

Is Superfund Dead?

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The death of Superfund — aye, in the minds of most corporate counsel, and in the words of Shakespeare, “tis a consummation devoutly to be wish’d.” Tens of thousands of companies have been touched by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) since it was enacted, forcing the private sector collectively to expend more than \$15 billion in transaction and response costs between December 1980 and December 1998. Efforts in Congress to reduce or reform the Superfund program, however, have consistently failed. In recent years, one of the reasons for failure is that many members of Congress, and their major corporate constituents, view the Superfund program as winding down of its own accord.

Is Superfund becoming a thing of the past? Can corporate counsel stop worrying about potential liability under CERCLA arising from past off-site waste disposal or releases at or from facilities currently or formerly owned by the company or its subsidiaries?

In a word, no. Although the U.S. Environmental Protection Agency may have learned to manage the Superfund program better over the years, and companies have learned to deal with routine Superfund liability issues in fairly routine ways, Superfund liability can still present significant problems. The Superfund program is maturing, and new aspects of Superfund liability are becoming increasingly important, but Superfund is not going away.

First, the good news. The General Accounting Office (GAO) estimates that as of mid-April 1999, out of a cumulative total of about 1400 sites listed on EPA’s National Priorities List (NPL) for Superfund action, about 40% had been cleaned up. Of the remaining 640 nonfederal NPL sites still to be cleaned up, 41% were in either the remedial design or remedial action phase — *i.e.*, near the end of the cleanup process. GAO estimates that cleanups will be completed at 85% of these 640 nonfederal NPL sites by the end of 2008, and EPA believes that it will happen even faster.

Now, the bad news. GAO estimates that the remaining 15% of the nonfederal NPL sites will take much longer to complete cleanup, and that cleanups at all unfinished nonfederal NPL sites are estimated to require between \$8.2 billion and \$11.7 billion to complete. Although the authority for assessing Superfund taxes expired in December

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1995, substantial sums remain in the Superfund, and money is continually added to the fund through interest on unexpended amounts and government recoveries from potentially responsible parties (PRPs). And the lack of taxing authority has not appreciably affected Congressional appropriations to EPA or the rate of EPA enforcement: GAO estimated that PRPs spent over \$2.6 billion on cleanup work — 17% of all PRP expenditures on cleanup activities at NPL sites since 1980 — in the three years following the expiration of taxing authority in December 1995. In addition, at all NPL sites where remedial construction has been completed and hazardous substances remain at the site over cleanup levels (for example, at all sites where the selected remedy included in-place waste containment or groundwater controls), EPA is required by CERCLA to conduct a review of the effectiveness of the remedy every five years. If new information is discovered during these reviews, EPA can require the potentially responsible parties to undertake further cleanup.

And remember, the NPL is still growing. EPA added an average of about 30 sites to the NPL each year between 1993 and 2000, and expects to add up to 40 sites to the NPL each year in the future. In 1999, GAO estimated that almost 1800 facilities in EPA’s site database were potentially eligible for placement on the NPL based on their characteristics. Officials of EPA, other federal agencies, and states collectively indicated that about 17% of these potentially eligible sites currently pose high risks to human health and the environment, and another 10% may pose high risks in the future if they are not cleaned up (for a total of 27% of the almost 1800 sites, *i.e.*, about 480 “high risk” sites that are not yet on the NPL.) (Another 22% of the facilities posed “average” potential risks, which still suggests a possibility of NPL listing.) While EPA and state officials collectively indicated to GAO their belief that only about 13% of these 1800 sites may actually be placed on the NPL for federal atten-

tion, limited state funding and enforcement authorities may drive the percentage higher.

As a result of the foregoing, new NPL listings can be expected for years to come. If past is prologue, the fourteen states with 26 or more NPL sites are likely to continue to be significant sources of new NPL listings: California, Florida, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Texas, Virginia, Washington, and Wisconsin.

But even states with a small number of NPL sites can be the source of new sites that are large, complex, and costly, such as sediment sites in rivers and bays. For example, although Oregon has had only 15 proposed or final NPL sites (three of which have been deleted from the NPL), one of the recently added sites was Portland Harbor, a six-mile stretch of the Willamette River that contains contaminated sediments. EPA reportedly expects to notify more than 60 landowners and companies along the Harbor that they could be responsible for Harbor sediment cleanup costs. Over \$56 million reportedly has already been spent on cleanups on land adjacent to the Harbor. The Harbor sediment cleanup will involve not only EPA and the Oregon Department of Environmental Quality, but six Washington and Oregon Indian tribes that have asserted an interest in the cleanup.

And here’s the kicker: Some of the most significant Superfund liabilities faced by private industry over the next decade or so may never show up on the final NPL. In fact, they won’t even be claims for remedial action or response costs. Instead, these liabilities will arise as a result of claims for damages allegedly arising from injuries to natural resources from hazardous substance releases.

CERCLA has authorized claims for natural resource damages (NRD) since the statute was enacted in 1980. However, few significant claims were made prior to 1990, in part because the Department of the Interior’s regulations setting forth natural resource damage assessment procedures were not issued until 1986 and subsequently underwent several challenges and amendments. Over the last decade, however, the number of multi-million dollar NRD claims has been rising, as the federal and state resource agencies that are designated as natural resource trustees have become more familiar with their authorities and opportunities. To date, over \$300 million in NRD settlements have occurred under CERCLA, and more than a billion dollars in claims are pending.

Most big claims — including all of the sites on which Beveridge & Diamond is working — involve releases of persistent compounds such as polychlorinated biphenyls (PCBs), pesticides, and heavy metals to surface

water and sediments. The claims are large for two principal reasons: (1) hazardous substances in sediments and surface water have the opportunity to bioaccumulate and move throughout the food web, giving rise to trustee allegations of injury to a broad range of fish and wildlife species; and (2) fish and fish-eating wildlife are important to a large number of outdoor recreators, leading to trustee allegations of large public welfare losses from the hazardous substance releases. In addition, because multiple federal and state resource agencies typically have overlapping claims for damages concerning the same resources, there is a tendency for the agencies to resolve their internal differences over methodology (or over which agency receives which portion of the recovery) at the expense of the PRPs.

NRD claims from historical releases into waterways are going to be a problem for a number of companies. A Sediment Quality Survey conducted by EPA several years ago listed 96 “Areas of Potential Widespread Sediment Contamination,” most of which were not on the NPL. Many of these areas may become candidates for response action, natural resource damages claims, or both. In addition, the U.S. Fish and Wildlife Service has stated that 44% of NPL sites include contaminated surface water. Similarly, the National Oceanic and Atmospheric Administration has estimated that about 700 NPL sites have significant NRD problems. Because the statute of limitations for natural resource damages claims at NPL sites is three years from completion of the remedial action (excluding operation and maintenance activities), there are many sites where PRPs remain exposed to further substantial liability, even if they have fully resolved their liability for response actions and response costs.

The bottom line: Superfund is not dead. Superfund liability, including potential liability for natural resource damages claims, will require active management for some time to come. Significant legislative reform of Superfund seems unlikely. Moreover, GAO has confirmed, EPA’s administrative reforms of the Superfund program remain largely unproven in terms of their concrete benefits to PRPs. And the natural resource damages programs of the various natural resource trustee agencies have undergone essentially no administrative reforms. If not actively and carefully managed, individual sites or claims could end up costing PRPs unnecessary millions — or even tens of millions — in response costs and natural resource damages due to aggressive agency positions or public pressure. With foresight and strategic management, on the other hand, the Superfund headache need not get any larger. Like any other headache, it can be controlled with the right medicine.

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