing the Bill for Superfund Cleanups*, we estimate that eliminating liability for hazardous substances disposed before 1987 at multiparty sites would require an annual increase in trust fund revenues of \$1.4 billion—a doubling of the trust fund. It is reasonable to assume that if retroactive liability were eliminated for *all* substances disposed of before 1987 (that is, at both single and multiparty sites), the trust fund would need to be large enough to cover *all* site study cleanup costs now being incurred for sites on EPA's National Priorities List, which is over \$2 billion annually.

What happens if the trust fund is not increased to cover the additional costs of cleanup no longer the responsibility of responsible parties? Other things being equal, the average length of time for a Superfund cleanup would more than double—from its current pace of twelve years to a mind-numbing twenty-five years. Perhaps the one criticism on which everyone agrees is that site cleanups take too long. Changes that lengthen, rather than accelerate, the time it takes to clean up sites are not at all what those living near these sites want to hear.

Alternatively, Congress could elect to scale back the extent of cleanup. Many see this as the best way to "make all the numbers add up." Here, I would offer some cautionary notes. First of all, the most important change Congress could make to Superfund, to my mind, is to set a clear policy regarding the goal of site cleanup, an issue I discuss later in my testimony. This discussion should not be constrained by the need to make sure that the total cost of the program is precisely the same as current appropriations levels. The views of the public, who rank cleaning up hazardous waste sites at the top of the environmental agenda, need to be taken into account in rethinking remedy selection. Scaling back cleanup may also lead to outrage among those living near sites. At many sites, the remedies have already been selected and cleanup finally begun. Revising cleanup standards for these sites will only lead to more delay. In addition, regardless of what kinds of changes, if any, are made to that part of the law governing remedy selection, it will take years before these changes begin to actually affect the cost

of remedies being implemented.

We should not kid ourselves that eliminating retroactive liability and shifting responsibility for cleanups to the government is going to lead to cheaper, faster cleanups. If Congress releases many private companies from Superfund liability, this would actually *increase* the cost of site cleanups, as private sector cleanups are 20% less expensive than the governments'. Shifting responsibility for cleanups to the public sector will add \$3.4 billion, according to our estimates, to the total cost of cleaning up sites on EPA's National Priorities List. This is just about equal to the savings that are likely to be reaped in responsible party transaction costs. In terms of the effect on the overall costs of the Superfund program, eliminating retroactive liability would save a mere 4% of total costs, according to our estimates.

Suppose Congress *is* willing to consider higher Superfund taxes in exchange for eliminating retroactive liability. Several principles should guide the thinking here. First, the three taxes created to stock the Superfund trust fund raise only about \$1.3 billion annually. This seems an excessive number of individual taxes to generate what is, in the context of the federal budget, a very small amount of revenue. Each of these taxes generates its own form of transaction costs called *compliance costs*—the time, effort, and out-of-pocket expenses necessary to calculate tax liability and file the proper forms. The compliance costs of these taxes may well rival transaction costs incurred as a result of the liability standards.

Second, Congress should not fall into the trap of trying to make sure that any new taxes come from those industries that are benefiting from changes in the Superfund liability scheme. While it may make everyone feel better if they believe that the cost of new taxes being proposed will be borne by those who nominally pay the tax, it just isn't true. In reality, most taxes are passed on to all of us as consumers in the form of higher prices. For each new tax Congress adds to make the new financing scheme appear "fairer," the net result is increased compliance costs. If one of the goals of reform is a more efficient way of raising Superfund revenues, enacting new Superfund taxes just doesn't make sense. In fact, repealing some of the current taxes and getting *all* Superfund revenues from one funding source would be a way to increase the efficiency of the program with *no* adverse effect on the site cleanups—certainly a good place to start.

Finally, there is the question of what kind of message would be sent to those who must comply with environmental laws if, after fifteen years, the rules are now changed and those who did not comply with the law are rewarded, while those who did suffer the consequences. If companies are *not* reimbursed for site study and cleanup costs they have incurred to clean up sites on the NPL, this would send a clear message that it is okay to wait and see if Congress is "really serious" when it enacts new environmental laws because these laws might be changed in the future. Even if PRPs are reimbursed (and this would require even larger increases in the trust fund than we have estimated), it is still a troubling signal to send regarding the sanctity of our nation's laws, not only to corporate America, but to state and local governments as well.

Given the small savings that are likely to actually accrue to the country as a whole if retroactive liability is eliminated, it is important to ask the question, "Is it worth it?"

### **Remedy Selection Goals Need to Be Clarified**

I urge the subcommittee to wrestle with the issue of site cleanup goals. The lack of agreement within EPA, between EPA and PRPs, and between EPA and the public about Superfund's site cleanup objectives contributes to a lengthy site study and cleanup process and to distrust and miscommunication among all involved. Getting a clearer sense of what we are trying to achieve is crucial not only to speeding cleanup, but to restoring the credibility of the Superfund program. This is one of the major areas in which the current law simply is too confusing and does not provide adequate guidance. The American public, as well as government employees and those who work for the organizations that contaminated these sites, deserves a clear understanding of the goals of the Superfund program.

Although the program has been in existence for over fourteen years, we still know very little about the benefits of site cleanup or about the associated costs. There is little consensus among different interest groups about the appropriate degree and scope of cleanup, that is, "how clean is clean?" This controversy stems from disagreements about the fundamental purpose of site remediation. There is still heated debate about what we should be trying to accomplish at sites: is the goal to reduce exposure to current threats, to minimize the likelihood of future risk, to curtail the spread of contamination, or is it to restore sites and natural resources to an uncontaminated state—to "clean them up?"

While the debate about cleanup standards is often framed in terms of "relative risk," the real issue is a matter not of science, but of policy. That is, while science can help us to better understand the effects of contamination at a site, as well as the potential effectiveness of various cleanup technologies, the decision of how much to clean up is, at heart, a philosophical one. Arguments about whether containment remedies are acceptable are really arguments about whether our national cleanup policy should be simply to reduce human exposure to contamination (which can often be achieved through containment remedies) or whether the purpose of site remediation programs is, in fact, to "clean up" sites (which could involve the permanent destruction or immobilization of contaminants). More difficult, of course, is developing a sound remediation strategy that falls somewhere between these two extremes.

Whatever route is taken, however, reforming Superfund's liability scheme and cleanup standards is likely to be every bit as difficult as cleaning up the waste sites themselves.

Thank you very much for inviting me here to testify before you today. I would be happy to answer any questions.

## Footnotes

**Note 1.** See *Assigning Liability for Superfund Cleanups: An Analysis of Policy Options*, Katherine N. Probst and Paul R. Portney. Resources for the Future, Washington, D.C., 1992. ([back to text](#))

**Note 2.** See *Footing the Bill for Superfund Cleanups: Who Pays and How?*, pages 35 and 38, Katherine N. Probst, Don Fullerton, Robert E. Litan, and Paul R. Portney. The Brookings Institution/Resources for the Future, Washington, D.C., 1995. ([back to text](#))