

## NEGOTIATION AND INFORMAL AGENCY ACTION: THE CASE OF SUPERFUND\*

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*The multi-billion dollar federal "Superfund" program for the cleanup of thousands of hazardous waste sites currently emphasizes federally-funded cleanups followed by reimbursement actions filed against any responsible parties who can be found. Litigation to compel direct private cleanups supplements this strategy. Dean Anderson argues, however, that a variety of factors, including statutory constraints, inadequate funding, the shortcomings of litigation, and particularly the selection of a cumbersome quasi-regulatory implementation scheme, has combined to increase the costs and delay already inherent in the federal government's program. After a careful analysis of the existing program, he suggests that greater reliance on privately-funded cleanups negotiated with the full accord of the Environmental Protection Agency, site users, state and local governments, and affected citizens would significantly improve the pace and efficiency of the program. Applying principles and techniques developed in the field of alternative dispute resolution, Dean Anderson details a negotiation process that includes the selection of skilled convener-mediators, the identification of those waste sites that a balance of factors indicates are ripe for a negotiated private cleanup, and the inclusion of all parties with a stake in the outcome. Such a process, he suggests, would protect against the type of abuses that occurred at the Environmental Protection Agency during the first three years of the Superfund program. Hence, Dean Anderson tests in the crucible of Superfund the conflict-resolving power of four basic domestic policy tools—public works, litigation, regulation, and negotiation. His recommended approach, endorsed by the Administrative Conference of the United States, offers a concrete case study of the difficulties that*

\* © Frederick R. Anderson. This article is based on a study that the author prepared for the Administrative Conference of the United States. The Conference adopted recommendations based on the study on June 29, 1984. See 49 Fed. Reg. 29,937, 29,938-44 (1984). The sources cited herein include many interviews and difficult-to-obtain publications that are in the files of the author.

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arise because negotiating a solution where a governmental agency is a party awakens a fundamental political conflict between consensual problem-solving and decisionmaking imposed by pluralist democratic authority. Thus, the study provides insights about when and how negotiation might supply the preferred problem-solving tool in other domestic policy arenas.

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## I. INTRODUCTION

During the 1970's, as part of a potent array of legislation for the protection of health, safety, and the environment, Congress enacted a comprehensive scheme for the safe handling of newly-generated hazardous wastes.<sup>1</sup> This major regulatory statute, the Resource Conservation and Recovery Act (RCRA),<sup>2</sup> was supposed to close "the last remaining loophole in environmental law."<sup>3</sup> But Congress was soon forced to admit that yet another loophole existed, and in 1980 it addressed the prob-

1. See Anderson, *Human Welfare and the Administered Society: Federal Regulation in the 1970's to Protect Health, Safety, and the Environment*, in ENVIRONMENTAL AND OCCUPATIONAL MEDICINE 835, 837-42 (W. Roin ed. 1983).

2. 42 U.S.C. §§ 6901-6987 (1982). See especially subchapter III: Hazardous Waste Management, 42 U.S.C. §§ 6921-6931 (1982). Following the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982), by only 10 days, RCRA was the most recent comprehensive federal environmental regulatory statute to be adopted by Congress.

3. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 4 (1976).

lem of spills of hazardous substances and the past improper disposal of hazardous wastes. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), or Superfund,<sup>4</sup> created a \$1.6 billion hazardous substances spill and waste disposal site cleanup program. Funds are provided by a tax on crude oil and chemical feedstocks and by general revenues. CERCLA also includes provisions for state participation in cleanups, voluntary cleanup by private parties, administratively- and judicially-ordered cleanup, and reimbursement from site users for the cleanup expenses incurred by federal and state governments.

The legislative inquiry preceding CERCLA's enactment established the seriousness of the hazardous waste problem.<sup>5</sup> For decades, dangerous residues have been accumulating on generators' premises or at dump sites: acids and bases, synthetic organic compounds, fuel byproducts,

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4. Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9657 (1982)) [hereinafter cited as CERCLA]. CERCLA is commonly called the Superfund; however, as will become clear, CERCLA embraces many more administrative and judicial options than direct federal cleanup. The terms "Superfund" or the "Fund" are used only to refer to the Hazardous Substances Response Fund, *id.* at §§ 9631-9633, and its requirements. Superfund revenues are to be collected over a five-year period ending in 1985, with \$1.38 billion collected from taxes on the manufacture of petroleum products and certain inorganic chemicals and \$220 million from general federal revenues. 42 U.S.C. § 9631(b). The statute specifies a per-ton tax, ranging, for example, from \$4.87 for benzene and several other substances to 22 cents for potassium hydroxide. 26 U.S.C. § 4661(b) (1982). The tax on crude oil and petroleum was set at 0.79 cents per barrel. Hazardous Substances Response Revenue Act of 1980, Subchapter A, 26 U.S.C. § 4611(a) (1982).

CERCLA also creates a \$200 million Post-Closure Liability Trust Fund. 42 U.S.C. § 9641 (1982). After a hazardous waste disposal facility has been finally closed and sealed under RCRA's strict closure requirements, including monitoring and maintenance for 5 years, all liability of a site owner or operator passes to the federal government for any harm that may occur in the indefinite future. 42 U.S.C. § 9607(k) (1982). The Fund is financed by a tax on the dry weight of hazardous wastes deposited at RCRA-approved sites. The Fund is not subrogated to claims for damages against the facility that any party may have. Thus, the combined effect of the Fund provisions is to transfer title to the interred wastes to the federal government. Government assumption of hazardous waste liability is similar to the policy embodied in the Nuclear Waste Policy Act of 1982, 42 U.S.C.A. § 10,143 (West 1983), by which the government actually takes title to civilian nuclear power plant wastes.

5. Perhaps the best of the legislative summaries is *Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, Hazardous Waste Disposal*, 96th Cong., 1st Sess. 106, 9-28 (Sept. 1979). See also *Hazardous Waste Disposal: Our Number One Environmental Problem, Hearing before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. (1980) (Ser. No. 96-207); *Hazardous and Toxic Waste Disposal, Joint Hearings before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. (1979) (Ser. No. 96-H9). Key reports included ENVIRONMENTAL LAW INSTITUTE, SIX CASE STUDIES OF COMPENSATION FOR TOXIC SUBSTANCES POLLUTION: ALABAMA, CALIFORNIA, MICHIGAN, MISSOURI, NEW JERSEY, AND TEXAS 15-58 (1980) (Senate Comm. on Environment and Public Works); REPORT FROM THE SURGEON GENERAL OF THE UNITED STATES, HEALTH EFFECTS OF TOXIC POLLUTION (1980) (for the Senate Comm. on Environment and Public Works) (Ser. No. 96-15); and Toxic Substances Strategy Comm., TOXIC CHEMICALS AND PUBLIC PROTECTION: A REPORT TO THE PRESIDENT (1980). The problem continues to receive intense popular attention. See, e.g., 167 NAT'L GEOGRAPHIC 318 (Mar. 1985).

toxic metals, explosives, and infectious organic materials from hospitals and scientific laboratories. As time passed, storage containers and burial locations have been breached, and the waste material has dispersed in ground and surface waters, the soil, and the air. Original generators and dump site operators may have gone out of business; ownership of sites may have been transferred many times. Records may have been lost or destroyed, if they ever existed at all.

Waste chemicals may cause sudden injury by exploding or igniting, but they may also cause harm from prolonged exposure at low levels. These slower, incremental harms often are masked behind other plausible causes that may delay and confound reliable medical diagnosis.<sup>6</sup> The diseases associated with chronic human exposure to hazardous wastes may affect respiratory, nervous, alimentary, and urological systems and include cancer, infant deformity, and genetic damage. Considerable uncertainty surrounds estimates of which waste disposal sites currently threaten human health and the environment.<sup>7</sup> More certain is the permanent loss of valuable supplies of groundwater.<sup>8</sup>

Hazardous waste sites present a particularly difficult area in which to implement a complex statutory program because they are astonishingly diverse. There may even be a significant initial problem in identifying the type of hazards posed by a site. Groundwater contamination, for

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6. See *supra* note 5; see also *Health Effects of Hazardous Waste Disposal Practices, Joint Hearings Before the Subcomm. on Health and Scientific Research of the Senate Comm. on Labor and Human Resources and the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980); M. BROWN, *LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS* (1979); Doniger, *Federal Regulation of Vinyl Chloride: A Short Course in the Law and Policy of Toxic Substances Control*, 7 *ECOLOGY L. Q.* 497, 508-14 (1978).

7. The Love Canal site near Niagara Falls, N.Y., provided the paradigm for the hazardous waste cleanup and risk problem. See F. ANDERSON, D. MANDELKER, & A. TARLOCK, *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 532-33 (1984). When the Department of Justice filed suit against the potentially responsible Hooker Chemical Company, EPA commissioned a study of the possible chromosomal damage the releases may have caused nearby residents. An acrimonious debate then ensued in the scientific community over the study methodology and its conclusions. See M. LEVINE, *LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE* (1982); Kolata, *Love Canal: False Alarm Caused by Boicched Study*, 208 *SCIENCE* 1239 (1980); *Correspondence*, 209 *SCIENCE* 751-56, 1450 (1980).

8. Even if human exposure can be prevented, irretrievable losses of millions of dollars worth of usable groundwater are also results of careless waste disposal. The groundwater trapped in underground aquifers (porous layers of rock, sand, or gravel) supplies one-quarter of all fresh water used in the United States. It supplies half the population with drinking water. The "most pernicious" consequence of land disposal may be that improperly maintained waste sites have contaminated aquifers. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 89 (1976). See CONGRESSIONAL RESEARCH SERVICE, *RESOURCE LOSSES FROM SURFACE WATER, GROUNDWATER, AND ATMOSPHERIC CONTAMINATION: A CATALOG* 7-10 (1980); COUNCIL ON ENVIRONMENTAL QUALITY, *CONTAMINATION OF GROUNDWATER BY TOXIC ORGANIC CHEMICALS* 1-14 (1981); see also Sharefkin, Kneese, & Schechter, *The High Cost of Contaminated Groundwater*, *RESOURCES*, Winter, 1984, at 27 (discusses contamination of groundwater in New Jersey at the Price Landfill).

example, presents investigative and cleanup requirements radically different from those associated with contamination confined to the surface. Waste migration in groundwater is one of the least understood hydrological phenomena, principally because underground soil, sand, and rock vary so greatly.<sup>9</sup> At some sites no one can be sure if groundwater supplies are threatened; at others, some groundwater is already contaminated, but the extent of the damage is unclear. Moreover, the significance of the contamination differs from site to site. In some cases, contamination of ground water is not important because the water was unsuitable for use for other reasons. Other hazardous waste sites threaten aquifers on which human populations depend.

The parties responsible for and affected by hazardous waste sites are also varied. Some sites are the result of the activities of a small number of large cooperative users, and few of the wastes are "orphaned." At the other extreme, a large number of unrelated users may exist, and there can be no direct attribution of responsibility for the bulk of the wastes. Between these extremes lie situations of great diversity, although it now seems clear that completely orphaned sites for which no responsible parties can be identified are relatively few in number.<sup>10</sup> Public involvement ranges from indifference to panic.<sup>11</sup> Not surprisingly, a complex web of relationships has been spun at each site between the governmental and private interests involved.

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9. U.S. COUNCIL ON ENVIRONMENTAL QUALITY, CONTAMINATION OF GROUND WATER BY TOXIC ORGANIC CHEMICALS 1-14 (1981).

10. EPA predicts that at least one site user—the owners, operators, transporters, and waste generators that the agency refers to collectively as "potentially responsible parties" (PRP's)—will be identified at 95% of the priority sites, leaving a small number of true orphan sites, the category that Congress had most in mind when it enacted CERCLA. Between 10 and 25% of sites will involve 50 or more generators, and the bulk of sites, some 70 to 75%, will probably involve less than 50 generators. Presentations by Lee M. Thomas, EPA Assistant Administrator for Solid Waste and Emergency Response, and Gene A. Lucero, Director, EPA Office of Waste Programs Enforcement, Aspen Institute Conference on Superfund, Wye River Plantation, Md. (Nov. 29-30, 1983). The companies and individuals who qualify as potentially responsible parties range from Fortune 500 companies (chemical, steel, electronics, aircraft, autos) and their suppliers and customers, to an array of present and former disposal site owners or operators, many of whom possess slender means and a wavering commitment to their occupations. Offsetting this diversity, which might unleash centrifugal forces that only strict adversarial processes could overcome, are equally powerful centripetal forces created by the economic interdependence of many of the largest site users. Most of the major companies in the chemical industry, for instance, are each other's customers and suppliers for a large array of feedstocks and final products. Interview with Gene Lucero, Director of Office of Waste Programs Enforcement (Jan. 6, 1984); see also J. BACKMAN, *THE ECONOMICS OF THE CHEMICAL INDUSTRY* 96 n.82 (1970). CERCLA threatens to precipitate scores of contribution actions among participants in this tightly interconnected market, a fratricidal prospect that the firms would like to avoid.

11. *But see* Schwartz, *The Public is Not Hysterical*, 2 ENVTL. F., Jan. 1984, at 40 (asserting that public reaction to Love Canal was appropriate).

CERCLA's provisions have been successful in effecting the quick cleanup of spills,<sup>12</sup> but there has been no similar success in dealing with the highly complex and diverse problems associated with the cleanup of hazardous waste sites. The program dealing with several thousand inactive and abandoned sites founders while a major legal and policy debate takes place over the roles of the federal Environmental Protection Agency (EPA),<sup>13</sup> the courts, and voluntary private cleanup in achieving CERCLA's purposes. Over two thousand sites may require attention, at a cost of billions of dollars.<sup>14</sup> Yet only a handful of sites has been cleaned

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12. The Agency's Superfund emergency response program has performed well. An experienced emergency response team works quickly with local police and firefighters. EPA may provide specialized contractors and other resources. See National Oil and Hazardous Substances Contingency Plan, 47 Fed. Reg. 31,180, 31,182 (1982).

13. EPA was created by presidential order, Reorg. Plan No. 3 of 1970, 3 C.F.R. 199 (1971), reprinted in 5 U.S.C. at 1132 (1982), borrowing authority and programs from the Departments of Agriculture and Health, Education, and Welfare, the Federal Radiation Council, and the Atomic Energy Commission, on recommendation of the Ash Council. It is not an independent regulatory commission, as often assumed. See COUNCIL ON ENVIRONMENTAL QUALITY, FIRST ANNUAL REPORT 24-26 (1970) (detailing the consolidation into EPA); 40 C.F.R. § 1.49 (1984) (EPA regulations on organization and general information).

14. The inability to determine the dimensions of the cleanup problem was the most troubling aspect of the CERCLA program in its early years. EPA first estimated that over 32,000 uncontrolled closed or inactive sites contained hazardous wastes, but later revised its estimate to 30,000-50,000. The inventory of sites that must be examined to see if they warrant a CERCLA response, now at 17,000, may increase to 22,000. Presentation by William Hedeman, Director of EPA Office of Emergency and Remedial Response, Conference on Environmental Law, co-sponsored by the ALI-ABA Committee on Continuing Professional Education, the Smithsonian Institute, and the Environmental Law Institute, Washington, D.C. (Feb. 23, 1984) [hereinafter cited as *Hedeman Presentation*]. The inventory does not contain federal sites, sites under permit pursuant to RCRA, radioactive mine tailings piles, or other mine waste piles. The agency estimates that 1400-2200 of the inventoried sites will find their way onto a list of sites destined for priority treatment. *Supplemental appropriation for Superfund being considered for fiscal 1984, EPA says*, 14 [Current Developments] ENV'T REP. (BNA) 1245, 1245 (1983). Other private estimates are higher. For example, Douglas Costle, former EPA Administrator, believes the number will easily reach 3000. Interview with Douglas Costle, former Administrator of the Environmental Protection Agency (Dec. 14, 1983). EPA has completed preliminary assessments for approximately 7000 sites. Fact sheets distributed by Lee M. Thomas, EPA Assistant Administrator for Solid Waste and Emergency Response, Conference on Negotiated Cleanup Settlements of CERCLA, sponsored by the Natural Resources Law Section of the American Bar Association, Crystal City, Va. (Dec. 9, 1983) [hereinafter cited as *Fact Sheets*].

Former Deputy Administrator Barbara Blum testified that the total cost of the cleanup could approach \$26-42 billion, although her estimate was almost twice as high as the \$13.1-\$22.1 billion estimate of the leading EPA study on costs. *Hazardous waste sites may cost \$22 billion to clean up, EPA study says*, 9 [Current Developments] ENV'T REP. (BNA) 2085, 2085 (1979). EPA has estimated more recently that Fund cleanup will require \$8.4 to \$16 billion. *\$8.4 billion to \$16 billion needed to clean Superfund sites, EPA paper says*, 14 [Current Developments] ENV'T REP. (BNA) 1725, 1725 (1984). Congress's General Accounting Office has pointed out that EPA assumes that 40% of the 1400-2200 sites will be cleaned up privately and that groundwater cleanup costs are not included. *Superfund projections may not be reliable, exclude groundwater cleanup costs, GAO says*, 14 [Current Developments] ENV'T REP. (BNA) 1943 (1984). Others dispute the EPA figures: \$10.5 billion (Commerce Department), \$4-6 billion (Arthur D. Little for the Chemical Manufactur-

up, and government estimates of how much can be achieved with the existing Fund are pessimistic.<sup>15</sup>

Congress may enlarge the Fund and set deadlines for cleaning up sites.<sup>16</sup> Perhaps money, deadlines, and enforcement actions will be

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ers Association), and \$20 billion (EDF and National Audubon). Werner, *The Cost of Superfund: How Much?*, 2 ENVTL. F., Oct. 1984, at 15, 16. Surface cleanup is averaging \$6.5 million, and where groundwater problems exist, \$10 million. Hedeman Presentation, *supra*. Present cost estimates for cleanup of a 22-acre landfill, including present worth of twenty years operation and maintenance, vary widely depending on the amount of work required: surface water control by contour grading costs \$510,000; surface sealing by either clay, fly ash, concrete, or PVC from \$639,000 to \$1,336,000; and groundwater flow control \$1,860,000 (simple slurry trenches) to \$11,000,000 (bottom sealing four feet deep). If excavation and burial is needed, the estimated cost is \$12,686,000. See Sharefkin, Kneese, & Shechter, *supra* note 8, at 27, 29.

The Office of Technology Assessment (OTA) has recently estimated that 10,000 sites or more may require Superfund cleanup. Costs could "easily" be \$100 billion out of total costs of several hundred billions. A half-century to complete cleanup may be required. Summary, Superfund Strategy 7-8 (Mar. 1985) (OTA-ITE-253).

15. Six sites were completely cleaned up by the Fund in the first three years; more negotiated private cleanups have been completed. See EPA Office of Public Affairs, *Envtl. News: Superfund Status Report 1* (Mar. 1984). The number of complete Fund cleanups had only risen to 11 by mid-1984. *128 sites added to Superfund cleanup list; addition to be proposed soon*, Thomas Says, 15 [Current Developments] ENV'T REP. (BNA) 756, 756 (1984). The EPA estimates that only 170 of the priority sites can be addressed with the Fund's \$1.6 billion. *Waxman undecided on 48 state controls on acid rain, weighs option on sanctions*, 13 [Current Developments] ENV'T REP. (BNA) 2307, 2308 (1983). OTA reports that approximately one-third of the 538 priority sites are receiving remedial attention but two-thirds of the program's initial funding has been committed. Superfund Strategy, *supra* note 14, at 7.

16. President Reagan announced his support for Fund reauthorization in his 1984 State of the Union Message. *Reagan supports large EPA Budget Increase, Superfund Reauthorization, Acid Rain Research*, 14 [Current Developments] ENV'T REP. (BNA) 1643, 1643 (1984). The Fund's revenue-gathering mechanism expires in 1985. See *infra* note 50. Scores of measures were introduced in the 98th Congress but CERCLA was not amended. Most of the bills would have enlarged the Fund and tightened up the cleanup schedule by imposing action-forcing deadlines on EPA. The Senate Committee on Environment and Public Works reported out a \$7.5 billion bill, S. 2892, 98th Cong., 2d Sess. (1984), and the full House approved a \$10.1 billion bill, H.R. 5640, 98th Cong., 2d Sess. (1984), but both died with the 98th Congress. *Administration Opposition, Impasse on Taxes Blamed for Killing Superfund Reauthorization*, 15 [Current Developments] ENV'T REP. (BNA) 957-58 (1984). The most ambitious proposal was made by CERCLA's "House Father," Congressman James Florio (D-N.J.), the Chairman of the Subcommittee on Commerce, Transportation and Tourism of the House Energy and Commerce Committee, in February 1984. H.R. 4813, 98th Cong., 2d Sess. (1984) (proposal to amend the Solid Waste Disposal Act to provide for the immediate cleanup of hazardous waste sites that present a threat to human health and the environment). The National Conference of State Legislatures recommended that Congress increase the Fund to \$12 billion. *State Legislatures Conference Endorses Superfund Reauthorization at \$12 Billion*, 14 [Current Developments] ENV'T REP. (BNA) 1493, 1493 (1983). Even the Chemical Manufacturers Association endorsed Fund reauthorization. *CMA endorses Superfund reauthorization but calls for tax on generators of waste*, 14 [Current Developments] ENV'T REP. (BNA) 1309, 1309 (1983).

In the 99th Congress, many bills to expand CERCLA were introduced, including one by Congressman Florio which included numerous EPA action-forcing provisions and a \$10.1 billion, five-year bill public works component. 16 [Current Developments] ENVTL. REP. (BNA) 164-65 (1985). As the CERCLA review has progressed, however, prospects for a strong reauthorization have diminished. Florio's bill was defeated in favor of a bill reported out of the House Energy and Com-



enough to solve the problem. Congress has had some success in legislating solutions to environmental disruption through regulatory statutes, but such regulation arguably is inefficient and costly.<sup>17</sup> Other options, however, might save considerable time and money without a complete congressional overhaul of CERCLA. Authority already exists under CERCLA to fashion a practicable long-term remedial program,<sup>18</sup> although its key elements are somewhat at odds with current EPA strategy.

This article proposes a strategy whose central element is cleanups that are negotiated publicly and with the full accord of EPA, site users, states, local governments, and local citizens. EPA policy now emphasizes Fund cleanup coupled with reimbursement by site users, with a fallback alternative of private cleanup compelled by administrative orders and court actions. In fact, the EPA has negotiated more cleanups with private parties than it has carried out itself or compelled by judicial action. Nevertheless, the option to negotiate has been deemphasized and is restricted both substantively and procedurally under current Agency negotiation policy. The emphasis in the proposed new strategy would be on negotiation, but the approach developed here is radically different from that prevailing between 1981 and 1983, when the EPA went through a severe managerial crisis that focused political attention on its attempt to negotiate cleanups without any expenditures from the Fund.

CERCLA was enacted specifically to respond to one of the most unfortunate byproducts of modern industrialization and thereby further the goals of the more comprehensive Resource Conservation and Recovery Act. Yet, on another level, CERCLA also provides a setting in

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merce Committee, which stripped away most of the action-forcing provisions. *Id.* at 587. On the Senate side, by the summer of 1985, legislation reported out of the Senate Environment and Public Works and Finance Committees would authorize a \$7.5 billion five-year fund with no action-forcing provisions. As this article goes to press further amendments and bills threaten to weaken Superfund prior to its September 30 expiration date. *Id.* at 587-88.

17. See R. CRANDALL, *CONTROLLING INDUSTRIAL POLLUTION* (1983); J. KRIER & E. URSIM, *POLLUTION AND POLICY* (1977); A. KNEESE & C. SCHULTZE, *POLLUTION, PRICES AND PUBLIC POLICY* (1975); *APPROACHES TO CONTROLLING AIR POLLUTION* (1978) (A. Friedlaender, ed.); Roberts & Stewart, *Energy and the Environment*, in *SETTING NATIONAL PRIORITIES: THE NEXT TEN YEARS* 411 (1976) (H. Owen & C. Schultze, eds.); *ENVIRONMENTAL REGULATION AND THE U.S. ECONOMY* (1981) (H. Peskin, P. Portney, & A. Kneese, eds.). For criticism of public works and natural resources policies, see R. HAVEMAN, *THE ECONOMIC PERFORMANCE OF PUBLIC INVESTMENTS* (1972) and *CURRENT ISSUES IN NATURAL RESOURCES POLICY* (1982) (P. Portney, ed.). For a recent study less critical of the economic impact of environmental regulation, see Congressional Budget Office, *Environmental Regulation and Economic Efficiency* (Mar. 1985) (regulation not a major contributor to loss of economic efficiency in U.S. private economy; annual productivity loss 1967-1982 was 0.28 percent; pollution control expenditures have generally remained small and have declined steadily since mid-1970's as percentage of gross domestic product).

18. See *infra* text accompanying notes 19-41.

which to test the conflict-resolving power of traditional institutions such as the courts and regulatory agencies, not only against each other, but against new dispute resolution processes. The purpose of this article is to attempt a basic evaluation of this kind, recognizing that the actual development of a successful Superfund negotiation program is dependent on a number of factors, including the reconciliation of negotiation techniques with democratic pluralism and the procedures and demands of informal agency adjudication, the role of the courts in promoting non-adversarial processes, and the effect of rapidly-developing legal norms on bargaining that is attempted in their lengthening shadow. To the extent that the orchestration of a quasi-regulatory program like CERCLA with consensus-based negotiation can be accomplished, similar developments might be expected on a broader scale.

## II. THE IMPLEMENTATION OF CERCLA: LAW, POLITICS, AND ADMINISTRATIVE PROGRAM BUILDING

### A. *The Statutory Plan.*

Widely perceived by the general public as a federal cleanup law, CERCLA actually places responsibility on site users. If responsible parties cannot be identified or are unable or unwilling to undertake cleanup measures, the government is authorized to clean up the site, using Superfund to pay cleanup costs,<sup>19</sup> but the Fund may then sue responsible parties for reimbursement.<sup>20</sup> Responsible parties can also be sued to compel them to clean up sites themselves.<sup>21</sup>

The National Contingency Plan (NCP) establishes procedures for

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19. Section 104 of CERCLA authorized the President to order the direct cleanup of wastes and spills, but the President delegated this authority to EPA. Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981), reprinted in 42 U.S.C. § 9615 app. at 1444 (1982).

20. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1982).

21. CERCLA § 106, 42 U.S.C. § 9606 (1982). While willing to endorse the \$1.6 billion cleanup effort, Congress was not willing to endorse a Senate-proposed \$4.1 billion cleanup and victim compensation fund. See S. 1480, 96th Cong., 2d Sess. § 5(b), 126 CONG. REC. 30,906, 30,910 (1980) (listing budgetary sources of Superfund). The bill passed by the Senate was, in fact, a substitute for the original S. 1480, but bore the same title. See Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) (discussion of the legislative history); see also Trauberman, *Compensating Victims of Toxic Substance Pollution: An Analysis of Existing Federal Statutes*, 5 HARV. ENVTL. L. REV. 1 (1981) (discussing the alternatives considered by Congress). Recovery for personal injuries was left to the common law, although detailed personal injury recovery provisions were included in the bill, up until the final floor votes. See S. 1480, 96th Cong., 2d Sess. §§ 4(a),(c),(n), 126 CONG. REC. 30,906, 30,908-10 (1980). Congress did, however, authorize a 12-member study commission to report on the adequacy of common law recovery for injury from hazardous substances. 42 U.S.C. § 9651(e) (1982). See STUDY GROUP, 97TH CONG., 2D SESS., REPORT ON SECTION 301(E) 12 (Comm. Print 1982). The author was a member of this commission.

response actions and a method for ranking waste sites for cleanup.<sup>22</sup> The Plan also specifies methods for inventorying sites, suggests techniques for cleanup, and coordinates intergovernmental cleanup activities. The politically explosive core of the NCP is a list of several hundred sites—at least one in each state—that have first call on the Fund and other cleanup efforts.<sup>23</sup>

The federal government may respond immediately at a hazardous waste site and bring suit later to shift the cost to responsible parties.<sup>24</sup> Liability extends to the cost of cleanups by federal or state government or any person who incurs expenses consistent with the NCP, as well as to damages to natural resources.<sup>25</sup> Nothing in the statute indicates that responsible parties may not be held liable merely because they have paid substantial taxes into the Fund. The Act provides an expansive list of potential sources of reimbursement: current owners and operators of vessels, and of facilities for the treatment or storage of hazardous waste,

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22. 42 U.S.C. § 9605 (1982). The NCP had to be promulgated before EPA could begin a full scale cleanup program with Superfund revenues. The Plan was not readily promulgated because of OMB scrutiny and EPA internal disagreement over the contents of the Plan, see McChesney, *EPA Proposes Court-Ordered Contingency Plan Revisions Under Superfund; Stresses "Flexible" Cleanup Standards*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 10,040 (1982), and court action was necessary to get EPA to act. *Environmental Defense Fund, Inc. v. Gorsuch*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 20,376, 20,377-78 (D.D.C.), *order modified*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 20,401 (D.D.C. 1982). The NCP is now codified at 40 C.F.R. §§ 300.1-.81 (1984). CERCLA mandates that governmental response actions are to be conducted in accordance with the provisions of the Plan "to the greatest extent possible." 42 U.S.C. § 9605 (1982).

23. 42 U.S.C. § 9605(8)(B) (1982). The hazard ranking system set out in the NCP allows EPA to estimate the probability and magnitude of human and environmental exposure (a classic risk assessment). See 40 C.F.R. § 300.64 (1984). An interim NPL of 115 sites was published in October, 1981. An additional 45 sites were added the following July. 47 Fed. Reg. 31,180 (1982). A list of 418 sites appeared in December, 1982. 47 Fed. Reg. 58,476, 58,477, 58,481-85 (1982). By October, 1984, 786 sites were listed or proposed for listing on the NPL. *EPA proposes an additional 208 sites to get cleanup money under Superfund*, 15 [Current Developments] ENV'T REP. (BNA) 887-88 (1984). As of September 21, 1984, a total of 538 sites had been listed. See Final Rule, 49 Fed. Reg. 37,070, 37,071 (1984) (410 sites were already on the NPL and the EPA added 128 additional sites to it). Some 238 more were proposed to be added in late 1984. 49 Fed. Reg. 40,320 (1984). Ten more were still pending.

24. 42 U.S.C. § 9607(a)(1982).

25. *Id.* at §§ 9607(a)(4)(A),(B),(C). States can sue responsible parties for remedial and removal costs and for damage to natural resources. *Id.* at §§ 9607(a)(4)(A) & (C). Their efforts must be consistent with the NCP. Of potentially great long-term importance, "any person" acting consistently with the National Contingency Plan may sue for costs of cleanup. *Id.* at § 9607(a)(4)(B). The provision is worded differently than a parallel section allowing persons to present claims against the Superfund. There the cost must be "approved" under the NCP and "certified by the responsible Federal official." *Id.* at § 9611(a)(2). The express language of the statute and the legislative history clearly overcome the strictures on implied federal causes of action presented by *Cort v. Ash*, 422 U.S. 66, 82-84 (1975). Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1982), was the subject of litigation in *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140-44 (E.D. Pa. 1982) (defendants' motion for summary judgment denied when defendants argued Philadelphia could not recover because it had owned the site).

as well as owners and operators at the time of disposal; all waste generators or other persons who arranged for the treatment, disposal, or transport of wastes that they owned or merely "possessed" to any facility where wastes remain; and any transporter who selected a disposal or treatment facility that afterwards required a Fund response.<sup>26</sup>

CERCLA dwells upon governmental cleanup, yet it quite plainly mandates, albeit more succinctly, a substantial direct role for responsible parties if they can be found. First, federal authority to undertake response actions is contingent upon a determination that the cleanup will not be done properly by a responsible party.<sup>27</sup> Thus it seems that Congress intended that the EPA negotiate voluntary cleanup with private parties before expending Superfund revenues. Second, CERCLA authorizes the federal government to seek broad equitable relief in the federal district courts for endangerment caused by a release of hazardous substances.<sup>28</sup> In addition to court-ordered relief, the government may issue administrative orders to protect health or the environment. Substantial penalties may also be requested for refusal to comply, including treble damages equal to three times cleanup costs.<sup>29</sup> These provisions, con-

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26. 42 U.S.C. § 9607(a)(1)-(4) (1982). Site users incur no liability if the release is caused solely by acts of God, certain third parties, or some combination of the two. *Id.* at § 9607(b). The Act also establishes liability limitations that apply unless the actual or threatened release was the result of willful misconduct. *Id.* at § 9607(c). Under certain circumstances the Fund can also sue insurers and other guarantors directly for amounts already expended. *Id.* at § 9612(c)(3). The statute prevents the transfer of liability by conveyance or indemnification, hold harmless, and similar agreements, although this does not bar agreements to insure or indemnify in order to meet the costs of liability. *Id.* at § 9607(e). An important exception exists for properly-permitted facilities under RCRA that have been permanently closed under the strict RCRA requirements. Then liability in effect passes to the Post Closure Liability Trust Fund. *Id.* at § 9607(k).

27. 42 U.S.C. § 9604(a)(1) (1982). CERCLA mirrors the government initiated cleanup provision of § 311 of the Clean Water Act, 33 U.S.C. § 1321(c)(1), which also limits government action to those instances when responsible parties will not properly clean up the spill. Like Superfund, § 311 provides for cleanup using federal funds after a determination that voluntary clean up is not available, § 311(c)(1), and for recoupment from responsible parties § 311(f). Under § 311, the requirement that EPA first determine the availability of voluntary cleanup of spills into the rivers and other waterways has proved successful. A large percentage of spills are cleaned up voluntarily, thus allowing cleanup to take place expeditiously. *See, e.g., Anglo Fabrics, Co., Inc. v. United States*, — F.2d —, No. 279-77, slip op. at 15, 23 (Ct. Cl. Jan. 9, 1981) ("the policy behind the FWPCA . . . encourages owners and operators of oil facilities to promptly and efficiently clean up any oil spills"). Recognizing the efficiency of this approach, Congress authorized government § 311 cleanup only "[i]f the owner or operator fails to do so." S. REP. NO. 351, 91st Cong., 1st Sess. 17-18 (1969). Thus, the Coast Guard routinely seeks private cleanup before resorting to the government's authority. *See, e.g., Union Petroleum Corp. v. United States*, 651 F.2d 734, 740 (Ct. Cl. 1981).

28. Section 106, 42 U.S.C. § 9606(a) (1982), figures prominently in the government's CERCLA implementation strategy. I will analyze the government's CERCLA enforcement litigation strategy in a separate article. *Congress, the Courts, and CERCLA: Towards a Theory of Judicial Interpretation* (draft).

29. 42 U.S.C. § 9607(c)(3). Any person who willfully violates an order is subject to a fine of not more than \$5000 for each day that a violation occurs. 42 U.S.C. § 9606(b) (1982).

tained in two brief sections of the Act, potentially confer CERCLA's most potent powers, but the scope of this authority remains unsettled. In particular, the statute fails to spell out the relationship between abatement and government cleanup, and it does not specify the parties against whom injunctive relief can issue.

Unlike the federal regulatory pollution control laws, CERCLA does not provide for program delegation to the states. CERCLA delegates authority to state officials to obligate money from the Fund and to settle claims so long as they have signed a contract or cooperative agreement with the EPA.<sup>30</sup> Federal response authority is limited to six months or one million dollars if no state contract or cooperative agreement has been executed, unless an emergency situation exists.<sup>31</sup> Response authority may continue beyond these limits if a contract or cooperative agreement is subsequently executed and the state is in compliance with federal requirements related to off-site disposal, long-term site maintenance, and payment of the state's share of the cleanup costs.<sup>32</sup>

Certain waste site conditions—fire, fumes, breach of containment, sudden threat to a water supply—may present an acute need for an emergency response, or circumstances may permit a more deliberate response to deal with chronic risks. CERCLA carefully preserves this distinction throughout, although its diction leaves much to be desired, by providing for emergency “removals” for the former but more protracted “remedies” for the latter.<sup>33</sup> Emergency removals require minimal pre-clearances; the lengthy analytical and ranking procedures of the NCP do not apply. Emergencies can jump the queue of sites awaiting a long-term response.<sup>34</sup> The Superfund emergency response program receives almost

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30. 42 U.S.C. § 9611(f)(1982).

31. *Id.* at § 9604(c)(1).

32. *Id.* at § 9604(c)(3). That section requires a state to assure (1) the future maintenance of the removal and remedial actions for the duration of the cleanup; (2) the availability of an off-site storage facility; and (3) payment of 10% of all remedial actions or at least 50% of all remedial actions if the state or its political subdivision ever owned the facility at which hazardous wastes were disposed. *Id.* The state or a political subdivision may take responsibility as the lead agency in a cleanup action if the state or political subdivision has the capability to carry out response actions. *Id.* at § 9604(d)(1).

33. The technical terminology of CERCLA defines three principal activities: “removal,” or prompt short-term stabilization of a site; “remedy,” or longer-term permanent measures to clean up sites; and “response,” which covers both removal and remedial measures. CERCLA § 101(23) (removal), 42 U.S.C. § 9601(23)(1982); § 101(24) (remedy), 42 U.S.C. § 9601(24)(1982); § 101(25) (response), 42 U.S.C. § 9601(25)(1982). “Removals” are not well named for CERCLA purposes. They often do not involve removal of materials at all; rather, removals may include fencing a site, in-situ treatment, or other stabilization measures to convert the site to a “remedial” one.

34. The NCP provides another way emergency removals can jump the queue and command attention as long-term remedies. The NCP provides for “planned removals,” which are taken where converting the emergency response to a remedial action is either cost-effective, because the necessary equipment and resources are already mobilized, or necessary to prevent risks arising if response is delayed. 40 C.F.R. § 300.67(a)(1984). Very few planned removals have been allowed—fourteen in

universal praise. Unfortunately, it offers few precedents relevant to the more troubled remedial program.<sup>35</sup>

The CERCLA scheme—a two-prong public works and cleanup liability approach—sharply distinguishes the statute from other federal environmental laws. Congress did not require the EPA to set ambient or performance standards specifying the degree or type of cleanup required at the sites.<sup>36</sup> CERCLA appears to contemplate an individualized, case-by-case approach to the selection of particular site remedies.<sup>37</sup> Nevertheless, CERCLA cannot be viewed as an isolated piece of legislation. The drafters of CERCLA borrowed its blueprint from other federal remedial statutes. During the past fifteen years Congress has enacted a host of statutes providing compensation for, and cleanup of, hazardous conditions. Many key Superfund provisions are modeled after the oil spill legislation, and, in some instances, language was taken almost verbatim from earlier enactments. Even CERCLA's cleanup expense recoupment

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fiscal years 1981-1983. *Fact Sheets, supra* note 14. The EPA does not intend to lower the rank of a site because site users voluntarily undertake cleanup measures that reduce the risks it presents. *Hedeman Presentation, supra* note 14.

35. See National Oil and Hazardous Substances Contingency Plan, 47 Fed. Reg. 31,180, 31,182 (1982) (because EPA has far less experience with remedial actions than with removal actions, it has provided a detailed, systematic procedure for determining the appropriate extent of remedy); Novick, *What is Wrong with Superfund?*, 1 ENVTL. F., Nov. 1983, at 6, 7. Sheldon Novick was Regional Counsel for EPA Region III in Philadelphia until September, 1984. By the end of fiscal year 1983, 193 removals had been carried out. *Fact Sheets, supra* note 14.

36. Still, in defining hazard and toxicity Congress pragmatically incorporated by reference the substances designated as hazardous under the major environmental regulatory statutes. 42 U.S.C. § 9601(14)(1982). The pre-existing definitions provide few practical limits to the substances subject to CERCLA, although some hazardous substances were excluded. *See id.* Most importantly, CERCLA does not cover oil spills. *Id.* Although CERCLA taxes crude oil (petroleum by-products end up in waste dumps), Congress in the end could not agree how oil spills should be handled under CERCLA. *See* 42 U.S.C. §§ 9601(14), 9606(a), 9607(a)(1982) (no abatement proceeding in response to oil spill or financial liability for spill provided). CERCLA largely leaves oil cleanup to the § 311 Clean Water Act program. Congress also authorized EPA to designate additional substances if they may present a substantial danger. § 102(a), 42 U.S.C. § 9602(a) (1982). As a fail-safe mechanism, the President can take action if "any pollutant or contaminant"—not just those listed under the Act—may present an imminent and substantial danger to public health or welfare. § 104(a), 42 U.S.C. § 9604(a)(1982).

37. Congress recognized that flexibility was required to allow the President to determine what action best protected public health in a given instance—for example, a complete removal in some circumstances, a minimization of the risk in others. "The President must carefully fashion the appropriate remedial action in each instance." S. REP. No. 848, 96th Cong., 2d Sess. 55 (1980). The NCP established procedures for selecting a remedy but not substantive standards to govern each remedy, because "experience in developing remedies for hazardous wastes sites is limited. Moreover, each hazardous waste site has unique characteristics which merit individual attention. Often the unique characteristics of sites will represent factors that have never been dealt with before." 47 Fed. Reg. 31,180, 31,184 (1982) (preamble to final rule). *See* 40 C.F.R. § 300.68 (1984). The development of substantive remedial standards will be attempted in rulemaking under a settlement of a suit challenging the NCP. *Settlement Agreement, Environmental Defense Fund v. EPA*, Nos. 82-2238, 2239 (D.C. Cir. Jan. 16, 1984).

mechanism was presaged.<sup>38</sup> Further, the most important of the existing

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38. The ad hoc programs of the past fifteen years are diverse but their common feature is an attempt to ameliorate the harmful conditions of past conduct, not through comprehensive standards for industry, but through cleanup or payment of compensation. Examples abound: the Lead-Based Paint Poisoning Act of 1971, Pub. L. 91-695, 84 Stat. 2078, *codified at* 42 U.S.C. §§ 4801-4846, the Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. 95-604, 92 Stat. 3021, *codified at* 42 U.S.C. §§ 7901-7942, the Asbestos School Hazard Detection and Control Act of 1980, Pub. L. 96-270, 94 Stat. 487, *codified at* 20 U.S.C. §§ 3601-3611, the Black Lung Benefits Act, Pub. L. 91-173, 83 Stat. 742, *codified at* 30 U.S.C. §§ 901-962, and the Federal Abandoned Mine Reclamation Program, 30 U.S.C. §§ 1231-1243. The federal abandoned mine reclamation program, which is quite analogous to CERCLA, was established to reclaim lands that had been affected by mining operations that were abandoned or inadequately reclaimed prior to the Surface Mining Coal Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328. The federal government may reclaim the abandoned site or a state may undertake reclamation if its plan has been approved by the Interior Department. *Id.* at §§ 1235 and 1237. State and federal Abandoned Mine Reclamation Funds are established with revenues collected from a reclamation fee charged on coal. *Id.* at §§ 1231 and 1232. The abandoned mine reclamation program is to SMCRA what CERCLA is to RCRA. Both SMCRA and RCRA establish comprehensive regulatory schemes to minimize future harms flowing from environmentally-threatening conduct. The abandoned mine program and CERCLA are designed to eliminate conditions that were in existence at the time SMCRA and RCRA were passed and for which those acts offered no solution. The first of the oil spill legislative provisions was § 311 of the Clean Water Act and its predecessors, in which Congress sought to provide for the cleanup of oil and hazardous substance spills, but without placing a drain on general federal revenues. All similar laws are financed by taxes or fees on the oil or hazardous substance, and the costs of cleanup are ultimately the responsibility of various liable parties.

CERCLA adopts the standard of liability for responsible parties found in § 311 of the Clean Water Act. 42 U.S.C. § 9601(32). The liability-creating provision of § 311 is silent, however, on the standard of liability as applied to responsible parties. 33 U.S.C. § 1321(f). The courts have interpreted § 311 as establishing strict liability. *See, e.g., Stewart Trans. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979). Similarly, neither CERCLA nor the CWA, by express terms, establishes joint and several liability for responsible parties, although both have been interpreted as doing so. *See United States v. A & F Materials Co.*, No. 83-3123 (S.D. Ill. Jan. 20, 1984). Other oil and hazardous substance liability acts expressly provide strict, joint, and several liability. The Deepwater Port Act of 1974 expressly provides that responsible vessels and port authorities shall be "jointly and severally liable, without regard to fault," for cleanup costs and damages that result from a discharge of oil. Pub. L. 93-627, 88 Stat. 2126, *codified at* 33 U.S.C. §§ 1501-1524. *See* 33 U.S.C. §§ 1517(d) and (e). The trans-Alaskan Pipeline Authorization Act, Pub. L. 93-153, 87 Stat. 584, *codified at* 43 U.S.C. §§ 1651-1655, imposes strict liability on parties who are responsible for releases of oil from a pipeline or vessel, *id.* at §§ 1653(a)(1) and (c)(1), and parties responsible for oil spills above the outer continental shelf or submerged lands are jointly, severally, and strictly liable for all compensable losses. *Id.* at § 1814(a).

The Superfund was not the first statute in which Congress established a fund to finance federal cleanup activities. Section 311 of the CWA had established such a fund in 1972, and part of that money was transferred to Superfund. The 1974 Deepwater Port Act fund is financed by a fee on oil that is handled at deepwater ports. 33 U.S.C. § 1517(f). The 1978 Offshore Oil Spill Pollution Fund is financed by fees on oil produced on the OCS. 43 U.S.C. §§ 1812(a) and (d). A similar fund is established by the Trans-Alaskan Pipeline Authorization Act of 1973 with revenues from fees on Alaskan oil. 43 U.S.C. §§ 1653(c)(4) and (5).

CERCLA's legislative precedents authorize government-initiated cleanup, but only as an alternative to private remedial action. Similarly, the oil spill liability acts authorize the federal government to clean up spills unless cleanup will be done by responsible parties. 33 U.S.C. § 1321(c)(1). *See also* 33 U.S.C. § 1517(c)(1) (Deepwater Ports Act). When private parties incur cleanup costs yet have a defense against liability, they are often entitled to bring a claim against the appropriate fund

regulatory statutes, the Resource Conservation and Recovery Act,<sup>39</sup> overarches and incorporates the more limited, transitional mission of CERCLA. RCRA's provisions for on- or off-site treatment, storage, and disposal have direct implications for cleanups under CERCLA, because wastes from abandoned sites may have to be placed in a RCRA-permitted facility.<sup>40</sup> The EPA has proposed applying RCRA's substantive standards and public participation requirements—but not its procedural requirements—to CERCLA cleanups. Similarly, the Agency has proposed applying to cleanups the standards developed under other regulatory laws that bear a close relationship to CERCLA.<sup>41</sup> Thus CERCLA adds an important thread to the already intricate web of existing regulatory and remedial statutes and it challenges the EPA to shape a coordinated whole.

### B. *Policy Evolution: A Background of Politics and Negotiated Settlements.*

CERCLA had a dismal beginning. From 1981 until mid-1983, the CERCLA program suffered from frequent policy shifts and reorganizations, patent abuse by its leadership, and a demoralizing slowdown of Fund expenditures and other cleanup initiatives. Negotiation acquired a bad name during this period because key officials appeared willing to negotiate unduly generous cleanup terms with site users. Largely in reaction to congressional criticism, new EPA leadership began to build a program that stressed Fund-based remedies and permitted cleanup negotiations only under tightly-controlled circumstances. The new EPA pro-

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to recoup their costs. 33 U.S.C. § 1321(g). Subrogation and contribution are also preserved. *Id.* at §§ 1321(g) and (h). Unfortunately, CERCLA is not as clear whether responsible parties can recover from the Superfund. *See* 42 U.S.C. § 9607(a). Very similar language to Superfund's provisions may be found in 33 U.S.C. §§ 1321(e)(2) and (e).

Finally, provision for suits against responsible parties to recoup response costs when the conduct giving rise to the liability occurred before enactment of the law is also found in the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3607.

39. *Supra* note 2. *See generally* J. QUARLES, FEDERAL REGULATION OF HAZARDOUS WASTE: A GUIDE TO RCRA (1982). Several thousand pages of regulations have been proposed or promulgated under RCRA—500 on one day in May, 1980. *Id.* at 43; *see also* Note, *EPA's Responsibilities Under RCRA: Administrative Law Issues*, 9 *ECOLOGY L.Q.* 555, 567 (1981).

40. RCRA's comprehensive "cradle-to-grave" system provides for formal identification of hazardous wastes, 42 U.S.C. § 6912 (1982), establishment of a paper trail of all waste creation and shipment, 42 U.S.C. § 6924 (1982), and certification through a permit system that standards for treatment, storage, and disposal have been met, 42 U.S.C. § 6924 (1982). The standards include both performance standards for groundwater protection (monitoring and corrective measures may be required) and specific operation and design standards. *See* 42 U.S.C. § 6924 (1982).

41. *See infra* notes 95-97. For more than most may want to know about CERCLA's relationship to its regulatory cogeners, *see* Anderson at 1984 AD. CONF. U.S. PROC. 6-9 & nn. 33-68 (my original study).



gram was to be backed up by aggressive litigation under CERCLA's cost reimbursement and imminent hazard provisions. The government would seek to hold all potentially responsible parties jointly and severally liable without regard to fault for the complete costs of cleanup.

The new program was expected to produce prompt voluntary cleanup on the Agency's terms. However, as the following analysis shows, the Fund-based program bristles with quasi-regulatory requirements that slow the rate of cleanup below even the leisurely pace imposed by the limited size of the Fund. Moreover, vagaries in doctrine, especially joint and several liability, raise doubts that the federal courts will interpret CERCLA as generously as the EPA wishes and create a disincentive for responsible parties to comply promptly with the Agency's preferred course of action. The slow pace of the remedial program and the residual ambiguity in the EPA's legal position suggest that a change in the Agency's approach to negotiation might produce a more rapid rate of cleanup in the actual circumstances under which the remedial program must operate.

1. *The Early Site Cleanup Program.* Abandoned and inactive site cleanup by the federal government has its roots in litigation launched late in the Carter Administration, before CERCLA was enacted. By the end of 1980, the Department of Justice had filed over fifty suits under the imminent hazard provisions of RCRA.<sup>42</sup> The EPA played a supporting role in this effort.<sup>43</sup> The program emphasized case filings; the expecta-

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42. Resource Conservation and Recovery Act (RCRA) § 7003, 42 U.S.C. § 6973 (1982). Note, *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 *ECOLOGY L.Q.* 599, 601 n.9 (1981). The Justice Department filed its first suit under RCRA § 7003 in February, 1979. *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982) (filed Feb. 7, 1979). By the time Attorney General Civiletti created the Hazardous Waste Section in the Land and Natural Resources Division on October 7, 1979, four suits had been filed. The government filed suit against Hooker Chemicals and Plastics Corp. over the Love Canal dump in December of 1979, *United States v. Hooker Chem. & Plastics Corp.*, 540 F. Supp. 1067 (W.D.N.Y. 1982). In the section's first year, 51 cases and six consent decrees were filed. 1980 U.S. DEP'T. JUST., LAND & NAT. RESOURCES DIV., HAZARDOUS WASTE SECTION ANN. REP..

43. In March of 1979, EPA Deputy Administrator Barbara Blum organized a small Hazardous Waste Task Force composed of various headquarters technical and legal personnel to give support to the Justice Department. Similar regional task forces were also formed. 9 [Current Developments], *ENV'T REP.* (BNA) 2292 (1979). By the time the Task Force was phased out two years later, it was known as the Office of Hazardous Waste Enforcement and had a professional staff of about 35, divided approximately half-and-half between attorneys and technical personnel. Its staff continued to report to the Assistant Administrator for Enforcement until July, 1981, when the first of a series of agency reorganizations releasing or transferring enforcement personnel took place. Telephone interview with John Wheeler, Attorney, EPA Office of Enforcement Counsel (Apr. 20, 1984).

Ordinarily, if litigation is necessary to enforce pollution control statutes, EPA requests the Land and Natural Resources Division of the Department of Justice to bring suit. The attorney-client relationship between the Department and the EPA is not in all respects traditional; it provides a cameo study of the government-wide struggle for agency autonomy from the Department, the desig-

tion was that most of the suits would be settled, although the Justice Department realized that litigating some cases would be necessary to clarify the law and establish credibility.<sup>44</sup> The view that imminent hazard actions would usually be settled without resort to trial comported with established practices in most federal environmental enforcement. The government expected that a consent decree would eventually be negotiated with the defendants.<sup>45</sup>

The enactment of CERCLA completely changed the complexion of the government's program. By enacting CERCLA, Congress did for the RCRA cleanup program what it had done earlier for the Refuse Act water pollution program when it enacted the 1972 Federal Water Pollution Control Act Amendments: it replaced a simple pollution control plan based on a few words in a self-executing statute with a complex

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nated broker of executive relationships with the judiciary. See Olson, *Agency Litigating Authority as a Factor in Court Policy Making*, Paper delivered at Annual Meeting of the American Political Science Association, Chicago, Ill. at 15-18 (Sept. 1983). See generally D. HOROWITZ, *THE JUROCRACY: GOVERNMENT LAWYERS, AGENCY PROGRAMS, AND JUDICIAL DECISIONS* (1977). The struggle resulted in a 1977 joint Memorandum of Understanding which provides that if prompt representation is not provided, EPA may bring the action itself, and that EPA lawyers will be allowed to participate in actions prosecuted by the Department. Pub. L. No. 95-95, 91 Stat. 685, 772 (1977); [Federal Laws] ENV'T REP. (BNA) 41-2401 (June 13, 1977). Since the 1977 agreement, all referrals to the Department must be made by EPA headquarters. The earlier, somewhat uneven practice of regional referrals directly to the United States Attorneys or the Land and Natural Resources Division ceased except on rare occasion in federal districts where the United States Attorney has traditionally asserted a strong independent role (e.g., the Southern District of New York, the District of New Jersey, and the Northern District of Indiana). Hazardous waste enforcement cases are handled almost without exception through the Department of Justice. Federal Water Pollution Act § 311 spill cleanup case management followed the centralizing influence of the Memorandum. Federal enforcement had no significant role to play under the Solid Waste Disposal Act until it was amended root-and-branch by RCRA in 1976. RCRA implementation consisted almost entirely of rulemaking until the early 1980's, except for the cases brought under § 7003.

The 1977 Memorandum has more or less well served its peacekeeping purpose, although Congress has the jurisdiction over waste litigation under review. Legislation was introduced in the 98th Congress by Congressman John Dingell (D-Mich.) that would have given EPA broad authority to manage its own hazardous waste litigation if the Department failed to act within 30 days of an EPA request. H.R. 2867, 98th Cong., 1st Sess. § 11d (1983), *reprinted in* H.R. REP. NO. 198, pt. 1, 98th Cong., 1st Sess. 10 (1983). A recent modification to the 1977 Memorandum permits the EPA regional offices once again to refer cases directly to the Department on an experimental basis, but the experiment has not yet been extended to hazardous waste cases. 14 [Current Developments] ENV'T REP. (BNA) 924 (1983).

44. In statements at the American Bar Association annual meeting on August 10, 1981, Department of Justice Section Chief Anthony Z. Roisman encouraged the chemical industry to begin negotiating cleanups. He based his recommendation on the government's "get-tough" posture coupled with its successful litigation track record up to that time. See 12 [Current Developments] ENV'T REP. (BNA) (1981).

45. Telephone interview with James W. Moorinan, former Assistant Attorney General, Land and Natural Resources Division, Department of Justice (Apr. 8, 1984). The use of consent decrees in the enforcement of public law litigation has recently renewed judicial and legislative concern about how well they protect the public interest.

administrative scheme.<sup>46</sup> As the EPA began to implement CERCLA, a shift in the center of gravity of the federal waste site remedy effort occurred, away from the Justice Department and toward the EPA. In early 1981, the EPA Hazardous Waste Task Force formed to assist the Justice Department was disbanded, and its functions were assumed by staff assigned to the new CERCLA program.<sup>47</sup> Decisions on case referrals necessarily began to be made in the context of the more complex statutory program, which gave the EPA many more options with respect to site remedies. Current CERCLA implementation continues this trend, although the Justice Department maintains a vigorous effort to secure favorable judicial interpretations of CERCLA's enforcement provisions. The first two years of CERCLA implementation, however, coincided with a grave managerial crisis that exposed the CERCLA program to national political attention.

2. *A Stormy Political History.* Between mid-1981 and mid-1983, internal dissension, reduced staffing and funding, and several reorganizations impaired operations throughout the EPA.<sup>48</sup> The inability of the CERCLA program to establish a record of accomplishment is due in large part to this unfortunate period. Moreover, the current approach to

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46. The Refuse Act provided a one paragraph section dealing with water pollution. See Refuse Act § 13, 33 U.S.C. § 407 (1982). The amendments in 1972 introduced many complex sections to the statutory scheme. See 1972 Water Pollution Amendments, §§ 101-518, 86 Stat. 816, 816-96. Similarly, CERCLA established an extensive legislative scheme. See *supra* notes 19-41 and accompanying text. The conversion now underway of the flexible cleanup approach of CERCLA to a quasi-regulatory program parallels in interesting respects the difficulties encountered by the 1970 Refuse Act Permit Program (RAPP), 36 Fed.Reg. 6564 (1971), under which Corps of Engineers permit authority was exercised to implement effluent standards developed by the EPA. Under the 1899 Refuse Act, 33 U.S.C. § 407 (1982), a Corps permit was necessary to authorize release of any "refuse matter" into United States navigable waters. RAPP foundered under the technical difficulties and sheer bulk of 40,000 permit applications and soon became enmeshed in controversy over whether NEPA impact statements had to be prepared on each permit. *Kalur v. Resor*, 335 F. Supp. 1, 15 (D.D.C. 1971), had required them. The RAPP was superceded by the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), Pub. L. No. 92-500, 86 Stat. 816, (1972) (codified at 33 U.S.C. ch. 26 (1982)), a complex regulatory scheme occupying some 72 pages of the Public Laws. See J. QUARLES, *CLEANING UP AMERICA* 114 (1976).

47. See *supra* note 43.

48. See Fielding, *The Environmental Interregnum—It's Over*, 1 ENVTL. F., June 1983, at 10; *The EPA Controversy: How the Nation's Editorial Writers Viewed It*, *id.* at 44-45. For an excellent discussion and documented summary of EPA's problems in this period, see Feliciano, *The U.S. Environmental Protection Agency: An Analysis of Its Controversies*, Report No. 83-114 ENR, Congressional Reference Service, Library of Congress (June 1, 1983). The citations in following notes are to the trade press and popular magazines through which the public largely followed the controversy. References to the dozens of hearings and meetings conducted by six congressional committees are on file with the author, for whom the staff of the House Committee on Energy and Commerce generously prepared a detailed survey of all printed and unprinted congressional hearings, meetings, and reports on CERCLA abuse through mid-1983 when the crisis apparently ended.

CERCLA implementation has been forged as a reaction to the politically discredited managerial strategy which then prevailed.

The strategy that contributed to the resignation or firing of more than fifteen EPA officials<sup>49</sup> attempted to use program delays and private cleanup agreements to keep Fund expenditures low so that Congress would not need to reauthorize the Fund in 1985.<sup>50</sup> This approach was supposed to curb inflationary spending and obviate the need for another federal public works program.

The National Contingency Plan was to have been revised within six months of CERCLA's enactment.<sup>51</sup> Many months passed before a court order forced EPA to promulgate the plan.<sup>52</sup> The Fund, meanwhile, accumulated unspent revenues. The EPA defended its actions as necessary to ensure that limited funds would be spent at deserving sites and to allow its staff time to negotiate for cleanup by responsible parties.<sup>53</sup>

Critics charged that the EPA had relaxed cleanup requirements as an inducement to private parties to clean up sites themselves,<sup>54</sup> had agreed to cost-reimbursement settlements short of what the Fund should recover under the statute, had allowed politics to interfere with the proper administration of the Fund,<sup>55</sup> and, in general, had failed to follow acceptable management practices.<sup>56</sup> On instructions from the White House, EPA Administrator Anne Gorsuch claimed executive privilege and refused to share enforcement documents with House subcommittees.

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49. EPA's 'ins' and 'out,' 1 ENVTL. F., June 1983, at 47; *The Old EPA: Where Are They Now?*, 2 ENVTL. F., Mar. 1984, at 47.

50. CERCLA § 303, 42 U.S.C. § 9653 (1982), precludes the collection of Superfund taxes after September 30, 1985 unless reauthorized by Congress. EPA Assistant Administrator Rita Lavelle, director of the CERCLA program, testified at a congressional hearing that her policy of negotiating settlements with waste dumpers instead of using enforcement proceedings against them had been adopted by the EPA Administrator with White House approval. NEWSWEEK, Mar. 7, 1983, at 18.

51. CERCLA § 105, 42 U.S.C. § 9605 (1982). Although CERCLA did not make promulgation of the Plan a condition precedent to remedial expenditures from the Fund, CERCLA § 221(c), 42 U.S.C. § 9631(c) (1982), EPA did so by rule. 40 C.F.R. § 300.68(a) (1984).

52. See *supra* note 22.

53. By September, 1982, \$452 million had been collected, but only \$88 million had been spent. *EPA Figures Contradict Public Claims of Progress in Superfund, Florio Charges*, 13 [Current Developments] ENV'T REP. (BNA) 884 (1982). For a chronicle of EPA footdragging on the NPL, see *supra* notes 14-15.

54. 13 [Current Developments] ENV'T REP. (BNA) 2307 (1983).

55. Scattered reports emerged that CERCLA funds were spent to aid Republican candidates or withheld to harm Democratic candidates, for example, that EPA delayed a \$6.1 million Superfund grant to clean up the Stringfellow Acid Pits in California to avoid aiding then-Governor Jerry Brown's senatorial campaign. Washington Post, Feb. 9, 1983, at A1; N.Y. Times, Feb. 24, 1983, at 13; NEWSWEEK, Mar. 7, 1983, at 17-18.

56. A draft report by EPA Inspector General Matthew Novick said he had been unable to show that \$53.6 million from the Superfund had been spent for its intended purpose. N.Y. Times, Feb. 19, 1983, at 1.

In response, the House of Representatives voted for the first time in history to hold an agency head in contempt of Congress.<sup>57</sup> The head of the CERCLA program was later convicted of perjury in connection with her testimony before a congressional committee and of obstructing congressional investigations.<sup>58</sup>

Under Administrator Gorsuch, the agency experienced unprecedented managerial dissension.<sup>59</sup> In fairness, a chronic tension between "program" and "enforcement" functions, never satisfactorily resolved in the Agency's fifteen years of existence, caused some of the difficulty.<sup>60</sup>

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57. In September 1982, the House Energy and Commerce Subcommittee on Oversight and Investigations requested EPA enforcement documents on various hazardous waste sites, to investigate whether negotiated settlements fell short of what the public should recover in expenses. *Dingell Seeks Superfund Enforcement Data to Study Justice's Delay in Filing Cases*, 13 [Current Developments] ENV'T REP. (BNA) 810 (1982). The Administration claimed executive privilege, stating that the documents were "enforcement-sensitive" and that their release would reveal litigation strategy for cases under development. *Dingell Says Administration Blocking Panel's Investigation; Gorsuch Subpoenaed*, *id.* at 881-82 (1982). The subcommittee then voted to issue contempt citations to Administrator Gorsuch, *Gorsuch Found in Contempt of Congress by House Panels over Subpoenaed Documents*, *id.* at 1403 (1982), and the 259-105 vote of the full House followed on December 16, 1982. *House Votes to Find Gorsuch in Contempt; Justice Sues House to Block Further Action*, *id.* at 1435 (1982). After the government suggested it might not prosecute the citation, a negotiated settlement provided that members of Congress could inspect but not copy the documents. *House Committee, White House Reach Agreement on Disclosure of EPA Documents*, *id.* at 1885 (1983).

58. Initial reports of the February 1983 dismissal of Rita M. Lavelle, Assistant Administrator for Solid Waste and Emergency Response, indicated that EPA Administrator Gorsuch deemed the dismissal an agency "personnel matter." N.Y. Times, Feb. 10, 1983, at A1, col. 2. Subsequent coverage suggested collusion by Lavelle with companies in cleanup litigation. NEWSWEEK, Mar. 7, 1983, at 18. From 1979 until her appointment to EPA, Ms. Lavelle was director of communications of the Cordova Chemical Company, a division of Aerojet Liquid Rocket Company, which was on the list of dumpers at the Stringfellow Acid Pits. N.Y. Times, Feb. 10, 1983, at 1, cols. 1-3. Government sources indicated that Lavelle continued to play a role in negotiations despite the conflict of interest. N.Y. Times, Feb. 9, 1983, at B13, col. 4. Ultimately, Ms. Lavelle was convicted both for perjury in her testimony to the House Energy and Commerce Committee about the date on which she learned of her former employer's involvement with the Stringfellow site and for obstructing congressional investigation of these events. *Lavelle Found Guilty on Four Counts of Perjury Obstructing Panel Inquiry*, 14 [Current Developments] ENV'T REP. (BNA) 1417, 1417 (1983). At that time the chairman of the House Energy and Commerce Committee, John Dingell (D-Mich.), was quoted as saying, "I would hope that the painful experience of Miss Lavelle can be a useful reminder both to these public servants who were dutiful and upheld the law—that they did the right thing—and to those who will be called to account in the future." *Id.* at 1418.

59. One report, prepared at the request of Administrator Gorsuch prior to her resignation, blamed conflicts between top EPA officials and regional offices for most of the problems in implementing the Superfund clean-up program. *See EPA Study Lays Blame for Slow Cleanup of Sites on Administrative Tug-of-War*, 14 [Current Developments] ENV'T REP. (BNA) 52, 52 (1983). In testimony before a Senate subcommittee, Lavelle charged that there was no established chain of command at EPA, which resulted in disorganization and internal dissension. NEWSWEEK, Mar. 7, 1983, at 17.

60. The problem in fact transcends EPA. Programmatic and enforcement functions shade imperceptibly into one another in the spectrum of administrative acts implementing social regulatory programs. Under the pollution statutes, large program staffs maintain frequent contact with the regulated communities, from rulemaking through permit issuance, compliance, rule modification,

Yet this longstanding tension alone was inadequate to explain three chaotic reorganizations within one year.<sup>61</sup>

CERCLA program officials are now keenly aware that Congress is vigilant concerning Superfund abuse.<sup>62</sup> This political backdrop helps explain EPA's current wariness toward negotiation. But negotiation done improperly need not rule out negotiation done properly. In retrospect, the discarded negotiation strategy seems almost quixotic; however much the Agency was committed to holding down inflationary spending and promoting cooperative problem-solving with the private sector, the site problem was enormous and private willingness to solve it was limited. Failure of an all-carrot-and-no-stick approach was certain.

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repermitting, and adjusted compliance, in never-ending reiteration. Statutory sanctions reflect this progression—permitting, self-reporting, notice, conferences, administrative orders, inspections, civil penalties, various delayed or adjusted compliance orders, injunctions, fines, and imprisonment. Compliance initially has a strong managerial component, characterized by non-adversarial negotiation to secure compliance with the norm. Yet failure to comply is a violation of law, which soon must shade over into efforts to compel rather than cajole. As the coloration of agency efforts darkens, the management response yields to a legal one. Lawyers figure more prominently, and technical personnel lose influence in the implementation process. Agency "enforcement" stands in this twilight zone. At EPA, enforcement has variously been dominated by the technical programs or the General Counsel or has been sui generis. Enforcement personnel may or may not hold law degrees and may or may not have a strong "enforcement mentality." The toughness of the Janus-faced enforcement function varies critically depending upon the organizational treatment it receives and whether the Agency views it as a lawyer-dominated function or as a mixed function with strong program involvement or even supervision.

In the first EPA organization, one individual held the title of Assistant Administrator for Enforcement and General Counsel. *See generally* EPA, *THE FIRST TWO YEARS—A REVIEW OF EPA'S ENFORCEMENT: TWO YEARS OF PROGRESS* (1975). His small policy-oriented office supported the primary regional enforcement effort, which paradoxically was organized into separate offices under the regional administrators. The regional enforcement divisions housed most of their lawyers in legal branches. The regional counsels occupied a separate, coordinate niche. Prior to 1974, regional enforcement personnel primarily wrote NPDES permits, helped review SIP components, conducted air quality compliance conferences, and (of subsequent importance to CERCLA) enforced the oil and hazardous substances spill provisions of FWPCA § 311. Interview with Kirk Sniff, EPA Associate Enforcement Counsel for Waste (Feb. 24, 1984). In 1975, EPA split the functions of General Counsel and Assistant Administrator for Enforcement. Headquarters enforcement was staffed with a mix of attorneys and program personnel; its small, policy-oriented effort was focused on management and coordination, not hands-on enforcement. Regional structure was unchanged, so that regional and headquarters enforcement and legal review were both finally organized in parallel. *See generally* EPA, *EPA ENFORCEMENT: A PROGRESS REPORT, DECEMBER 1974 TO DECEMBER 1975* (1976).

61. Under Administrator Gorsuch, three turbulent enforcement-program reorganizations occurred within 12 months. The first reorganization destroyed the regional enforcement divisions. Their attorneys were moved to the regional General Counsel's offices, others to the programs with which they were most concerned. *See* Anderson, *supra* note 28 (forthcoming). A fourth reorganization occurred when William Ruckelshaus returned as Administrator in the summer of 1983.

62. Without exception, the present and former EPA officials whom I interviewed mentioned Committee Chairman John Dingell and raised the spectre of oversight hearings if negotiated agreements for cleanup are entered into by the agency.

3. *Negotiation in CERCLA: The Experience with Remedial Agreements.* The CERCLA remedial program remained controversial throughout the Gorsuch era. Certain agreements, such as those involving Seymour in Indiana,<sup>63</sup> General Disposal in California,<sup>64</sup> and Chem-Dyne in Ohio,<sup>65</sup> drew severe criticism for their generosity to the responsi-

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63. The site at Seymour, Indiana, involved some 20,000 tons of wastes—60,000 drums and 98 bulk storage tanks—deposited by approximately 364 known generators. Federal removal actions responded to immediate threats to health, but a long-term Fund remedy could not be launched, because the site was municipally-owned and Indiana could not provide the 50 percent of remedial costs required by CERCLA § 104(c)(3). Relegated to lawsuits or a negotiated cleanup, the government accepted the offer of 24 generators who accounted for about half the wastes to conduct a cleanup of the surface in return for federal covenants not to sue for any further cleanup costs. The EPA had estimated that total cleanup would cost \$30 million—\$15 million for the surface, the remainder for soil and groundwater—but the settling generators were able to obtain the surface cleanup for \$7.7 million. A district court upheld the reasonableness of the settlement. *See generally* United States v. Seymour Recycling Co., 554 F. Supp. 1334, 1341 (S.D. Ind. 1982). The EPA sent demand letters to 340 smaller non-settlers for their pro-rata shares of the soil and groundwater cleanup, still estimated to cost \$15 million. 13 [Current Developments] ENV'T REP. (BNA) 877 (1982). By late 1983, some of the smaller generators had provided an additional \$5 million. The federal government has sued the remaining generators and operators for the balance of its projected cleanup costs. Surface cleanup has been completed. [14 Current Developments] ENV'T REP. (BNA) 1437 (1983).

Critics charged a "sweetheart deal" because the large settlers had paid about half what EPA estimated surface cleanup would cost and half what the smaller, subsequent settlers would pay. The total releases further shielded them from any additional expense, should suits otherwise collected prove inadequate for the groundwater cleanup. *See* 13 [Current Developments] ENV'T REP. (BNA) 877, 878 (1982). *But see* Bernstein, *The Enviro-Chem Settlement: Superfund Problem Solving*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,402, 10,403 n.7 (1983) (appearance of sweetheart deal based on inflated cost figures). Often, small generators disfavor allocation methods that could create financial responsibility in excess of the volume of waste that they sent to a site. *See* Ward, *Settling at Chem-Dyne*, 1 ENVTL. F., Dec. 1982, at 7, 15. The *Enviro-Chem* settlement refined the allocation methodology employed by the Seymour settlement. The refinements were designed to allocate more fairly each defendant's costs. *See* Bernstein, *supra* at 10,403. General Disposal was the first CERCLA settlement.

64. The General Disposal Site at Santa Fe Springs, California, contained 50,000 drums of sludge and chemical waste. The principal generator was the Inmont Corp. An assistant to Administrator Gorsuch reportedly leaked the government's negotiating position to Inmont's lawyer. At a point when negotiations seemed to break down, Inmont offered the EPA's bottom line position of \$700,000. EPA accepted. Inmont obtained a complete release from all federal claims under all statutes. No consent decree was entered. *See Hazardous Waste Enforcement, Report of Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, H.R. Rep. No. 97-NN, 97th Cong., 2nd Sess. (1982).

65. Wastes at the Chem-Dyne waste facility near Hamilton, Ohio, included some 11,500 drums and 14 bulk tanks, some of which were damaged and leaking. The water table lay 20-30 feet below through sandy, porous soil. EPA estimated surface cleanup to cost \$3.4 million. In a negotiated settlement announced in August, 1982, 116 of the nearly 300 identified potentially-responsible parties provided 70% of the estimated costs of surface cleanup and groundwater studies (\$2.4 million). The Fund would pay the rest. The United States and Ohio sued 25 non-settling major generators for reimbursement. No releases were given for groundwater cleanup. Ward, *Settling at Chem-Dyne*, 1 ENVTL. F., Dec. 1982, at 7, 7-17.

Praised contemporaneously, Ward, *id.* at 7, the Chem-Dyne settlement nevertheless was not subject to public comment because the settlement was not incorporated in a consent decree. (Be-

ble parties. These agreements involved large sites and major companies and portended permissive agreements to come unless the government adopted a more aggressive negotiating posture. It should be noted, however, that approximately three dozen other agreements concluded prior to mid-1983 escaped criticism.<sup>66</sup>

Perhaps Congress and the press needed only a few symbolic sites as vehicles for exploring EPA mismanagement and the potential for abuse inherent in the fund-conserving strategy; thus, further criticism of specific agreements might have been considered unnecessary. Yet further missteps by EPA and the Justice Department during this politicized era were unlikely to escape vigilant congressional oversight committees and the press. It also can be argued that the participation of the Justice Department, judicial review to ensure that consent decrees did in fact serve the public interest, and prompt congressional oversight prevented greater abuses. But even the most-criticized agreement, that involving the Seymour site, was carefully reviewed and approved by a federal district court,<sup>67</sup> and the Justice Department continues to defend that settle-

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cause payments were made at the time the bargain was struck, subsequent enforcement via decree was arguably unnecessary.) Further, a 70% settlement falls 10% short of the amount EPA then required even to enter negotiations, and 30% short of its negotiating goal. *See infra* text accompanying notes 103-10. Finally, the United States and Ohio agreed not to sue the settlers for any surface cleanup, should the \$3.4 million estimate prove to be low. Additionally, the United States agreed that should the settlers be impleaded for contribution in the court action against the non-settlers, and should the judge subsequently find that the impleaded settlers owe the non-settlers contribution over and above the settled amounts, the United States will reduce the settlement contributions by the amount of court-ordered contribution, thereby effectively forcing the Fund to pay the settlers' contribution. For more than six months after the settlement for surface cleanup was reached with responsible parties, EPA struggled with the Army Corps of Engineers and the state-appointed receiver over access to the property. The Army Corps of Engineers, which was to manage the clean-up for the EPA under the agreement, refused to enter the property without written consent from the property owners. Wash. Post, Feb. 26, 1983, at A11, Col. 1.

66. By March 15, 1984, the EPA had negotiated 42 full or partial settlements. Hinden & Tasher, *EPA Hazardous Waste Enforcement: A Policy in Evolution*, reprinted in HAZARDOUS WASTE LITIGATION 1984 (PRACTICING L. INST. 1984). By May, 1984, negotiated settlements reached by the agency totalled \$278.1 million. Letter from Lee A. Thomas, EPA Assistant Administrator, to Loren Smith, Chairman, Administrative Conference of the United States (May 17, 1984). As of the fall of 1983, 36 agreements for complete cleanup had been reached (21 of which are NPL sites), while particular settlements, e.g., for surface cleanup and studies, affected 31 additional sites. *Fact Sheets*, *supra* note 14. The first settlement reached under the Ruckelshaus administration concerned the Enviro-Chem site. *See* Bernstein, *supra* note 63, at 10,402. The large generators agreed to pay about half of the surface cleanup cost and were released from any additional liability. *See also* United States v. Petro Processors, No. 80-358-B (N.D. La. 1983) (10 defendants agreed to clean up two sites over a 15 year period and to maintain and monitor the sites at a cost of \$60 million). (Written case summary provided by Kirk Sniff, Director, Office of Associate Enforcement Counsel for Waste).

67. *See supra* note 63.



ment.<sup>68</sup> The most likely conclusion to be drawn from this conflicting evidence is that the shortcomings of the initial CERCLA remedial program have been somewhat exaggerated.

Whatever the merits of the agreements concluded in CERCLA's first three years, a practical and defensible process for negotiating site remedies evolved during that period.<sup>69</sup> While improvements obviously can be made to current EPA negotiation policy, the initial Superfund experience laid a useful foundation.

After the EPA has notified potentially responsible parties, the government and the parties consult about a meeting. In most cases, the EPA has convened the parties to discuss how to proceed.<sup>70</sup> At the beginning of the program, initiative by the private parties was difficult because the EPA would not disclose the identity of the parties; as this restriction was relaxed, one or more responsible parties often took the lead in contacting the EPA and other parties.

The most important procedural step has proven to be the organization of a committee of a few responsible parties to represent the diverse interests involved. These committees typically have consisted of corporate technical staff and inside and outside counsel, who consult frequently with the companies which they represent. At the few sites involving similarly situated parties, organization presents few problems, but at most sites party organization taxes the ingenuity of the participants. At the Chem-Dyne site, the committee created for the large generators represented the small generators as well.<sup>71</sup> At the Stringfellow

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68. Statement of Mary Walker, Deputy Assistant Attorney General, Dept. of Justice, Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation (Dec. 15, 1983).

69. See generally Pain, *Mega-Party Superfund Negotiations*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 15,054 (1982) (reviews the negotiation process as it has evolved for sites involving large numbers of potentially responsible parties). Very little has been written about the site cleanup negotiation process. What little has been written is dutifully cited here. Where particular attributes of the process or facts regarding a settlement can be attributed to a particular publication or interview, I have done so. But the paradigm that follows is largely a synthesis of scores of interviews conducted with active private and governmental participants in the evolving process. I refrained from including a process attribute unless a broad consensus emerged that the attribute belonged in the paradigm. Elsewhere in this article the reader will also recognize my unattributed reliance upon hours of conversation with busy role players in the evolving quasi-governmental site cleanup process.

70. For example, EPA sent letters to the 47 major generators at the Chem-Dyne site notifying them of a meeting to be held in Columbus, Ohio, on April 27, 1982. Ward, *supra* note 65, at 8. At the 5-1/2 hour meeting, EPA, the Justice Department, and Ohio demanded \$3.4 million in cleanup costs and set settle-or-be-sued deadlines of six weeks for groundwater issues and eight weeks for surface issues. *Id.* After substantial prodding, the government negotiators ranked the top 29 companies in groups of five. *Id.* The 47 major generators became known as Tier I generators, the 243 smaller generators as Tier II generators. *Id.*

71. The first industry negotiating committee of significance was apparently formed by the 13 generators at the Bluff Road site in South Carolina. Government lawyers believe this committee was

site, several tiers of parties were established.<sup>72</sup> The government has been represented by EPA technical, program, and enforcement personnel, as well as attorneys from the Justice Department.

Once organized, the parties exchange information, digest it, and consider a draft agreement. Early in CERCLA's history, inadequate information was a stumbling block to negotiations. The EPA sought to protect its litigation position; the parties could not decide whether to negotiate or litigate until they better understood their involvement at the sites. Some early negotiations over cleanup terms began before the sites had been adequately studied. Disputes also occurred over the reliability of certain EPA findings.

Offers and counter-offers on the terms of the draft agreement give rise to certain problems. First, the parties may dispute the formula to be used in apportioning liability; agreement on how the toxicity, mobility, or condition of the wastes should affect share allocation has usually been difficult to obtain. Second, parties have sought releases from further liability. On this sticking-point, no general solution has yet been found. When overall agreement has been reached, some type of release—albeit partial—has ordinarily been granted. But the most important of these requests involve release from liability for later-emerging groundwater contamination, and this is usually denied. A third recurring difficulty is the presence of hold-outs—parties who refuse to negotiate or sign and thereby obstruct negotiations or prevent final agreement. In some situations the other parties have gone forward with an agreement, and the government has sued the hold-outs for the unallocated cleanup costs. While generally unwilling to grant cooperative parties immunity from further suit in the wake of the much-criticized Seymour settlement, the Justice Department occasionally has agreed first to pursue nonsettling parties for costs beyond the amount of the settlement, and has been willing to assist cooperative parties in their defenses when they are impleaded for third-party contribution by hold-outs.

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the model for committees at subsequent sites. Telephone Interview with John Wheeler, EPA Office of Enforcement Counsel (formerly assigned to Bluff Road) (Apr. 20, 1984). After the Chem-Dyne Tier I generators' meeting with the government negotiators, *see supra* note 70, the generators met alone to arrange a second meeting and to establish a preliminary steering committee. Ward, *supra* note 65, at 8. At the second meeting, twelve steering committee members were assigned as liaison to the parties in both tiers. *Id.* A single document repository was created. *Id.* In mid-July the companies named by secret ballot a three-member Industry Negotiating Committee. Ward reports that the model for the Chem-Dyne Committee was the Seymour site committee. *Id.*

72. At the Capri site in Los Angeles County, California, four tiers were established: transporters, large and small generators, and a residual fourth group. Telephone interview with James W. Moorman, Washington, D.C. attorney (Apr. 13, 1983).

The courts have encouraged negotiated solutions at CERCLA sites. The court in the *Stringfellow* case attempted unsuccessfully to involve an outside mediator.<sup>73</sup> The judge in the *Petro Processors* case stated early in the proceedings that, if necessary, he would subpoena the EPA Administrator and the defendants to explain why the case had not been settled. Later, the judge summoned the parties to a marathon settlement negotiation during which the judge "assisted" the parties in reaching agreement.<sup>74</sup>

Most settlements to date have been judicially approved as consent decrees. Even where negotiations did not begin in the context of a lawsuit, suit was subsequently filed to obtain the consent decree. While private parties would prefer a quasi-contractual negotiated agreement to avoid the adverse publicity of a lawsuit, the EPA now insists on an administrative consent order because of its greater enforceability. Given a choice between an administrative order and a consent decree, many parties tend to prefer the judicial decree to avoid the uncertainty of the treble damages remedy available to enforce administrative orders.<sup>75</sup>

### C. Current EPA Policy.

New EPA leadership reversed the direction of the Fund-conserving strategy of the Gorsuch years by emphasizing direct federal cleanup.<sup>76</sup> In mid-1983, the EPA began to produce program documents detailing its terms for discussing voluntary cleanup with site users, its plans for informing the public of cleanup activities, its approach to federal and state coordination, and its criteria for site study and cleanup design. These documents ordinarily take the form of interim, draft, and final guidance memoranda to regional administrators and staff, although plans and handbooks are also in preparation. The process of producing this gui-

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73. See *infra* text accompanying notes 372-74.

74. See EPA Case Summary, *supra* note 66.

75. Telephone interview with Michael Brown, Washington, D.C. attorney (May 9, 1984); Moorman Interview, *supra* note 72.

76. Upon taking office as EPA Administrator, William Ruckelshaus was quoted as stating that there was "too much emphasis now on who pays as opposed to cleaning up. We don't need to answer the question of who pays before we clean up." 14 [Current Developments] ENV'T REP. (BNA) 51 (1983). A draft list of 35 agency-wide program priorities ranked CERCLA removal and remedial actions first and second but negotiation of responsible party cleanup ranked 33rd. EPA Memorandum and List of Candidate Priorities for Agency Activities in Fiscal 1985, reprinted in 14 [Current Developments] ENV'T REP. (BNA) 942, 943 (1983). After extensive discussions, removal and remedial actions remained first and second but negotiations moved to eighth place on the final list. A. ALM, MEMORANDUM ON DEVELOPMENT OF OPERATING YEAR GUIDANCE FOR FY 1985 AND FY 1986 11-12 (1983). Hazardous and toxic substances programs have come to dominate the overall EPA agenda. Of the 31 priorities in the final Alm Memorandum, 18 addressed toxic substances, and of these, 13 were closely related to the waste site cleanup problem. Of the top 15 priorities, 13 were toxic and hazardous substances-related. *Id.* at 12-14.

dance is still under way and challenges even insiders to keep clear what has been planned, drafted, approved, or withdrawn.<sup>77</sup>

Placement of a site on the National Priority List triggers the remedial program.<sup>78</sup> After listing, responsibility for each NPL site in a given region is assigned either to the program or the enforcement personnel for that region.<sup>79</sup> These assignments reflect the EPA's best guess as to how cleanup eventually will be conducted if negotiations are unsuccessful: program personnel will supervise a cleanup by the Fund, while enforcement officials will seek to compel the site users to act by means of administrative orders and, if necessary, litigation conducted by the Department of Justice.<sup>80</sup> The criteria that guide this classification include the existence of financially sound responsible parties, the strength of the enforcement case, the likelihood of constructive negotiations, the time available before the response must begin, and "the objectives of the Superfund program"—factors such as allocating CERCLA resources or a limitation on

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77. The National Contingency Plan requires notice-and-comment rulemaking but apparently does not have to contain the many substantive matters addressed in the guidance. Still, in settling litigation over the NCP, *see supra* note 22 and *infra* note 83, the Agency has agreed to revise the Plan to include provisions for public involvement in site cleanup planning, inclusion of federal facilities on the NPL, requirements for cleanups to comply with RCRA and other regulatory statutes, and other standards for ensuring a safe level of cleanup.

78. *See* 40 C.F.R. § 300.68(a)(1984)(remedial actions are taken in response to releases on the National Priority List).

79. EPA, Guidance for Selecting Enforcement Action or Fund-Financed Response 4 (July 27, 1983). This guidance appears to supersede similar draft guidance dated June 8, 1983, *reprinted in* 14 [Current Developments] ENV'T REP. (BNA) 325 (1983). Of the 419 NPL sites listed before the fall of 1983, 113 were designated for enforcement lead. EPA, REPORT TO THE [HOUSE] APPROPRIATIONS COMMITTEE 42 (Nov. 1, 1983). Presumably, the remainder were intended initially for a Fund response. This special report is unique in that it attempts to explain how current remedial policy corrects the shortcomings of EPA's earlier approach to negotiating cleanups.

80. Four categories are actually used: (1) Fund-financed sites (dim prospects for successful enforcement actions within a reasonable time period); (2) Enforcement sites (financially-viable responsible parties clearly exist and the government's case is strong); (3) Limited negotiation sites (inarguable enforcement case and marginal prospects for negotiated cleanup, handled like category 1); and (4) State enforcement lead (states control site cleanup under varied state approaches). July 27, Guidance, *supra* note 79, at 1-2. On occasion, assignments to category 2 will occur if the site involves precedent-setting issues or issues of national importance. *Id.* at 12-13. The guidance implies the EPA will take responsibility for NPL sites—but a large, ill-defined category of state leads exists—and de-emphasizes state leads (category 4) by urging that the "best" enforcement cases be placed in category 2. *Id.* at 1. EPA could then decide later how to apportion cases between state and federal enforcement. Still, of 235 NPL sites slated for attention in fiscal year 1984, 105 were initially designated state lead. Memorandum by Lee Thomas, EPA, Assistant Administrator for Solid Waste and Emergency Response, Final FY 1984 Remedial Accomplishments Plan (RAP) (Oct. 25, 1983). At these sites the federal role is difficult to describe: regional personnel may oversee cleanups, or merely observe, or not be involved to any appreciable extent. Telephone interview with Kirk Sniff, Director, Office of Associate Enforcement Counsel for Waste (Mar. 2, 1984).

a state's ability to pay its share of the costs.<sup>81</sup>

After leads are assigned, site management proceeds on two parallel tracks.<sup>82</sup> Enforcement personnel search for responsible parties, send notice letters, and otherwise attempt to lay a groundwork for negotiations. During CERCLA's first years, the notice letters were quite brief, specifying a party's suspected involvement with a waste site and providing the user an opportunity to clean up the site voluntarily. The agency has since issued some internal guidance on the scope and content of these

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81. See July 27, Guidance, *supra* note 79 at 8-13. The EPA organizational structure affects the choice between program and enforcement lead responsibility as well as the number and type of internal approvals that ultimately must be obtained for the cleanup remedy.

The current agency organization plan has been in effect since the summer of 1983. See 14 [Current Developments] ENV'T REP. (BNA) 941 (1983) for the organizational chart. The EPA organization chart reflects a variety of considerations: the influence of the three Gorsuch era reorganizations, *see supra* note 61, the tension between program and enforcement functions, *see supra* note 60, new emphases such as decentralized management and renewed enforcement efforts, and the resolution of "turf battles" based largely upon the length and strength of association with the current Administrator and upon his working style. Interview with Michael Brown, former EPA Enforcement Counsel (1981-1983) (Jan. 14, 1984). The regional effort balkanized among several offices that are coordinated only in the regional administrator's office.

Generally, the 10 EPA regional offices are divided into four parts: air, water, environmental services (technical support and direct surveillance), and policy and management. Program responsibility for wastes, pesticides, and toxic substances is combined with air quality in a single division in six regions (despite the closer affinity of toxic wastes with water pollution). Responsibility for hazardous wastes and toxic substances occupies its own division in the remaining four (Regions 1, 2, 5, 9). EPA Headquarters Telephone Directory (Winter, 1984). Enforcement no longer has a separate organizational niche on the regional divisional level, although the program divisions have enforcement branches. Moreover, the Environmental Services Division is responsible for surveillance, analysis, and inspections—all vital enforcement activities. Further, attorneys in the regional offices spend about 70% of their time on enforcement and report to the regional general counsel, who in turn reports at the divisional level to the regional administrator. Thus, enforcement responsibility coalesces only at the topmost regional level, the regional administrator's office. *See EPA Regional Administrators Responsible for Activities, Results Under New Plan*, 14 [Current Developments] ENV'T REP. (BNA) 644, 644-45 (1983).

In Washington, an Assistant Administrator for Solid Waste and Emergency Response manages the CERCLA program. Under the Assistant Administrator, an Office of Emergency and Remedial Response manages direct Superfund actions, those involving Fund expenditures for both emergency removals and longer-term remedies. An Office of Waste Programs Enforcement manages the remaining CERCLA cleanups, by providing policy guidance and technical support, and an assistant administrator for enforcement and compliance monitoring reviews enforcement policy and practice in the various regions.

An associate enforcement counsel for hazardous waste takes the lead on CERCLA enforcement matters involving both § 106 administrative orders and judicial actions handled by the Justice Department. Direct assistance to the regions in gathering the data for enforcement actions is provided by the National Enforcement Investigations Center, a specialized prosecution-minded office located in Denver, Colorado. In the Office of General Counsel, an associate general counsel for solid waste and emergency response oversees compliance of agency initiatives with the statute. CERCLA itself is assigned to a deputy associate general counsel. *See Fact Sheets, supra* note 14.

82. Flow charts describing the EPA *modus operandi* have been prepared by Assistant Administrator Lee Thomas. *See Fact Sheets, supra* note 14.

letters, with a view to making them more effective.<sup>83</sup> Simultaneously, the lead office lets contracts for a "remedial investigation study" and a "feasibility study" (RI/FS).<sup>84</sup> The RI/FS have become the centerpiece of the remedial program. In brief, they are supposed to provide a detailed physical assessment of conditions at sites (RI) and a set of alternative actions for cleanup (FS). They have begun to consume a large percentage of Fund revenues and will account for the single largest block of agency staff time over the coming years.<sup>85</sup> Completion of the RI/FS has been made a condition precedent to any remedial activity at sites, in order to avoid situations in which the EPA perceived that insufficient knowledge about site conditions resulted in lengthy and inconclusive negotiations.<sup>86</sup>

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83. See Memorandum by EPA Office of Waste Programs Enforcement, Office of Enforcement Counsel-Waste, CERCLA Notice Letters (May, 1983). This guidance will be revised to cover Fund-financed planned action, RI/FS conduct by responsible parties, party cleanup, party liability in the event of failure to respond, negotiation with the Agency, and information requests under RCRA § 3007 and CERCLA § 104(e). It will provide "generic sample notice letters" for use by the regional offices that must transmit them. The draft is undergoing revision to reconcile it with the Agency's RI/FS policy. Interview with John Cross, Esq., Office of Waste Program Enforcement (Jan. 10, 1984).

84. See National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.68(f),(g) (1984). Detailed Feasibility Study Guidance and Remedial Investigation Guidance are under development. See also proposed revisions in the NCP, 50 Fed. Reg. 5862, 5905-06 (Feb. 12, 1985).

85. Ninety-five RI/FS were planned for fiscal year 1984, about 115 for completion in 1985. The remaining RI/FS will have to be completed after 1985. RI/FS take from nine months to two years to prepare, depending on terrain, weather, and extent of contamination. *Hedeman Presentation, supra* note 14.

86. EPA, Report to House Appropriations Committee, *supra* note 79, at 6-7. EPA contractors perform the RI/FS at fund expense, with reimbursement by responsible parties. See L. Thomas, Assistant Administrator for Solid Waste and Emergency Response, & C. Price, Assistant Administrator for Enforcement and Compliance Monitoring, Participation of Potentially Responsible Parties in Development of Remedial Investigation and Feasibility Studies under CERCLA (Mar. 20, 1984) [hereinafter *RI/FS Guidance*].

Responsible parties may perform the RI/FS for any NPL site if they agree in advance to design and carry out the remedy specified by the Agency. The Agency can invest extra resources in supervising the RI/FS because it will not have to invest staff resources in negotiating over cleanup design and execution. *Id.* at 6. Likewise, responsible parties may be able to perform the RI/FS for active dioxin-contaminated sites, because the public expectation of quick action may not allow the Agency to use its more deliberate planning framework. *Id.* at 7. Responsible parties may perform RI/FS only if the Agency has already committed Funds to perform them. *Id.* at 3-5.

The Agency does not engage in lengthy negotiation about RI/FS, *id.* at 4, and it expects to use judicial decrees to formalize any private RI/FS. *Id.* The list of qualified RI/FS will be "made available," and known site users will be sent a notice letter at least 60 days before the Fund-financed RI/FS is scheduled to begin informing them of the possibility of their performing the RI/FS. *Id.* at 7. See also Memorandum by EPA Office of Waste Programs Enforcement Office of Enforcement Counsel-Waste, CERCLA Notice Letters at 6 (Feb. 1984) (internal draft).

Separate guidance ensures public release of the names of other potentially responsible parties. See Memorandum by G. Lucero, Director of the Office of Waste Programs Enforcement, & K. Sniff, Associate Enforcement Counsel for Waste, Releasing Identities of Potentially Responsible Parties in

The EPA intends the RI/FS to produce a record of decision with respect to alternative cleanup plans for each site. The Agency has patterned this record after the environmental impact statement prepared under the National Environmental Policy Act (NEPA).<sup>87</sup> NEPA requires an environmental impact statement on proposals for major federal actions that significantly affect the quality of the human environment.<sup>88</sup> The Agency concedes that NEPA applies to CERCLA remedial actions,<sup>89</sup> but argues that the record of decision compiled in the course of preparing the RI/FS is the "functional equivalent"<sup>90</sup> of an impact statement that satisfies NEPA.<sup>91</sup> EPA has also provided for public comment prior to the selection of a remedial alternative, even when the RI/FS have been privately performed.<sup>92</sup> Public comment is also provided for in connection with proposed consent decrees and administrative consent orders.<sup>93</sup>

The performance and design specifications that a site cleanup should meet are the heart of the feasibility study. Two opposed views clash starkly on how such specifications should be developed. One maintains that CERCLA should treat each site as unique: because the agency has almost no relevant experience with site risk mitigation, it should apply at each site the cost-effective, specific measures most likely to control risks at the particular site.<sup>94</sup> The other view proceeds from the premise that the wastes CERCLA was designed to control are often the identical chemical substances regulated under other federal statutes, and the risk

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Response to FOIA Requests (Jan. 26, 1984) (policy and guidelines for responding to Freedom of Information Act requests for the names of potentially responsible parties at CERCLA sites).

87. *Hedeman Presentation*, *supra* note 14.

88. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(C)(1982). See Anderson, *The National Environmental Policy Act*, in *FEDERAL ENVIRONMENTAL LAW* 238 (E. Dolgin & T. Guilbert, eds. 1974).

89. The legislative history of CERCLA indicates that impact statements are not to be prepared on removal actions, but that they may have to be prepared for remedies. "In some such circumstances, Formal Environmental Impact statement requirements may be determined to be applicable." S. REP. NO. 96-848, 96th Cong., 2d Sess. 61 (1980).

90. See *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 384-86 (D.C.Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

91. *Hedeman Presentation*, *supra* note 14. The Agency, however, will resist judicial review of its remedial decisions as informal adjudication.

92. Memorandum by Hedeman, EPA, Director of the Office of Emergency and Remedial Response, Community Relations During Enforcement Actions 3 (Feb. 6, 1984) (transmitting to agency personnel draft chapter 6 of *COMMUNITY RELATIONS IN SUPERFUND: A HANDBOOK—INTERIM VERSION*).

93. *Id.* at 6-5, 6-6. EPA has agreed to propose NCP amendments to require (1) development of community relations plans for all Fund-financed response measures, (2) public review of feasibility studies for Fund-financed response measures, and (3) comparable public participation for private-party response measures. See *Consent Decree*, *supra* note 37.

94. *Supra* note 37.

of injury is likely to be the same. Therefore, the ambient and design standards to limit human and environmental exposures to hazardous substances of such statutes as the Clean Air and Clean Water Acts, the Toxic Substances Control Act, the Safe Drinking Water Act, and especially RCRA should apply to waste site cleanups as well.

The EPA has struggled with this issue, tending first to the former, but more recently to the latter view.<sup>95</sup> In settling a challenge brought by an environmental organization, the Agency formally agreed to adopt the substantive standards approach by revising the NCP.<sup>96</sup> The EPA has taken the position that as a matter of law it is not bound to comply strictly with the procedural and permit requirements of other federal statutes, but as a matter of policy it will apply to CERCLA cleanups the substantive standards evolved under other federal statutes.<sup>97</sup> Agency officials once stated that waivers would be available to introduce flexibility into the system at sites that are not amenable to application of existing standards,<sup>98</sup> but the necessary flexibility apparently will be achieved more through the non-compulsory application of regulatory standards and the Fund-balancing requirement. The Agency will also provide for public participation comparable to that required under similar federal statutes.

After notice letters have been sent and the RI/FS have been completed, negotiations may begin. Although some relaxation had occurred by mid-1985, negotiations have been tightly leashed so the Agency can control the rank order and timing of site cleanup, and prevent negotiations from diverting staff from agency-determined priorities.<sup>99</sup> The EPA

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95. *Contrast* Report to House Appropriations Committee, *supra* note 79, at 15-1 (initial EPA policy characterized as flexible site-specific approach), with Lee M. Thomas, Assistant Administrator, *EPA Memorandum [to Regional Administrators] outlining Draft Policy on Compliance of Superfund Law with Other Environmental Statutes* (Jan. 5, 1984), reprinted in 14 [Current Developments] ENV'T REP. (BNA) 1591-93 (1984) (though CERCLA responses not legally subject to other environmental regulatory programs, it will be policy to comply with such programs) [hereinafter cited as *Draft Compliance Policy*]. Guidance manuals for regional use were supposed to be available by June, 1984. *Hedeman Presentation*, *supra* note 14.

96. The NCP merely specifies a procedure for site cleanup to ensure that Fund cleanups are cost-effective. See *supra* note 37. Still, EPA now takes the position that CERCLA § 105(c) requires EPA to adopt substantive cleanup rules. *Draft Compliance Policy*, *supra* note 95. Interview with John Cross, Staff Attorney, Office of Waste Programs Enforcement (Feb. 23, 1984). See Consent Decree, *supra* note 37.

The NCP revision has been formally proposed, *supra* note 84, and weak substantive cleanup requirements are included. See 50 Fed. Reg. at 5865-66, proposed 40 C.F.R. § 300.68(i) at 5906-07, and Appendix: CERCLA Compliance with Other Environmental Statutes, at 5928-31 (confirming the compliance requirement and listing several dozen statutes and programs implicated).

97. 50 Fed. Reg. at 5865.

98. *Draft Compliance Policy*, *supra* note 95.

99. Current settlement policy is contained in Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034 (Feb. 5, 1985) [hereinafter cited as *Interim Settlement Policy*]. This interim policy state-



does not want to lose control of its cleanup agenda by tying up staff in lengthy discussions. Paradoxically, in its opinion the EPA has authority generously to allocate resources for expensive Fund cleanups, but its budget for staff supervision of private cleanups "off-Fund" is severely restricted.<sup>100</sup>

The Agency notifies responsible parties that they have sixty days<sup>101</sup> to agree to carry out EPA's preferred cleanup alternative; otherwise, the government will either clean up the site itself or attempt to force them to clean it up through an administrative order or a lawsuit. These additional notice letters, known colloquially as "drop dead" letters, ordinarily do not take responsible parties by surprise. Officials may have already encouraged the parties to organize a committee to develop their bargaining perspectives and negotiate with the Agency. In negotiations,

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ment provides the text of a guidance memorandum, Interim CERCLA Settlement Policy (Dec. 5, 1985), for public comment. Publication followed both the adoption of Administrative Conference recommendations based on the study from which this article was drawn and the criticisms by potentially responsible parties that EPA settlement policy fostered litigation and discouraged voluntary cleanup. This interim guidance makes plain that EPA would like to follow a more conciliatory policy in future negotiations. *Id.* at 5035.

This new guidance supercedes Courtney M. Price, Assistant Administrator Designate for Office of Enforcement and Compliance Monitoring, and Lee M. Thomas, Assistant Administrator, Office of Solid Waste and Emergency Response, Interim Hazardous Waste Case Settlement Policy (Dec. 1983) [hereinafter cited as *1983 Settlement Policy*]. An Agency spokesman commented at the time that 107 sites were pending which the policy might affect and that during 1983 the Agency had negotiated 27 site cleanup settlements valued at \$93 million. 14 [Current Developments] ENV'T REP. (BNA) 979 (1983). The 1983 guidance supplemented and to some extent superseded a thoughtful guidance memorandum prepared by Michael Brown, former EPA Enforcement Counsel. See EPA Pre-Litigation Enforcement Strategy in Hazardous Waste Cases *reprinted in* 14 [Current Developments] ENV'T REP. (BNA) 149 (1983).

The EPA policy regarding negotiation was first presented in guidelines under CERCLA § 106(c), which required EPA to publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of CERCLA and other environmental statutes. The EPA general policy statement appears at policy statement, 47 Fed. Reg. 20,664 (1982). "[I]t is Agency policy to seek, whenever possible, cleanup by responsible parties prior to recourse to either the Fund or litigation. To this end EPA may, whenever possible, provide notice to potentially responsible parties and an opportunity to confer with the Agency in an effort to develop a satisfactory cleanup agreement." *Id.* at 20,665. The Agency stressed, however, that it would use enforcement actions "as an alternative to or complementary with" Fund-financed cleanup, to save the Fund for true orphan sites. *Id.* But the Agency also repeatedly stated that it would proceed on a case-by-case basis and was not committed to any particular strategy. *Id.* at 20,666. Hence site users did not have to be given notice and the opportunity to act; notice was not viewed as a condition precedent to Agency action. *Id.* The NCP and its preamble currently are silent on negotiation, remarking only that the NCP did not define § 106 "imminent and substantial endangerment," did not implement § 106, and did not address enforcement. 47 Fed. Reg. 31,180, 31,201-02 (codified at 40 C.F.R. § 300.3(a)(2)). The NCP explicitly preserves a case-by-case approach to individual site cleanups. *Id.* at 31,182. Proposed NCP revisions preserve enforcement flexibility but largely abandon the case-by-case approach in selecting cleanup standards. *Supra* note 96.

100. EPA Report to House Appropriations Committee, *supra* note 79 at 39-41. See also Lucero, *supra* note 10, at 1, 4.

101. *Interim Settlement Policy*, *supra* note 99, at 5041.

the Agency will seek one hundred percent of the response costs or complete implementation of its preferred cleanup alternative, although the Agency may settle for a "substantial proportion" of the costs in "narrowly limited" circumstances.<sup>102</sup> The Agency prefers that the parties allocate costs and responsibilities among themselves, but upon request it may help apportion costs, without prejudice to its legal claim that each party is individually ("severally") liable to perform or pay for the entire cleanup.<sup>103</sup> The current policy is to deny any financial offset to responsible parties who voluntarily undertook risk reduction measures at the site sometime in the past.<sup>104</sup>

Discussions and information-sharing between the EPA and the private parties are conducted with a view to protecting the government's litigation options. The Agency drafts a "Negotiations Decisions Document" to serve as the centerpiece for negotiations.<sup>105</sup> The EPA will consider releases from liability for the costs of discrete tasks—surface cleanup, for example—but the Agency ordinarily will not grant full releases and will generally insist that settling parties remain responsible for problems, such as groundwater contamination, which may emerge years later.<sup>106</sup> The criteria that guide the EPA's settlement negotiated decisions strongly resemble those applied in deciding whether to settle a

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102. *Id.* at 5036, 5037.

103. EPA Report to House Appropriations Committee, *supra* note 79, at 46.

104. If a responsible party can convince other parties in the negotiations to allow credit, EPA has no objection so long as the parties agree collectively to pay the entire cost of the remaining cleanup as estimated in the RI/FS. *Id.* EPA does not allocate costs among responsible parties, *id.*; to do so would be burdensome, especially because factors other than volume now may affect a party's negotiated cleanup share. The logical way to proceed would be to adjust the final RI/FS cleanup cost projection upward to include the cost the RI/FS would have produced had the earlier voluntary measure never been undertaken, and require that sum to be gathered proportionately from the responsible parties. The surplus would be subtracted from the early volunteers' share. But to ascertain volunteers' shares, EPA would either have to rely on their estimates or evaluate such measures post hoc. Under the former, EPA would be vulnerable to manipulation and might be accused of unfairly skewing the shares of the site users as negotiated *inter se*, while under the latter the Agency would considerably increase its administrative burdens. Here the matter stands; an internal draft guidance on credit for voluntary response actions has been overwhelmed by another Agency policy development—the abandonment of a simple volumetric settlement allocation approach in favor of a more complex allocation to be worked out by the responsible parties themselves. Yet no credit probably means settlement will be resisted by some site users who feel unfairly dealt with, and voluntary risk reduction measures will be fewer at the large number of sites remaining to be addressed.

105. See *Interim Settlement Policy*, *supra* note 99, 50 Fed. Reg. at 5041. The *1983 Settlement Policy*, *supra* note 99, referred to an "enforcement document," which could be enforced as an administrative consent order or consent decree if negotiations failed.

106. *Interim Settlement Policy*, *supra* note 99, at 5038, 5039-40. EPA Report to House Appropriation Committee, *supra* note 79, at 46.

lawsuit.<sup>107</sup>

Should negotiations fail and the enforcement option appear unattractive, EPA will conduct a Fund cleanup. Current policy stresses this option—clean up now, argue over who pays later.<sup>108</sup> The conspicuous silence in CERCLA on the requirements for negotiations, administrative orders, recoupment litigation, and judicially-mandated cleanup is made up for by the detailed provisions governing direct Fund expenditures. Both private party and federal cleanups must comply with NCP guidelines which include a cost-effectiveness standard, but a Fund remedy must also comply with constraints on the allocation of Fund resources or “Fund balancing.”<sup>109</sup> In addition, federal cleanup contracts must satisfy complex federal procurement regulations.<sup>110</sup> And the EPA is developing

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107. *Interim Settlement Policy*, *supra* note 99, at 5037-38; *see also 1983 Settlement Policy*, *supra* note 99, at 2. The factors include: (1) volume of wastes (but not just the known users' limited percentage “fair shares”; those limited percentages will often be used to establish the proportional responsibility for the *entire* cleanup of each site user); (2) the toxicity, mobility, or other special adverse characteristics of the users' wastes; (3) the strength of the evidence linking the users to the site; (4) the ability of the settling parties to pay; (5) litigation risks (admissibility and adequacy of evidence, defenses); (6) “public interest considerations” (whether a settlement would escape the state 10% contribution requirement in an instance when the state cannot pay; whether the federal government has the money, how quickly federally-financed cleanup can begin); (7) precedential values (trial of a strong case for its precedential value may be preferable to settling); (8) nature of the case remaining after settlement (piecemeal settlements are discouraged; non-settling parties may have to be sued to recover any balance); (9) interest value of obtaining a present sum certain; (10) inequities and aggravating factors. *Id.* at 2-10.

108. *See supra* note 76. *But see Interim Settlement Policy*, *supra* note 99, at 5041-42.

109. Subpart F of the NCP, 40 C.F.R. §§ 300.68(e)-(j) (1984), applies the NCP response management system's seven-phase process to cleanups that private parties undertake. *See* 47 Fed. Reg. 31,180, 31,182 (July 16, 1982); *see also* proposed NCP, 47 Fed. Reg. 10,972, 10,992 (Mar. 12, 1982).

Because § 106(c) requires private remedies to be consistent with the NCP to the maximum practicable extent, EPA has inferred that private remedies must also be cost-effective. *See* 40 C.F.R. 300.68(j),(k) (1984). Fund-balancing goes beyond cost-effectiveness to impose an inter-site expenditure optimization requirement on Fund remedies. *See id.* at 300.68(k). Thus, EPA may select a less reliable remedy, or none at all, because the funds are needed elsewhere at another site where the return in risk reduction is greater for an equal investment. Hence cleanups of Hudson River PCB's or James River Kepone, both hugely expensive, would not be undertaken because the Fund could be more efficiently employed elsewhere.

110. CERCLA, 42 U.S.C. § 9604(h), authorizes the President to use emergency procurement powers to effect CERCLA purposes. 42 U.S.C. § 9605(5) requires the President to include in the NCP provision for procurement of response equipment and supplies. The exercise of authority under § 9604(h) of the Act is subject to the approval of the Administrator of the Office of Federal Procurement Policy. Executive Order 12,316(e) and (f). CERCLA § 9604(h) and 9605(5) appear to require procurement regulations, but none have been promulgated. *But see* 40 C.F.R. § 300.37 (inventory of equipment that may be used to respond to a release, including private and commercial equipment); 40 C.F.R. 300.61(c) (rely on established technology; encourage the participation and sharing of technology by industry and other experts); 40 C.F.R. §§ 300.68(h), (j) (three broad criteria should be used in the initial screening of remedial actions: cost, alternatives, acceptable engineering practices). CERCLA procurement contrasts to the rather detailed procurement provisions contained in RCRA and the regulations thereunder, 42 U.S.C. § 6962; 40 C.F.R. §§ 247, 249 (1984).

informal Fund cleanup guidelines that go well beyond the NCP.<sup>111</sup>

Section 106 of CERCLA authorizes administrative orders to protect public health and welfare and the environment.<sup>112</sup> The administrative order was once the forgotten remedy under CERCLA,<sup>113</sup> but the EPA now intends to make it the primary CERCLA enforcement tool.<sup>114</sup> EPA's guidance contemplates both "consent" and "unilateral" orders. These will be issued, however, only if the Agency thinks compliance is

111. EPA has sent its regional offices lengthy technical Remedial Investigation and Feasibility Study Handbooks. In terms of policymaking, there is less to these documents than meets the eye. The two technical documents will take their place alongside an already weighty comprehensive remedial handbook containing the Superfund office's internal guidance memoranda.

The policy head for the Superfund office visualizes guidance on four tiers: (1) the NCP; (2) RI/FS guidance; (3) specific "how to" documents within the RI/FS guidance, e.g., how to perform an environmental analysis, or how to do project cost estimates; and (4) data compilations, e.g., tables of remedial equipment and services costs by geographic region. Interview with Sylvia Lowrance, Acting Policy Branch Chief, EPA Office of Policy and Program Management (May 15, 1984). Regional personnel occasionally refer to the headquarters guidance materials as "cookbooks."

112. 42 U.S.C. § 9606(a). The order can be enforced by the penalty provisions of CERCLA §§ 106 and 107, 42 U.S.C. §§ 9606(b), 9607(c)(3), including damages equal to three times the cost of cleanup.

113. See Miller, *Defending Superfund and RCRA Imminent Hazard Cases*, 15 NAT. RESOURCES LAW. 483, 494-95 (1983) (as of mid-1982 EPA had issued only 11 administrative orders under CERCLA § 106 and RCRA §§ 3013 and 7003).

114. L. Thomas & C. Price, *Guidance Memorandum on Use and Issuance of Administrative Orders under Section 106(a) of CERCLA 1* (Sept. 8, 1983) [hereinafter cited as *General administrative order guidance*] ("one of the most potent administrative remedies available to the Agency under any existing environmental statute"). Guidance on use of such orders in removal actions is more recent. L. Thomas, *Guidance Memorandum on the Issuance of Administrative Orders for Immediate Removal Actions* (Feb. 21, 1984). See also C. Dinkins, *Natural Resources*, remarks before the American Bar Association Annual Meeting 16 (Aug. 9, 1982) (EPA uses orders or court decrees to incorporate settlement to ensure quick enforcement); Note, *The Role of Injunctive Relief and Settlements in Superfund Enforcement*, 68 CORNELL L. REV. 706, 719 (1983).

Orders have been used increasingly in CERCLA enforcement. In fiscal year 1983, 23 administrative orders were issued under § 106. *Superfund administrative orders called 'patent' remedy, will be defended, EPA says*, 14 [Current Developments] ENV'T REP. (BNA) 951 (1983). Dioxin-contaminated facilities were ordered to close their doors and to put up warning signs. See *id.* at 58-59 (1983). A similar site was subject to an order on consent. *Id.* EPA ordered eight firms to clean up hazardous wastes at the Kin-Buc Landfill in Edison, New Jersey. EPA reminded the parties that noncompliance could result in treble damages of \$15 to \$21 million. *Id.* at 1057 (1983). Montrose Chemical Corp. was ordered to stop discharges of hazardous substances at a New Jersey facility and to report on the extent of DDT contamination at the site. *Id.* at 104-05 (1983).

Recent use of administrative orders in the settlement process includes the Oakdale Disposal site, where the Minnesota Pollution Control Agency and EPA issued an administrative order approving a plan by Minnesota Mining and Manufacturing that is expected to cost \$6 million; the Northern Ordinance site in Fridley, Minnesota, where FMC Corp. agreed to undertake response activities consistent with an interim response order, although FMC was not released from future liability, *id.* at 255 (1983); and a dump site in Moreau, New York, where General Electric Co. agreed to clean up about 450 tons of hazardous waste dumped between 1958 and 1968. *Id.* at 1534 (1984). EPA reached an administrative agreement with the owner of a well-publicized Virginia site containing millions of burning tires whereby the owner would construct an earthen basin to collect the oil runoff. *Id.* at 1916 (1984).

likely and practicable;<sup>115</sup> otherwise, it will proceed directly to a Fund remedy or to a section 106 federal district court action. The EPA believes it must make a finding of both a "release" and "imminent and substantial endangerment" for an order to issue.<sup>116</sup> A responsible party has an opportunity to request a conference with an EPA official to discuss the applicability and appropriateness of a proposed order. The party has the right to bring an attorney or technical representative to the conference,<sup>117</sup> but the EPA takes the position that this conference is not an administrative hearing.<sup>118</sup> Anticipating pre-enforcement judicial challenges, the Agency requires that the administrative record be ready for litigation at the time the order is issued.<sup>119</sup>

D. *A Critique of EPA Policy: How the Remedial Program Is Likely to Work.*

CERCLA was enacted with a sense of urgency<sup>120</sup> that did not carry over into the implementation of the remedial program during its first three years. The EPA and responsible parties negotiated a handful of private cleanups and laid a rudimentary foundation for negotiating additional ones,<sup>121</sup> yet on balance the Fund-conserving strategy and mismanagement damaged and delayed the program. As of the end of 1984, no action at all had been taken with respect to about half of the sites on the NPL.<sup>122</sup> The new EPA administration intended to accomplish orderly, prompt cleanups but soon issued exceedingly modest predictions of what it would be able to achieve.<sup>123</sup> The pace of cleanup is likely to be gla-

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115. *General administrative order guidance, supra* note 114, at 11-12.

116. *Id.* at 5.

117. *Id.* at App. at 3.

118. 14 [Current Developments] ENV'T REP. (BNA) 259 (1983).

119. *General administrative order guidance, supra* note 114, at 16.

120. 126 CONG. REC. H1030 (daily ed. Sept. 19, 1980) (statement of Rep. Florio in support of H.R. 7020) ("Preventive measures are needed immediately to stop further releases. Remedial action is urgently needed at those sites which are presently causing serious problems.").

121. *See supra* note 66 and text accompanying notes 69-75.

122. Through fiscal year 1984 the Agency will probably have spent Fund revenues for one purpose or another (removals, study, design, and remedy) at 235 NPL sites. Three dozen privately negotiated remedies have been completed or are under way (21 of which are at NPL sites). *Fact Sheets, supra* note 14. *See also* EPA Report to the House Appropriations Committee, *supra* note 79, at 5; 14 [Current Developments] ENV'T REP. (BNA) 803, 804 (1983).

Emergency removals have made a stronger showing. By September 1983, EPA had completed 159 removal actions and had an additional 48 under way. EPA Report to the House Appropriations Committee, *supra* note 79, at 8, 12.

Like data on the number and hazards of the sites themselves, data on CERCLA implementation are in flux. Different sources simply provide different numbers for the same index of performance.

123. In 1984, the Agency hoped to complete fifteen more remedial actions, 14 [Current Developments] ENV'T REP. (BNA) 645 (1983), and 65 RI/FS. *Fact Sheets, supra* note 14. Another 115 RI/FS were scheduled for fiscal year 1985. *See supra* note 85.

cially slow for reasons developed in this section: a conservative negotiation strategy, a cumbersome and underfinanced primary Fund alternative, and a private cleanup alternative that suffers from the expense and inefficiency of litigation. By replacing the Fund-conserving strategy with a Fund-first strategy, the Agency has created an inflexible site remedy program. Anxious to rectify the abuses of the Gorsuch era, the Agency's guidance memoranda reflect the conclusion that inaction provokes fewer penalties than action and that it is safe to spend or sue but dangerous to negotiate.

1. *EPA Policy: Prudent But Ineffective.*

a. *The impact of negotiation policy on the selection of an implementation strategy.* Despite some changes in early 1985 to increase private party incentives to negotiate cleanups,<sup>124</sup> EPA policy calls for strict control of the agenda of site cleanup, with the responsible parties assured of only a brief opportunity to meet with agency personnel to discuss private implementation of the remedy.<sup>125</sup> The opportunity to negotiate must not delay Fund action or weaken the Agency's litigation posture. But all of the following significantly reduce the opportunity and the incentive to negotiate a site remedy: the EPA's decision to perform the RI/FS itself in most cases; the sixty-day timetable for negotiations; the policy of seeking complete cost recovery or cleanup, and not bargaining at all unless a substantial proportion of response costs are offered in advance; the refusal to apportion costs; the position that each party is severally liable for one hundred percent of the cleanup costs without regard to the extent of the parties' waste contributions; the policy of holding parties contingently liable, above and beyond the negotiated settlement, for as-yet unknown problems; the refusal to take into account previous voluntary risk-reduction measures when calculating liability; and in general, a focus on a number of factors that seem to have more to do with obtaining a legal victory than with reducing waste hazards and completing cost-effec-

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Overall, the existing Fund may be adequate to complete 100 remedial actions; negotiation may produce another 100 to 170 remedial agreements. Lucero, *supra* note 10, at 1-2. Thus only about half the existing NPL sites can be addressed, leaving roughly 1,125 to 1,925 sites yet to receive attention. Still, the EPA hopes to have taken some type of action by the end of the decade on the sites which will require NCP listing. Telephone interview with Kirk Sniff (Mar. 2, 1984). A former EPA Administrator estimated that at the current rate of cleanup CERCLA's mission will not be accomplished until the year 2085. Telephone interview with Douglas Costle, EPA Administrator 1977-1980 (Dec. 13, 1983). The Office of Technology thinks 50 years may be required to complete the task, Superfund Strategy, *supra* note 14. Congress may expand the Fund in the near future, see *supra* note 16, but other impediments remain that money alone cannot overcome.

124. *Interim Settlement Policy*, *supra* note 99.

125. EPA Report to the House Appropriations Committee, *supra* note 79, at 44.

tive cleanups.<sup>126</sup>

These policy stances are intended to prevent delay and minimize the risk of an inadequate cleanup, but they are undermined by the Agency's financial constraints, its protracted schedule for site cleanup, and its limited capacity to participate in negotiations with the alacrity that it expects from others.<sup>127</sup> The stringent policy also seems to be designed to prevent negotiated cleanups that might be vulnerable to congressional second-guessing. The Agency apparently believes that the best way to placate critics is to impose the norms of its legal position on its negotiation posture.

Indeed, the 1985 settlement policy remains replete with the vocabulary and tactics of the litigator and the courtroom even if it is less belligerent than the 1983 version.<sup>128</sup> The policy guidelines on negotiation were written to be applied to "cases" and "settlements" instead of cleanup agreements. The Agency's negotiating text until recently was called a "draft enforcement document."<sup>129</sup> Yet this guidance is intended to be applied well before litigation is filed to negotiations that take place as a result of the sixty-day notice letter sent immediately following the completion of the RI/FS. In addition, while the guidance suggests that the Agency should be informed about the equities of the individual parties' involvement with the site, it is also insistent that such considerations are irrelevant under the statute.<sup>130</sup> Moreover, the guidance stresses the precedential value of cases favorable to the government's interpretation of CERCLA, implying that, barring a particularly attractive offer from the responsible parties, the government should proceed to litigation—pre-

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126. The substantive issues bound up in EPA's current settlement policy must be appraised if, however valid the underlying public interests EPA is attempting to promote, the positions it has taken discourage the adoption of more optimal administrative processes. Thus analyses of substance and process are inextricably intertwined, a situation not surprising to students of the American administrative process. See Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 786-87 (1975). Compare Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U.L. REV. 120 (1977) (arguing that teaching and research of administrative law focus on the administrative process rather than the role of courts in defining the legitimate scope of administrative activity); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 261-62 (1978) (referring to substance and procedure as the "twin tyrannies" of administrative law).

127. For example, the assistant administrator in charge of EPA's regulatory program under RCRA has pointed out that on the average two years elapse between EPA's learning of groundwater contamination and its cleanup, assigning the blame to EPA procedures. *Thomas seeks review of groundwater rules to shorten time between detection, cleanup*, 14 [Current Developments] ENV'T REP. (BNA) 1436 (1983). An attorney for disposers quipped that private attorneys cannot get replies to correspondence from the Agency in time to meet the negotiation deadlines. Interview with James W. Moorman (Dec. 15, 1983).

128. Compare the guidance documents cited *supra* note 99.

129. See *supra* note 105.

130. *Interim Settlement Policy*, *supra* note 99, at 5038.

sumably even if an otherwise acceptable solution might be negotiated.<sup>131</sup> Finally, EPA is reluctant to share information about conditions at the sites because of a perceived need to protect the Agency's position in subsequent litigation. This practice probably will change as a result of new guidance that encourages information sharing.<sup>132</sup> But the problem will not be eliminated altogether, because there is an information-use barrier inherent in the classic adversarial system—and the EPA's present policy is based on that system.<sup>133</sup>

Site users perceive the government's negotiation posture as unfair. Whether or not warranted, this perception poses a major impediment to negotiation.<sup>134</sup> Users contend that expecting each of them to agree to one hundred percent liability for all phases of a present cleanup with open-ended liability in the event groundwater problems emerge at some later time requires them in most instances to assume responsibility grossly out of proportion to their actual contribution to a hazardous waste problem. Instead, they urge an approach in which users would pay their shares of the cleanup costs based on volume—and perhaps certain other factors such as the toxicity and mobility of the wastes and the integrity of waste containers—with the Fund making up any deficiencies.<sup>135</sup> They argue that the current EPA approach offends fundamental notions of fairness that they believe the courts eventually will apply as part of joint and several CERCLA liability.<sup>136</sup> Users also observe that an uncompromising attitude causes small companies to fight rather than agree to a liability that may potentially bankrupt them,<sup>137</sup> and they point out that almost ninety percent of the Fund is derived from industry assessments. Additional arguments advanced against the Agency's approach are that a phased settlement process—addressing the RI/FS, surface cleanup, and groundwater contamination stages separately—is

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131. *Id.* at 5038.

132. See G. Lucero, Director, Office of Waste Programs Enforcement, & K. Sniff, Associate Enforcement Counsel for Waste, Releasing Identities of Potentially Responsible Parties in Response to FOIA Requests (Jan. 26, 1984) (guidelines for disclosures on a case-by-case basis).

133. "[P]arties have far more and more accurate information than they are willing or allowed to communicate." Susskind & Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B. C. ENV. AFF. L.REV. 311, 320 (1980).

134. *Superfund—How to Rebuild a Badly Damaged Program?*, 2 ENVTL. F., June, 1983, 17, 19-22 (panel discussion).

135. Cox, Matey, Zoll, & Stoll, Comments of the Chemical Manufacturers Association on EPA's December 13, 1983 Draft Hazardous Waste Case Settlement Policy, at 2 (Jan. 12, 1984).

136. *Id.*

137. "Imagine a site 90 percent of which is 'orphan.' The ten percent was contributed by a dry cleaners, a small laboratory, and a defunct garage. Is EPA seriously maintaining that it will only negotiate with the laboratory and the dry cleaners if they agree up front to at least 80 percent of the cleanup? Will EPA later try to hold each liable for costs in a court of law?" Costle interview, *supra* note 14.



desirable from a public policy standpoint, that users often possess the expertise necessary for effective cleanups and should be co-opted into active participation in the cleanup, and that the goal of rapid cleanups should not be subordinated to a concern for establishing points of law in the courts.<sup>138</sup>

b. *Cleanup by the Fund.* Fund expenditures are the centerpiece of the current EPA policy.<sup>139</sup> In theory, given enough resources and time, the Fund can contain the hazardous waste site problem. But in practice, such a strategy is slow and wasteful; it must satisfy numerous statutory conditions placed on expenditures, and it will require a tremendous expansion of the Fund by Congress.<sup>140</sup>

The EPA and other federal agencies apparently are not yet as successful as the private sector in keeping costs under control.<sup>141</sup> Early Fund commitments were notoriously wasteful.<sup>142</sup> Reliable estimates are

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138. Cox, Matey, Zoll, & Stoll, *supra* note 135, at 2, 7, 8, 10.

139. The Administrator and Deputy Administrator indicated this commitment. *See supra* note 76. Of the 419 original NPL sites, 113 were designated enforcement lead only. EPA Report to House Appropriations Committee, *supra* note 79, at 42. Presumably, the remaining 306 were initially destined for Fund lead and, barring successful negotiations, eventual cleanup. If at 95% of the sites at least one user has been identified, *see supra* note 10, then at least 70% of the original 419 sites have known users who could be sued or with whom negotiations could be conducted. The Associate Enforcement Counsel for Waste, Kirk Sniff, estimates that 90% of cleanups will involve Fund expenditures. Sniff interview (Feb. 23, 1984).

140. *See supra* note 16.

141. The Grace Commission report on federal inefficiency seems to confirm popular expectations. Magnuson, *Government is Run Horribly*, TIME, Jan. 23, 1984, at 16. The Grace Commission identified an opportunity for \$20.3 billion of cost savings in federal procurement, contracts, and inventory management. PRESIDENT'S PRIVATE SECTOR SURVEY ON COST CONTROL, REPORT ON PROCUREMENT/CONTRACTS/INVENTORY MANAGEMENT ii (Spring-Fall 1983) (approved by the Subcommittee for the Full Executive Committee). Senator Proxmire has covered much of the same territory. W. PROXMIRE, THE FLEEING OF AMERICA 17, 83-84, 94 (1980).

The Grace Commission's study on the EPA, PRESIDENT'S PRIVATE SECTOR SURVEY ON COST CONTROL, REPORT ON THE ENVIRONMENTAL PROTECTION AGENCY 32 (Spring-Fall 1983) (approved by the Subcommittee for the Full Executive Committee), found "very resource intensive and time consuming" contract award procedures, "the efficiency of contracting procedures could be improved by at least 20 percent," *id.* at 35, and streamlining "could reduce program staff time and contract costs and save" \$62.9 million over a three year period, *id.* at 31.

The Attorney General of New York has testified that his data show that in 1981-1983, \$165.4 million was spent from the Fund for administrative costs but only \$67.7 million was spent on responses. *Implementation of the Superfund Program: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 1st and 2d Sess. 472 (1984) (statement of Robert Abrams, Attorney General, State of New York and Chairman of Attorney, Environmental Committee, National Association).

142. Memorandum from Edward L. Fitzmaurice to James J. Florio regarding the Li Pari Land-fill Site, Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, May 3, 1983, at 3 (\$8,000 to consultants who did no work, \$165,000 for two chain link fences); Memorandum from Edward L. Fitzmaurice to James J. Florio regarding Problems with the Superfund Program in EPA's Region II, Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, Aug. 29, 1983, at 3-4 (no uniform filing system, no

few, but EPA assessment and cleanup costs might average thirty to forty percent more than equivalent private cleanups.<sup>143</sup> Even at the highly visible Love Canal site, officials failed to detect what appears to have been criminal contract skimming. Abuses occur although CERCLA requires that the fund disbursements comply with federal procurement regulations.<sup>144</sup> While intended to ensure competition among contractors, procurement procedures apparently are ineffectual at reducing waste and abuse, and they delay the implementation of the Fund alternative. Only a few firms reportedly are able to comply with EPA's procurement requirements.<sup>145</sup>

State participation is a statutory condition precedent to Fund action. Absent an emergency, federal removal and remedial efforts are limited to one million dollars and six months unless the government enters into a contract or cooperative agreement with the affected state under which the state assumes significant financial responsibility.<sup>146</sup> Most state cleanup programs, however, are underfunded and understaffed. State financial commitment to hazardous waste cleanup varies widely, and that variation does not necessarily correlate with the severity of the hazardous waste problem within the states. States may be unable to obtain the benefits of federal cooperative agreements or contracts because they are unable to ensure that RCRA-approved facilities will be available to accept the wastes removed from a site or because they are unable to assume long-term maintenance costs.<sup>147</sup>

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centralization of files, simple bits of information can take days to locate; exact figures on total remedial costs to date cannot be determined quickly and sometimes not at all). *Id.* at 1-2.

143. A newsletter published by a company that performs site technical assessments quotes a spokesman for a cleanup company as saying EPA response and assessment work is 30% more expensive than privately funded responses of comparable quality. 5 RESOURCES at 7 (Fall 1983) (published by Environmental Resource Management, Inc.) [hereinafter cited as newsletter]. In the *Enviro-Chem* case, the generators' technical committee obtained fixed price cleanup quotations 40% below EPA cost estimates for the same work. Bernstein, *supra* note 63, at 10,403. At the Seymour site, 24 large generators performed surface cleanup for \$7.7 million, \$7.3 million below EPA estimates. *Largest Voluntary Cleanup Settlement Announced for Seymour Site Under Superfund*, 13 [Current Developments] ENV'T REP. (BNA) 877 (1982); Testimony of Mary Walker, *supra* note 68, at 8 (surface cleanup completed November, 1983).

144. New York has filed suit alleging that state and federal governments were overcharged \$4-\$5 million for the cleanup of Love Canal. Approximately \$8 million was paid out for the cleanup. If New York's allegations are correct, the governments were overcharged between 100 and 167%. *Former Town Official, Contractor Sued for Alleged Overcharges in Waste Cleanup*, 14 [Current Developments] ENV'T REP. (BNA) 1539 (1984). See *supra* note 110 (procurement regulation structure).

145. Newsletter, *supra* note 143, at 7 (only 12 U.S. firms can meet "EPA's complex procurement requirements").

146. See *supra* notes 30-32 and accompanying text and CERCLA, 42 U.S.C. § 9604(c)(1).

147. See generally Association of State and Territorial Solid Waste Management Officials, *State Cleanup Programs for Hazardous Substance Sites and Spills* (Dec. 21, 1983).

The problems presented by coordinated federal-state Superfund actions are significant. Hence, final guidance on the federal-state relationship in CERCLA enforcement is expected to take some time.<sup>148</sup> Increased state involvement will exacerbate the difficulties that the EPA faces in controlling its cleanup agenda, because CERCLA does not require that state laws, cleanup standards, or settlements be consistent with federal standards. Many states have their own "mini-funds," the requirements and administration of which may not mesh with federal priorities.<sup>149</sup> If a state fails to perform its CERCLA obligations, only indirect sanctions—the loss of planning and contract funds and the benefit of a complete federal cleanup—can be imposed. Yet, the federal obligation to list sites remains; the basic thrust of CERCLA is federal responsibility to provide an eventual federal remedy. Thus it appears that EPA cannot simply disavow responsibility for a state's sites, remove the sites from the NPL, and permit the state to stew in its own waste juices. Its citizens appear entitled to a CERCLA response, although perhaps only after conditions at the sites deteriorate to emergency removal conditions.<sup>150</sup>

Without a specific statutory framework to coordinate the federal-state effort, the EPA and the states may clash over NCP listing and de-listing,<sup>151</sup> settlement terms and formality, the level of cleanup required, information sharing, inconsistent or overlapping enforcement policies,

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148. A preliminary working draft was completed in late January, 1984. It is being discussed and revised but "will take some time to finalize." Interview with John Cross, Office of Solid Waste—Enforcement (Feb. 23, 1984).

149. Thirty-six states have their own hazardous waste cleanup funds, some of which antedate CERCLA. ENVIRONMENTAL LAW INSTITUTE, STATE SUPERFUND STATUTES 1984 (1983) (compilation of statutory texts). See also Comment, *State Hazardous Waste Superfunds and CERCLA: Conflict or Complement?*, 13 [News & Analysis] ENVTL. L.REP. (ENVTL. L. INST.) 10,348 (Nov. 1983).

150. CERCLA falls far short of raising constitutional problems under the tenth amendment. See *FERC v. Mississippi*, 456 U.S. 742 (1982) (PURPA); *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264 (1981) (SMCRA); *United States v. Ohio Dep't of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980), cert. denied, 451 U.S. 949 (1981); *Brown v. EPA*, 566 F.2d 665 (9th Cir. 1977) (Clean Air Act).

While a state would appear free to undertake its own cleanup without federal involvement, CERCLA § 9614(c) prohibits "double taxation" by a state on oil and chemical products. This does not mean that states are prohibited under the preemption doctrine from taxing the chemical industry to clean up hazardous waste. The New Jersey Tax Court decided that § 9614(c) only prohibits taxation to pay for cleanups that are already funded by the federal government; it does allow states to tax chemicals in order to finance remedial action that CERCLA does not actually cover. *Exxon Corp. v. Hunt*, 4 N.J. Tax 294, 12 ENVTL. L. REP. (ENVTL. L. INST.) 20,734, 20,739-40 (1982). See generally F. ANDERSON, D. MANDELKER, & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 580-81 (1984).

151. A confidential draft guidance memorandum was first circulated in late February, 1984. L. Thomas, Procedures for Deleting Sites from the National Priorities List. De-listing requires notice-and-comment rulemaking. For completed responsible party and Fund remedial actions, the draft contemplates "consultation" with the state. (If the remedial investigation or an "equivalent" EPA-

and the vigor with which the states exercise their authority in the face of resource constraints.<sup>152</sup> The EPA, in fact, has had to relinquish the lead to states at almost half of the NPL sites currently being addressed.<sup>153</sup>

c. *Judicially-ordered cleanup.* The Agency's other major option, compelling site cleanup by issuing administrative orders or suing under CERCLA's section 106 "imminent and substantial endangerment" provision, has many apparent advantages over Fund cleanup.<sup>154</sup> No federal funds are spent. Deficit-watchers in the Office of Management and Budget are less concerned about the off-budget private expenditures. The Fund-balancing criterion does not apply;<sup>155</sup> private parties may be required to spend more on a site cleanup than the government could spend. While the private action must be consistent with the NCP,<sup>156</sup> there is no indication that state participation, NEPA standards, contract procurement regulations, and numerous program clearance procedures apply. Strictly speaking, a site need not be on the NPL at all for a section 106 action to be brought.<sup>157</sup> Nor, as a matter of law, need the court mandate the cleanup performance levels that would be required by the regulatory pollution control standards that the EPA plans to apply to both Fund cleanups and negotiated cleanups.<sup>158</sup> The resources and talents of the federal judiciary are mobilized for the CERCLA implementation effort.<sup>159</sup> Case development proceeds within the established adversarial system governed by the federal rules of procedure and evidence. A judicial decree is more easily enforced, because it rests upon the authority of a judicial act, not the quasi-contractual act of parties to a negotiated agreement. And direct cleanup suits do not require secondary cost recoupment actions under section 107.

Lawyers for the government realize that initial litigation costs will be high and delays will be extensive, but they think that when the cases are finally decided, the government will obtain strong precedents for use

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approved state or responsible-party investigation shows no significant threat to health or the environment, the site may also be de-listed.).

152. See *supra* note 147.

153. See *supra* note 80.

154. My study for the Administrative Conference treated the complex topic of liability for cleanup or cost reimbursement in an appendix which I am developing into a separate article. See *supra* note 28.

155. See *supra* note 109.

156. See Proposed NCP Revisions, *supra* note 83, 50 Fed. Reg. at 5870.

157. *Id.* at 5867, 5870.

158. *Id.* at 5866.

159. The courts assume part of the transaction costs that EPA and the parties would otherwise assume. "[I]t is always cheaper for the clients to have society rather than the litigants pay the judges." Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 126 (1976) (The Pound Conference).

in future mandatory cleanup and cost recoupment actions.<sup>160</sup> With such precedents established, they believe that site users will want to avoid litigation and will quickly negotiate with EPA for one hundred percent cleanup of sites in accordance with the standards and schedules mandated by the Agency, working out their concerns about cost apportionment among themselves.

Finally, a lawsuit has political advantages. Its use harmonizes with the public sentiment that pollution and health risk creation are evil and that their perpetrators should be punished.<sup>161</sup> Oversight committees can less easily fault the Agency for taking polluters to court and attempting to exact total cleanup commitments from each site user who can be identified, without regard to the extent of individual responsibility. Judicial cleanup orders that fall short of expectations cannot be blamed on the Agency if it and the Department of Justice presented the strongest case and conceded nothing. Merely filing a suit solves many of the Agency's problems with Congress and the public; letting federal contracts or attempting to negotiate does not convey as dramatic an impression that the EPA has taken effective action.

Nevertheless, the litigation option has more drawbacks than advantages. CERCLA cases are hardly open-and-shut. The facts are complex, and lawyers for potentially responsible parties have already compiled an impressive inventory of major litigable legal issues.<sup>162</sup> The government's position is strong and will become stronger, as the government expects. But the cryptic statutory provision authorizing suits to compel private cleanup and the legal doctrines upon which the strength of the government's position depends—particularly joint and several liability—will for some time cause a good deal of uncertainty as to the extent of the government's ability to compel a cleanup by or collect reimbursement from any given site user.

Further, litigation causes long delays and imposes high costs. Emphasis on compelling site cleanups will stimulate a competitive approach and hence a countervailing resistance to compulsion.<sup>163</sup> Placed in an adversarial situation, responsible parties will be less likely to understand and sympathize with the government's objectives. Soured relations can

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160. Telephone interview with Lois Schiffer, Special Litigation Counsel, Department of Justice (Feb. 29, 1984).

161. J. WILSON, *POLITICAL ORGANIZATIONS* 334-35 (1973); Ingram, *The Political Rationality of Innovation: The Clean Air Act Amendments of 1970*, reprinted in *APPROACHES TO CONTROLLING AIR POLLUTION* 12, 20-23 (A. Friedlaender ed. 1978); Wildavsky, *Economy and Environment/Rationality and Ritual*, 29 *STAN. L. REV.* 183 (1976).

162. Rogers, *Three Years of Superfund*, 13 [News & Analysis] *ENVTL. L. REP. (ENVTL. L. INST.)* 10,361, 10,363-64 (Nov. 1983).

163. H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 85-90 (1982) (the escalation game).

quickly develop as a result of information sheltering, the substitution of attorney representation for direct contacts between EPA officials and site users, and the exaggeration of positions required by case presentation.<sup>164</sup> Moreover, court-ordered technical solutions are not likely to be optimal. A judge is less likely to develop an adequate appreciation of technical complexities and uncertainties, because the parties cannot freely admit the problems inherent in the positions advanced by each. Finally, because litigation is predicated on vigorous advocacy of a "winning" position and avoidance of the heavy losses of a "losing" one, site users are forced to invest heavily in case presentation, instead of pooling resources and engaging in joint problem-solving. Site users will shift some of the resources that might otherwise have been available for prompt site cleanup into paying the high transaction costs of litigation in an attempt to reduce—or at least define—their CERCLA liability.

d. *Administrative orders.* Administrative orders enable the agency to maintain control of many site cleanups without enlisting the aid of the Justice Department or the courts.<sup>165</sup> Use of an administrative consent order to capture the terms of a negotiated cleanup agreement may prove more acceptable to some responsible parties who prefer to avoid lawsuits—even a "friendly" filing to obtain a consent decree.

Care in using the administrative order is necessary, however, to avoid judicial stays or even blanket invalidation. The possibility of pre-enforcement judicial review arises largely because of the availability of the treble damages sanction<sup>166</sup>—an ample deterrent where the value of the cleanup is millions of dollars. The penalty for refusing to pay what the agency demands seems severe in a statute that purports merely to allocate costs without regard to fault. A structured administrative hearing on unilateral administrative orders might help ensure that courts do not develop too much sympathy for a party who must risk paying four times the cost of a cleanup in order to obtain a judicial hearing on the propriety of paying it once. A plausible argument can be made that when such an order issues it becomes ripe for review under *Abbott Laboratories v. Gardner*,<sup>167</sup> and *Ex Parte Young*.<sup>168</sup> On the authority of a line of cases permitting the government to act summarily where safety and health are threatened, the EPA might be able to limit challenges to the

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164. Cox, Matey, Zoll, & Stoll, *supra* note 135, at 4-6.

165. See text accompanying notes 112-19 *supra*.

166. See *supra* note 112.

167. 387 U.S. 136 (1967) (adopting a flexible approach to permit pre-enforcement review of Agency regulations).

168. 209 U.S. 123 (1908) (denying petition for writ of habeas corpus after circuit court fined and committed state Attorney General for contempt for refusing to comply with Circuit Court order).

legality of its orders to defendants in enforcement proceedings.<sup>169</sup> More deliberate remedial actions may, however, require a greater measure of pre-enforcement due process.

2. *Regional Offices and National Headquarters: Managerial and Organizational Realities.* As is often the case in the American administrative process, agency vision and practice are not in perfect congruence in the site cleanup program. The numerous policy memoranda on CERCLA implementation mandate an orderliness that does not yet exist. The incongruence can be traced in large part to the diverse factual situations posed by the sites and to managerial problems that EPA has not yet solved.

The regional staff want policy guidance.<sup>170</sup> Basic policy has drifted in recent years, and clear signals from Washington would be welcome.<sup>171</sup> Clear national policy strengthens the hand of regional officials in dealing with local and state government as well as the private sector. Inconsistency between regions caused some large national companies, an important CERCLA "deep pocket" constituency, to complain of unequal treatment.<sup>172</sup>

Still, the specific content and form of central CERCLA policy cause difficulty in the regional offices. The detailed guidance now being issued by headquarters staff risks defining away the discretionary authority that regional officials believe is essential for dealing with the unique circumstances at many sites. These regional officials are in need of broad policy guidance, but cookbooks can be of little help.<sup>173</sup> From the local perspective, the guidance memoranda appear to spread a veneer of rationality over the diverse approaches necessary to cope with facts that vary tre-

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169. See, e.g., *Board of Regents of State College v. Roth*, 408 U.S. 564, 570 n.7 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 263 n.10 (1970); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of food not fit for human use). See generally *Freedman, Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1 (1972) (exploring the constitutionality and use of, as well as alternatives to, agency summary action).

170. Sniff interview, *supra* note 60. Mr. Sniff worked for six years as an attorney in Region V.

171. Regional confidence was enhanced by the selection of the former Director of the South Carolina Department of Public Safety, Lee Thomas, as Assistant Administrator for Solid Waste and Emergency Response. Mr. Thomas subsequently became the EPA Administrator in early 1985, after William Ruckelshaus resigned.

172. Sniff interview, *supra* note 60.

173. Brown interview, *supra* note 81. Some resentment occurs chronically throughout all of EPA's programs, although the attitudes of the regional offices toward headquarters vary from region to region. EPA regional officials have always had a love-hate relationship with headquarters, with a tilt toward dislike. Sniff interview, *supra* note 60. The absence of strong support from Washington in the two critical first years of CERCLA implementation has also contributed by forcing regional staff to make their own accommodations in the web of relationships at each site.

mendously from site to site.<sup>174</sup> The greater the mismatch between national policy guidelines and individual site management needs, the more headquarters becomes just another entity whose views must be accommodated by the regional personnel, who might then begin to question whether the managerial assistance Washington provides is worth the additional time required to assimilate it. Further, the crucial state and local role in cleanup actions is somewhat obscured by the guidance issued to date.<sup>175</sup> Consequently, regional staff spend more time working with their state counterparts than might be assumed. This forced cooperation is frustrating to regional officials, who encounter daily both the resource constraints facing the states and the disparity between federal and state cleanup laws and policy approaches. The inability or unwillingness of states to devote adequate resources to cleanups and to conduct negotiations and cleanups on the federal model, coupled with the heavy reliance headquarters has placed on states taking the lead at so many of the top priority sites, forms one of the least recognized problems of the CERCLA implementation strategy.

Finally, the EPA guidance model calls for a clearly designated regional lead office to control the course of approvals at sites, with prompt headquarters review. But in reality, organizational inconsistency promotes tensions, duplicative staff involvement, and "turf battles" that a more efficient organizational approach might reduce.<sup>176</sup> Organizational inefficiency also encourages forum shopping by site users attempting to obtain more sympathetic treatment or attempting to deal with the officials who, for one reason or another, the users conclude are "really" in

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174. Telephone interview with John Hamill, Senior Associate Regional Counsel, Region X (Mar. 27, 1984). Telephone interview with Roger Grines, Assistant Regional Counsel, Region V (Mar. 27, 1984) (headquarters should define policy in guidance but leave regions wide discretion to apply it).

175. Of the NPL sites singled out for attention during fiscal year 1984, almost half were assigned a state lead. See *supra* note 81. Perhaps 20% of all current NPL sites were once state-owned, Lawrence interview, *supra* note 111, which means that the states must find half of the funds necessary for a government cleanup. CERCLA is a quintessentially federal program, but the results of the statute are entirely local. In fact, until recently, hazardous waste was almost entirely a problem for state and local government to solve, despite the federal role created by RCRA. RCRA, 42 U.S.C. §§ 6901-6987 (1982), contains eight subchapters, only one of which deals specifically with hazardous wastes—subchapter III. In addition to dealing with hazardous wastes, RCRA (1) established the Office of Solid Waste within EPA (subchapter II, 42 U.S.C. §§ 6911-6916); (2) "encouraged" states to establish solid waste control plans including provisions for closing dumps (Subchapter IV, 42 U.S.C. §§ 6941-6949); and (3) expanded the federal role in research, development, and recycling (Subchapter VIII, 42 U.S.C. §§ 6981-6987). See generally Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 WIS. L. REV. 633 (1978) (complete overview of the purposes, provisions, and constitutional questions of RCRA).

176. See *supra* notes 60-61. Officials see severe problems with the current structure but are reluctant to suggest the fifth reorganization during this presidential administration.



charge.<sup>177</sup> These organizational problems can occur within the regional offices if the enforcement and program staff in a given area are unable to coordinate their efforts.<sup>178</sup> Tensions, delays, and forum-shopping may continue at national headquarters, which must grant multiple approvals for settlements. Washington approvals may involve the separate Fund and enforcement offices under the Assistant Administrator for Solid Waste and Emergency Response, the small enforcement staff under the Assistant Administrator for Enforcement and Compliance Monitoring, and, conceivably, the General Counsel's office.<sup>179</sup> Responsible parties may learn that their particular site has attracted special attention at

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177. Miller, *supra* note 113, at 498 ("A case by the government may sometimes be stopped, diverted, or settled on favorable terms by circumventing the agency officials handling the matter to deal with more favorably inclined superiors or colleagues."). The author's remarks might be more easily dismissed as speculation were he not a former EPA Assistant Administrator for Enforcement (1977-1980), who came to his post after several years as a high-ranking lawyer in EPA enforcement.

178. *See supra* note 81. The disbanding of the regional enforcement divisions in 1981 has meant that regional lead staff members have a large infrastructure to consult and on occasion placate. Some EPA officials believe that reconstituting the enforcement divisions in the regions would help restore to enforcement the focus it needs, although they also point out that the program staff, who resisted the creation of the post of enforcement coordinator, would resist this move even more strenuously. Sniff interview, *supra* note 60.

179. Program and enforcement are in an uneasy equilibrium at headquarters. The separate enforcement offices still exist, but in a weakened form. In the Carter Administration some 800 employees (line and support) reported to the Assistant Administrator for Enforcement. Now the number is closer to 100. Interview with Michael Brown, former EPA Enforcement Counsel, Jan. 10, 1984. The staff under the Assistant Administrator for Enforcement and Compliance Monitoring are too numerous to be denied an important CERCLA enforcement role, but too few to take on large responsibilities. Moreover, most of the regional enforcement lawyers who were formerly part of the enforcement divisions are now located in the regional counsels' offices, which take their guidance from the General Counsel in Washington. Just as regional programs now have their own enforcement branches, so do the program offices at headquarters, a 1981 acquisition the programs will try strenuously to keep. Sniff interview, *supra* note 60. The struggle of the separate enforcement entity to define a role for itself may mean delays in obtaining CERCLA policy clearances. Michael Brown, former EPA Enforcement Counsel, attributed the one-year delay in obtaining final approval for the agency's first settlement policy in large part to the enforcement-program conflict. Brown Interview, *supra*. A May 20 draft of the Brown memo was published on May 27, 1983, but was not approved until September 28, 1983. *Percentage Threshold Approved by EPA for partial settlements under Superfund*, 14 [Current Developments] ENV'T REP. (BNA) 925 (1983). Brown mentioned that at least in the recent past CERCLA program organization has exacerbated the bureaucratic tendency to avoid confrontation, to accommodate so that no one need lose over a policy disagreement, and to avoid disrupting working relationships. The problem is likely to worsen as the result of the past Administrator's publicly branding the Agency's enforcement record as "terrible," thereby providing a stimulus to headquarters enforcement to be more assertive in asking for CERCLA and RCRA cases. *Ruckelshaus Calls EPA Enforcement Record "Terrible," Demands to See Prompt Improvement* 14 [Current Developments] ENV'T REP. (BNA) 1723, 1723-24, (1984), [hereinafter cited as *Ruckelshaus*]; *Ruckelshaus Calls Tax on Hazardous Wastes as Source of Superfund Money Open Question*, *id.* at 1727. The Chairman of the House Energy and Commerce Subcommittee on Oversight and Investigations, John Dingell (D-Mich.), has repeated this theme. *Dingell Subcommittee to Look for Increase in EPA Actions on Enforcement, Compliance*, *id.* at 1492; *Ruckelshaus, supra* at 1724.

headquarters and may attempt to concentrate their efforts there. Regional control may thus be delayed or undermined. Headquarters also remains involved at major or controversial sites despite the official emphasis on regionalization of decisionmaking.

3. *The Vector of Policy Making: a De Facto Regulatory Program.* The EPA is making CERCLA over into a de facto regulatory program, and this contributes to the Agency's inability to clean up sites rapidly. The transformation is producing the "enormous, time-consuming, and costly" regulatory program that the Agency eschewed when the NCP was first promulgated.<sup>180</sup> The guidance memoranda significantly expand the list of substantive standards that cleanups must meet, and they impose significant procedural burdens as well.<sup>181</sup> Settlement policy is slowly evolving into a rule-type specification of when and on what specific terms the site users will be given an opportunity to clean up sites. The Agency plans to use the RI/FS process to produce a "record of decision" of steps taken, alternatives considered, and cleanup decisions made.<sup>182</sup> It will produce a "detailed justification" in case of an actual settlement.<sup>183</sup> Public participation is also required for site cleanup decision making.<sup>184</sup> Fund expenditures are hedged about by both statutory and discretionary guidelines. For both Fund and enforcement lead sites, regions soon will have lengthy "handbooks" specifying precisely how headquarters would like each site handled.<sup>185</sup>

By far the greatest burden involved in CERCLA compliance is the site cleanup standards based on the various ambient air, water, and groundwater measures of quality issued under other federal laws.<sup>186</sup> The rationale for this approach is unassailable: Why should ambient quality and human exposure vary in the same media for the same chemicals merely because of the point in the economic cycle at which they are encountered and because of the separate statutory regimes that apply? Yet their application to CERCLA cleanups presents enormous technical diffi-

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180. National Oil and Hazardous Substances Contingency Plan, 47 Fed. Reg. 31,180, 31,185 (1982) (to be codified at 40 C.F.R. § .300).

181. 47 Fed. Reg. 31,180, 31,185 (1982). The Agency is ambivalent about whether some of these requirements are imposed by statute. For example, it says NEPA applies to CERCLA cleanups but plans only to prepare the "equivalent" of an impact statement. EPA also plans to apply the substantive standards of the pollution statutes to cleanups, but earlier stated that it lacked authority to do so.

182. *1983 Settlement Policy*, *supra* note 99, at 9. The only effect of the 1985 *Interim Settlement Policy*, *supra* note 99, seems to be to provide a summary of conclusions reached in a "Negotiations Decision Document (NDD)," at 5041.

183. *Hedeman Presentation*, *supra* note 14.

184. Proposed NCP Revisions, *supra* note 84, 50 Fed. Reg. at 5880.

185. *Supra* note 95.

186. *See supra* notes 95-96 and accompanying text.

culties and completes the conversion of CERCLA into a quasi-regulatory statute.<sup>187</sup>

First, sites present situations in which standards developed for other purposes may be inapplicable. With respect to many site conditions—the movement of organic compounds in groundwater, for example—there are very few scientists who consider themselves experts.<sup>188</sup> Second, the relevant standards under the pollution statutes are only best-guess, first approximations even for the specific purposes for which they were adopted, and many will have to be revised. Third, the preventive RCRA disposal site standards with which CERCLA overlaps do not match up well with CERCLA's need for corrective remedial designs for old sites. In any event, the lengthy RCRA guidelines do not specify new-site designs with precision.<sup>189</sup> Fourth, perhaps sensing the inappropriateness of the regulatory approach, the EPA plans to relieve specific cleanups from compliance in a wide variety of appropriate cases.<sup>190</sup> This possibility will obviously introduce even more uncertainty into an already uncertain system of standards.

Why did EPA embark on a project to convert CERCLA into a regulatory statute? First, a bona fide need for policy existed, given an area of agency decisionmaking that was highly visible and volatile, that Congress had inadequately defined, and that some officials had recently abused. Second, the policies protect Agency officials from congressional criticism; it is much more difficult to find fault with spending and suing than with negotiating. Third, some type of radical management change was to be expected following the failure of the Fund-conserving approach of 1981-1983. Statutes and administrative programs typically go through cyclical reforms spurred by a scandal or emergency.<sup>191</sup>

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187. The Thomas Memorandum to the Regional Administrators, *supra* note 95, searches all EPA regulatory authority for requirements applicable to CERCLA site cleanup and finds over 30 "applicable or relevant" requirements and almost 70 requirements that will be "considered"—in other words, over 100 statutes, regulations, and policies that may flesh out to gargantuan proportions the quasi-regulatory CERCLA program. *Id.*

188. *See supra* note 7.

189. 40 C.F.R. § 264.6.

190. Proposed NCP Revisions, *supra* note 84, 50 Fed. Reg. at 5866. EPA will also require that the equivalent of the public hearing requirements of the regulatory statutes be imposed in site cleanup decisionmaking. *Draft Compliance Policy, supra* note 95, at 1592. A former EPA lawyer, now representing site users, believes that applying the regulatory standards to CERCLA is a multi-billion dollar decision and predicts that lawyers and technical consultants will earn large fees developing requests for variances and that a variance procedure will develop which will become a forum for proving case-by-case that the blanket policy was wrong. Presentation of James Rogers to the ALI-ABA-ELI Smithsonian Conference on Environmental Law, Washington, D.C. (Jan. 22, 1984).

191. M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 95 (1955). *But see* A. DOWNS, INSIDE BUREAUCRACY 96-101 (1967) (describing agency reluctance to discard past approaches if they still afford a source of power).

But there is a fourth and final reason that perhaps provides the best explanation of why EPA policy developed as it did. The EPA is a regulatory agency, and it probably would have soon begun to try to convert CERCLA to a quasi-regulatory statute regardless of those factors. Its greatest achievements and most reliable work style are grounded in rulemaking and in rule enforcement. Site cleanup without pre-established norms cuts against the EPA grain. Particularly at the national headquarters, agency personnel become accustomed to abstract and generalized facts. Agency knowledge is concentrated on systems, programs, and nationwide impacts, and agency reward structures reflect this proclivity. The goal of the EPA, like that of virtually all agencies, is to place an entire system in operation, rather than to measure daily progress by how well it addresses specific harms and specific remedies. Efforts focus on the final system as it will exist in place, not the rather messy ad hoc steps along the way.<sup>192</sup> The head of the Superfund program has speculated in print as to the desirability of Congress adopting a regulatory solution to the whole problem of hazardous waste sites.<sup>193</sup>

Because the de facto regulatory approach was fashioned in part to shield agency officials from the type of severe criticism that prevailed near the end of the Gorsuch era, it will be difficult to change. These rules are administratively safe, and the EPA is on familiar ground in implementing and defending a rule-based program. Progress will of course be slow, and inaction by an Agency charged with the protection of health and safety ordinarily provokes severe criticism. But while it might first appear that EPA has more to lose by inaction than by action, closer reflection suggests the opposite. In the present political dynamic of the CERCLA program, failure to clean up a site at all has fewer consequences for the Agency's reputation than cleaning it up inadequately. If a toxic dump that the EPA has cleaned up, or has allowed to be cleaned up, later presents a significant hazard, the Agency is likely to be viewed as responsible for any harm to persons or resources.<sup>194</sup> But the public or a congressional oversight committee cannot second-guess a remedy until it has been finally selected, and merely adding a site to the NPL does not commit the EPA to a schedule to carry out a remedy. The same analysis

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192. See *A Provocative Note on the Pitfalls of Comprehensiveness*, in F. ANDERSON, D. MANDELKER, & D. TARLOCK, *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 596-600 (1984).

193. *A Conversation with Superfund Chief Bill Hedeman*, 2 *ENVTL. F.*, Aug. 1983, 7, 13 (concluding remarks).

194. Samuel Peltzman maintains that the 1962 safety amendments to the Food, Drug, and Cosmetic Act imposed a net cost on drug consumers by reducing innovation in the drug industry. "[T]he FDA can expect little of the reward for extremely successful innovations, but substantial cost for wrongly certifying an unsafe or ineffectual drug." *The Benefits and Costs of New Drug Regulation*, in *REGULATING NEW DRUGS* 208 (R. Landau, ed. 1973).

on a more general plane explains chronic official reluctance to change programs to improve performance. Innovation focuses responsibility on the bureaucratic entrepreneur who brought the change about and disturbs the balance of accommodations that have been worked out among administrative peers. If the innovation fails, the innovator can expect to be treated as a scapegoat who can be punished with traditional sanctions such as reorganization, loss of staff, or transfer.<sup>195</sup> Speeding up the rate of Superfund site responses by whatever means will require a certain amount of risk-taking to overcome these inherent bureaucratic tendencies.<sup>196</sup>

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195. The cost to the public of sticking with the old is rarely clearly shown and is even more rarely attributable to the glacial slowness in any individual bureaucrat's willingness to countenance change. Because an error that stems from a decision in favor of innovation can be catastrophic to the decision maker, one would expect that most decisions will be against change. And that is exactly what students of the administrative agencies have suggested happens.

G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 47 (1982)(footnotes omitted); see also J. LANDIS, THE ADMINISTRATIVE PROCESS 75 (1938); A. DOWNS, *supra* note 191, at 96-101 (1967).

196. In form, EPA's guidance memoranda conform to the pattern of internal management rules common in every federal agency. See, e.g., Peterson & Kemian, *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ENVTL. L. REP. (ENVTL. L. INST.) 50,001, 50,001-17 (1972) (analyzing the Instructional Memoranda and Policy and Procedural Memorandum of the Federal Highway Administration). The U.S. Forest Service Manual in 50 volumes is available from the Government Printing Office. See A. DOWNS, *supra* note 191, at 59-63; Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65, 76-77 (1983); Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 261 (1974). Diver, *supra*, at 76-77, explains judicial tolerance of "opaque" internal guidance as motivated by confidence that relatively homogeneous staff and established agency routines will supply the missing "transparency." If outsiders must consult the guidance, judicial deference to opaque roles may not be justified.

In substance, however, the rules set the general policies that give coherence to the implementation of a major federal statute. Matters of vital concern to interests affected by CERCLA are revealed through speeches, interviews, fact sheets, and the trade press. Looseleaf services publish some guidance memos, but the services are expensive and sometimes difficult to locate. No centrally located public document repository for CERCLA yet exists.

Policymaking under CERCLA thus raises a broad threshold issue: is EPA developing the CERCLA program in the procedurally optimum manner? Clearly, improvements are needed which in time would improve cleanup negotiation processes along with the rest of the program. EPA might emulate other EPA programs and publish in the *Federal Register* both major draft guidance for public comment and major final texts. It should make the guidance available in its public documents room. Plaintiffs who fit the Administrative Procedure Act § 552(a)(1) test of being adversely affected by agency action and who did not have actual notice of agency policy have been able to have the court prevent the agency from enforcing the policy. See, e.g., *PPG Industries, Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) (enforcement of sulfur oxide standards); *Independent Broker-Dealers Trade Assoc. v. SEC*, 442 F.2d 132, 144 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971); *cf. Curlott v. Hampton*, 438 F. Supp. 505, 508-09 (D. Alaska 1977). The Attorney General's Manual on the Administrative Procedure Act suggests publication only if policy statements are formulated for the guidance of the public. U.S. DEP'T OF JUSTICE, ATT'Y GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 22. See K. DAVIS, *Administrative Law Treatise* § 6.31 (2d ed. 1978) (there is nothing in the APA that prohibits courts from requiring notice-and-comment procedures in situations where the APA itself does not explicitly require it).

### E. CERCLA in the Courts.

CERCLA's history in the courts presents a paradox. On the one hand, most of the decisions that the EPA makes prior to suing for direct cleanup or reimbursement involve various species of ill-defined informal agency action. Judicial review of these actions will probably develop hesitantly and with less clarity and will probably be more restricted than review under typical welfare statutes.<sup>197</sup> On the other hand, the large

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Wider availability and the enhanced perspective that public comment brings would typically outweigh the burdens which they would impose on the CERCLA program. Congress, the courts, and the Administrative Conference have encouraged voluntary adoption of notice-and-comment procedures in the development of non-binding policy. At the time the APA was enacted, Congress encouraged agencies voluntarily to adopt notice-and-comment procedures "where useful to the agency or beneficial to the public." S. REP. NO. 752, 79th Cong., 1st Sess. 13 (1945). Compare the more contemporary endorsement provided by the late Judge Harold Leventhal in *Guardian Fed. S & L v. FSLIC*, 589 F.2d 658, 666 (D.C. Cir. 1978). The choice of procedures rests with the agency. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 546-47 (1978). The Administrative Conference has recommended that pre- or post-adoption notice-and-comment procedures be employed before or after adoption of a policy statement or interpretive rule if it is likely to have a substantial public impact. See Recommendation 76-5, 1976 Report of the Administrative Conference of the United States 55-57; Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520 (1977). In 1982 the Senate adopted an amendment to § 553 of the APA requiring notice-and-comment treatment for any general policy statement or interpretive rule that "has general applicability and substantially alters or creates rights or obligations of persons outside the agency." S. 1080, 97th Cong., 2d Sess. § 3 (amending APA § 553(a)(3)), 128 Cong. Rec. S.2713 (Mar. 24, 1982) (daily ed.). See also Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy Under the APA*, 23 AD. L. REV. 101 (1971); Koch, *Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy*, 64 GEO. L.J. 1047 (1976); Comment, *A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy*, U. CHI. L. REV. 430 (1976).

The guidance approach grows in importance to CERCLA implementation. Yet EPA has not tried to use it to make binding policy choices, thereby satisfying what remains the bedrock distinction between general policy statements and substantive legislative rules. *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (requiring that binding rules of benefit eligibility be duly promulgated and published); see also *Morton v. Ruiz*, 415 U.S. 199, 234-38 (1974); *Batterton v. Marshall*, 648 F.2d 694, 702-04 (D.C. Cir. 1980) (distinguishing non-binding action expressing legislative interpretation or internal practice from substantive rules); *Chamber of Commerce v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980) (rule is interpretive if only an expression of agency's construction of statute, without force of law); *American Bus. Ass'n. v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980) (citing *Pacific Gas*).

But the template of a "binding norm" may not take the entire measure of a general statement of agency policy or instructions to staff. If policy statements or guidance memoranda are likely to have a "substantial effect" upon parties or the agency's exercise of discretion, *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974), or prescribe a "fairly tight framework," *id.* at 1113, that in purpose or effect narrowly limits the exercise of broad statutory discretion, *Guardian Fed. S & L v. FSLIC*, *supra*, at 666-67, then legislative notice-and-comment rulemaking may be required. While purporting to preserve the Agency's cleanup and enforcement options, EPA's guidance memoranda could leave the impression that the Agency intends to exercise its discretion within a "fairly tight framework."

197. Welfare regulation usually involves notice-and-comment rulemaking, for which judicial review is well established. Hearings may also be available before liability is imposed. But rulemaking

number of pending enforcement and reimbursement actions suggests that CERCLA is a thoroughly "judicialized" statute.<sup>198</sup>

The EPA has wide discretion about how to manage the CERCLA program. It can even be argued that there is no "law to apply" to the selection of a cleanup approach—no statutory criteria that a court can apply to the choice of cleanup tactics<sup>199</sup>—because Congress failed to specify whether cleanup demands, Fund cleanups, reimbursement actions, and imminent hazard relief were to function in parallel or in tandem.<sup>200</sup> On balance, however, responsible parties have a strong case for limited judicial review of certain Agency actions: the selection of a technical cleanup plan pursuant to a RI/FS; an announcement by the EPA that it will conduct the cleanup itself; and the issuance of an administrative order directing the parties to conduct the cleanup.<sup>201</sup> Applicable cri-

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in CERCLA is circumscribed; the most important occurs in the NCP. See Anderson, *supra* note 41, at 294-300. Judicial review of other informal agency action is still unsettled and developing. The diversity and complexity of informal contemporary governmental action thwarts reliable generalization about review. Gardner & Greenberger, *Judicial Review of Administrative Action and Responsible Government*, 63 GEO. L.J. 7, 20 (1974); see also Gardner, *The Informal Actions of the Federal Government*, 26 AM. U.L. REV. 799 (1977); Davis, *Informal Administrative Action: Another View*, *id.* at 836 (a reply to Mr. Gardner); Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972); Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

198. By April, 1984, over 60 active reimbursement and enforcement cases were pending. Chemical Manufacturers Association, Superfund Litigation Update (Apr. 1984).

199. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), citing SEN. REP. NO. 752, 79th Cong. 1st Sess. 26 (1945).

200. Respect for prosecutorial discretion inadequately explains Congress's silence, because management decisions are as important to EPA's choices as enforcement decisions are. Admittedly, courts traditionally do not interfere with an agency's choice of sanctions and enforcement techniques, for a mixture of reasons having to do with agency expertise, justiciability and judicial capacity, the analogy to criminal prosecutorial discretion and sentencing, and history. *Tager v. SEC*, 344 F.2d 5, 8-9 (2d Cir. 1965) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112 (1946)). This is true whether it is the severity of the sanction that is attacked, *American Power, id.*, (*but see Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 183-84 (2d Cir. 1976)), its non-use (*but see Dunlop v. Bachowski*, 421 U.S. 560, 566-68 (1975)), its leniency (*but see UAW v. NLRB*, 455 F.2d 1357, 1369-70 (D.C.Cir. 1971)), or its timing or selective application, *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 249-50 (1967). But the arguments and precedents used to shield agency enforcement discretion cannot be invoked without qualification in the administration of CERCLA. EPA's choices range from contracting for the remedy from the Fund (similar to contracting for highway construction or stream channelization) to ordering administratively that one, some, or all responsible parties complete the remedy, to requesting and then suing to recoup funds spent, to suing to enforce administrative orders, and to negotiating the remedy or reimbursement before any of the preceding are completed. Judicial willingness to intervene increases as one moves toward the beginning of the implementation process, and opinion favors a stronger reviewing role for the courts. See 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 157-304 (1979). See Note, *Judicial Control of Systematic Inadequacies in Federal Administrative Enforcement*, 88 YALE L.J. 407, 411-13 (1978). See generally L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 266-73 (1965).

201. Case law on pre-expenditure and pre-enforcement judicial review is almost non-existent. Only seven of 70 pending CERCLA cases involve pre-expenditure and pre-enforcement review. Chemical Manufacturers Association, Superfund Litigation Update 8-9 (Apr. 1984). The applica-

teria can be found in CERCLA, the NCP, and perhaps the guidance memoranda. *Abbott Laboratories*<sup>202</sup> and its progeny establish a presumption favoring prompt, pre-enforcement judicial review of agency rules and policies found to be "final" or "ripe" after a pragmatic assessment of the issues to be reviewed and the impact of agency action on the plaintiff.<sup>203</sup> There does not appear to be a contrary statutory policy in CER-

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tion of legal principles pertaining to standing, finality, ripeness, and equitable declaratory relief in CERCLA implementation consequently has just begun, as three initial district court rulings reveal. See *J. V. Peters & Co. v. Ruckelshaus*, 20 ENV'T REP. CAS. (BNA) 2222 (N.D. Ohio 1984) (plaintiffs—current and former owners and operators of an industrial waste storage facility—sought to prevent EPA from undertaking Fund cleanup, alleging that CERCLA and the NCP required EPA first to make assessment of the risks at the site and of willingness of plaintiffs themselves to clean up site; court found "great likelihood" that EPA would bring a § 107 reimbursement action and that immediate judicial review provided plaintiffs the only opportunity to challenge the propriety of the EPA response prior to the "potential imposition" of liability; these sufficient to overcome the government's standing, finality, and ripeness objections). The court thus seems to imply that a decision to launch a Fund cleanup is "final agency action," final enough at least to warrant judicial scrutiny of aspects of the EPA decision that might affect a responsible party's § 107 liability. Another district court has held squarely the opposite. *D'Imperio v. United States*, 575 F. Supp. 248 (D. N.J. 1983) (plaintiff was not entitled to a pre-expenditure Fund cleanup declaratory judgment regarding its liability to reimburse EPA for its response costs, because issue was not yet ripe for review). In *Nicolet, Inc. v. Eichler*, — F. Supp. —, — ENV'T REP. CAS. (BNA) — (E.D. Pa. Mar. 26, 1984), the court ruled from the bench that the responsible party plaintiff was entitled to pre-enforcement judicial review of § 106 administrative orders directing it to undertake certain measures to control releases of asbestos wastes at its Ambler, Pennsylvania plant and to give EPA access to the site, but that review would be limited to ascertaining whether EPA acted arbitrarily or capriciously or committed an error of law in issuing the orders. Plaintiff had requested *de novo* review; EPA argued that its orders were substantively unreviewable before enforcement. A more complete argument for pre-enforcement and pre-expenditure review appears in Anderson, *supra* note 41.

202. 387 U.S. 136 (1967).

203. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967) (courts must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration"). In *Abbott Laboratories* the Court asked whether the plaintiff faced a severe dilemma in deciding whether to comply with the order and contrasted the costs of compliance with "the alternative to compliance . . . [which] may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of misbranded drugs." *Id.* at 153 (citations omitted). Other decisions extended the presumption favoring pre-enforcement review to administrative orders. See, e.g., *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 521 (3d Cir. 1976) (order issued on failure to file certain financial reports with the Commission). The court remarked that the *Abbott Laboratories* test for ripeness was akin but not identical to the standard of irreparable harm applied in the granting of a preliminary injunction. *Id.* at 522. APA § 705 might be invoked in aid of judicial review. Under that section a court may stay agency action to prevent irreparable injury to the plaintiff. One possible set of factors to be considered appears in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (strong showing on the merits, irreparable injury, harm to other parties, the public interest is served by relief). Of course, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury," *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974), but the harm to potentially responsible CERCLA parties might lie in the government's destruction (during a remedial action) of physical evidence vital to a responsible party's defense in a reimbursement action, or lack of frugality and inefficiency in the government's choice of a remedy for which the responsible party will in all likelihood be asked to pay. See also *Charlie's Girls v. Revlon, Inc.* 483 F.2d 953, 954 (1973) (a preliminary injunction



CLA, so that Agency decisions to fund a cleanup or issue administrative orders seem ripe according to the evolving law of judicial review of final agency action.

If courts do not engage in searching pre-enforcement review of cleanup choices, EPA's hand in negotiations will be strengthened. Conversely, responsible parties would benefit from frequent review. But the present unsettled state of judicial review of informal action under CERCLA creates uncertainty, leaving all parties, at least for the moment, with an incentive to replace an uncertain outcome with a certain settlement through a negotiated solution.

Despite the great flexibility accorded the EPA to manage the initial phases of the CERCLA remedial program, in the end the program depends upon enforcement in the courts. If the EPA wants to recover expenses incurred in a Fund cleanup, to compel a private cleanup, or to enforce an administrative order demanding remedial action, it must bring an action in federal district court. The willingness of the government to negotiate will be directly related to the expected outcome of such litigation. Despite an inclination to view negotiation as power- and skill-based rather than normatively guided, norms define the context of negotiations, giving them direction and meaning.<sup>204</sup> Fewer victories and weaker doctrinal precedents create more difficulty for all participants in the negotiations. From the government's point of view, strong decisions vindicating its position mean that responsible parties will more readily negotiate satisfactory agreements. Indeed, the government recently has concentrated its efforts on strengthening its legal alternative to a negotiated agreement while holding further negotiations in abeyance, on the theory that overpowering precedent might permit it to dictate terms rather than negotiate.<sup>205</sup> Nowhere is the influence of legal norms more sensitively felt than in circumstances like those created by CERCLA. Negotiators carefully follow the results of each recent federal district court opinion, and CERCLA will continue to develop in the norm-defin-

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might issue either on a showing of probable success/irreparable injury "or that serious questions are raised and the balance of hardships tips sharply" in plaintiff's favor).

The other side of the coin, i.e., imminent danger to the public, may convince some courts that CERCLA implicitly contemplated post-cleanup review only. *E.g.*, *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of food not fit for human use); *Ewing v. Mytinger Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of mislabeled vitamin products). See additional cases cited in *Goldberg v. Kelly*, 397 U.S. 254, 263-64 n. 10 (1970); see also *Freedman, Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1 (1972).

204. See Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 639-46 (1976) (discussing how norms operate in dispute negotiation).

205. *Interim Settlement Policy*, *supra* note 99, at 5035.

ing shadow of case law.<sup>206</sup>

The courts have agreed that CERCLA adopted the principle of strict responsible party liability.<sup>207</sup> Yet "strict liability" says nothing about the choice between governmental and private cleanup or the allocation of particular tasks or costs to specific parties. Unless the government can compel direct private cleanup, it will be forced back on the slower, more cumbersome Fund remedy, which in turn requires reimbursement actions to replenish the Fund. Unless the government can sue—either initially or subsequently—the responsible parties with deep pockets, leaving the total pool of site users to work out contribution among themselves, the government will be drawn into the complicated area of defining the parties' shares, which will prolong the litigation and its costs. With respect to these critical matters the government's position is strong, but the outcome of specific litigation is far from certain.

Direct action to compel private cleanup rests upon the section 106 imminent hazard provision,<sup>208</sup> but that provision may not be able to bear the weight placed upon it. Despite the section's apparently plenary scope, its placement and brevity, coupled with its silence on liability standards and range of application, may lead the courts to restrict its application. It is not clear whether section 106 expands existing federal authority to order waste cleanups, or whether it merely confers jurisdiction on federal district courts to apply existing law—federal common law, state common law, or federal statutory law. The triggering requirement that an "imminent and substantial endangerment" be found before relief can be granted may limit the reach of the section to emergency circumstances and removals, although the legislative history of other imminent hazard provisions would endorse a broader interpretation.<sup>209</sup>

The district courts have interpreted CERCLA's section 107 to impose joint and several liability for cost reimbursement, but they have re-

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206. The metaphor was taken from the title of Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

CERCLA litigation presents a complex, important topic that, if attempted here, might blur the focus on administrative law, policy, and negotiation. In addition to the author's work in progress, for recent critical analysis see Blaymore, *Retroactive Application of Superfund: Can Old Dogs be Taught New Tricks?*, 12 ENV'TL AFF. L. REV. 1 (1985); Clark, *Section 106 of CERCLA: An Alternative to Superfund Liability*, 12 B.C. ENV'TL AFF. L. REV. 381 (1985); Reed, *CERCLA Litigation Update: The Emerging Law of Generator Liability*, 14 ENVTL. L. REP. 10,224 (1984); Note, *Joint and Several Liability for Hazardous Wastes Releases Under Superfund*, 68 VA. L. REV. 1157 (1982).

207. See, e.g., *United States v. Argent Corp.*, 14 ENV'T. L. REP. (ENVTL. L. INST.) 20,497 (D.N.M. 1984); *United States v. Conservation Chemical Corp.*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,207 (W.D. Mo. 1984); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 843-45 (W.D. Mo. 1984).

208. 42 U.S.C. § 9606.

209. See, e.g., *Water Drinking Safe Act*, H.R. REP. NO. 185, 93rd Cong., 2d Sess. 35-36 (1974).

served the right to require the EPA to apportion costs in circumstances where individual waste contributions can be identified.<sup>210</sup> Thus, the courts are insisting on flexibly resolving the complicated issue of how the costs of cleanup are to be apportioned. This judicial interpretation means that the EPA may not always be able to collect total cleanup costs and walk away from the demanding task of cost allocation. Undoubtedly the views of the various trial courts will vary as to the capacity of the EPA to assign responsibility for costs. The courts may be influenced by the Agency's superior expertise and information-gathering resources, its decision to include or omit particular parties from its selection of joint defendants, and equitable considerations such as how well the EPA managed the site cleanup prior to filing an action.

In short, the EPA cannot refuse offers to perform less-than-ideal remedies with confidence that it can promptly force its solution on reluctant responsible parties through the courts. Such uncertainty is the seedbed of productive bargaining.<sup>211</sup> The agency may be able and willing to trade a preferred—but ultimately uncertain—course of action for a less desirable—but certain—immediate negotiated cleanup.

#### F. *Breaking Through the Policy Impasse: Principled Negotiation Should be Tried.*

The EPA replaced a politically troubled, ineffectual CERCLA program with a quasi-regulatory scheme that threatens to choke off prompt site cleanup. In the first two-and-one-half years, the successes achieved by a few remedial measures and a nascent negotiation process were more than offset by staff demoralization and reductions in force, confrontations with Congress, misguided Agency reorganizations, loss of public confidence, and other repercussions of a do-little, Fund-conserving strategy. The new Fund-first strategy rectifies these abuses but suffers from shortcomings of its own. It straitjackets discussions with responsible parties and forces frequent reliance on the Fund and litigation.

The Agency points out that putting the new program in place will take time, that it has begun to move more rapidly, that firm control over its cleanup agenda will prevent delays caused by responsible parties, and that Congress is likely to expand the Fund and strengthen CERCLA in the near future. The Agency reasons that its negotiation strategy may be somewhat severe, but that the public and Congress expect firmness with responsible parties, who will be more inclined to accept the Agency's

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210. See Anderson, *supra* note 41, Appendix at 4-11; sources cited *supra* note 207.

211. See *infra* text accompanying notes 249-68.

cleanup demands as the federal courts continue to rule in the Agency's favor in reimbursement and cleanup actions.

Perhaps the Fund-first strategy will prevail, especially if Congress expands the Fund, gives the Agency more personnel, tightens up various provisions of CERCLA, and puts the Agency on strict cleanup deadlines.<sup>212</sup> The courts are generally providing the Agency with the precedents it needs to carry out its strategy. The EPA has already begun to revise and relax some of its guidance vis-a-vis responsible parties.<sup>213</sup> Increased resources, strong court opinions, and greater agency flexibility may see the CERCLA program past its current impasse.

Yet a growing body of opinion inside and outside the EPA favors developing the negotiation alternative. It promises gains in promptness and efficiency, because it vests cleanup responsibility from the beginning in those who ultimately will bear the cleanup costs. Negotiation promises to tap whatever technical resources and comparative frugality the private sector can offer. Negotiation should reduce large transaction costs associated with the Fund and litigation alternatives. The use of negotiation has the potential to enhance the CERCLA program in terms of the criteria traditionally used to evaluate the performance of any administrative program.<sup>214</sup> The Agency has the necessary power and dis-

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212. See *supra* note 16.

213. Instead of refusing to negotiate unless the parties first agree to a complete cleanup, EPA first agreed to negotiate if 80% of the cleanup was assured, then if a significant proportion was assured. Instead of refusing to share the names of responsible parties at a site, EPA now will make their names available. Instead of doing virtually all RI/FS itself, EPA now will allow responsible parties to perform them in a wider variety of circumstances. See *supra* text accompanying footnotes 76-119.

214. See, e.g., Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591-93 (1972) (accuracy, efficiency, and acceptability); Diver, *The Assessment and Litigation of Civil Money Penalties by Federal Administrative Agencies*, 1979 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 203, 283-87 ("substantive effectiveness"). For "criteria for determining the effectiveness of a dispute resolution mechanism," see Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 113 n.7 (1976) ("cost, speed, accuracy, credibility (to the public and the parties) and workability"). Diver, *supra* at 284 n.366, points out that the authors who propose criteria for evaluating administrative processes give scant attention to the substantive role of procedures. This may be a shortcoming more of the legal literature than other literature on the implementation of government programs. Three large groupings of analysts of administrative processes may be discerned: (1) Those who focus on the actual economic and social results of administrative programs. Do programs promote efficiency in the welfare economist's sense? Practitioners include economists, engineers, and some policy analysts. Legislative programs are also critiqued. (2) Those who focus on implementation efficiency. Are transaction costs low? Is the program well-administered, i.e., does it achieve least-cost solutions to given problems? Practitioners include engineers, students of public administration, agency program evaluation offices, and economists (as a secondary goal). (3) Those who emphasize process values. Is the program fair? Is due process accorded? Practitioners include lawyers and political scientists. See generally E. BARDACH, *THE IMPLEMENTATION GAME* (1977); L. LYNN, *DESIGNING PUBLIC POLICY* (1971); Bower, Ehler, & Kneese, *Incentives for Managing the Environment*, 11 ENV'TL. SCI. AND TECH. 250

cretion to implement a renovated bargaining approach,<sup>215</sup> and the existing negotiation process provides a sound base on which to build.<sup>216</sup>

Powerful incentives also exist among the private parties ultimately responsible for site cleanup to develop the negotiation option. The chemical industry has played a leading role in advocating alternative dispute resolution techniques for waste site cleanup.<sup>217</sup> The primary impetus behind the private sector's willingness to explore the negotiation option is financial; responsible parties face higher costs if negotiations fail. Federal cleanups are likely to be more expensive than private ones, delay may increase costs as conditions further deteriorate at sites, and the Justice Department may seek to recover its total transaction costs if reimbursement actions must be filed. Liability is strict, joint, and several; litigating either a reimbursement or cleanup suit is costly and risky and

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(1977); Hargrove, *The Missing Link: The Study of the Implementation of Social Policy* (Urban Institute Paper 1975); Sabatier, *Regulatory Policy Making: Toward a Framework of Analysis*, 17 NAT. RES. J. 415 (1977); Van Meter & Van Horn, *The Policy Implementation Process: A Conceptual Framework*, 6 AD. SOC. 445 (1975).

Welfare economics may afford the best starting point for developing criteria appropriate for evaluating the negotiation strategy proposed here. Negotiation promotes optimality through its emphasis on plus-sum solutions to conflict and on widening the scope of negotiation to the point bargains—including "side" bargains—which improve the positions of all participants are possible. Some of the tenets and techniques of modern negotiation seem expressly designed to keep parties' expressions of their utilities open and accurate and to overcome the problem of high transactions costs in multi-party dispute resolution. Even the problems of negotiation and market bargaining are similar—for example, the free rider problem. In the economist's view, an agency's environmental program should minimize the sum of damage costs (illness, risk, property damage), abatement costs (pollution controls, site cleanup), avoidance costs (leaving a polluted area, filtering water), and transactions costs (monitoring, administering, adjudicating). U.S. COUNCIL ON ENVIRONMENTAL QUALITY, *FOURTH ANNUAL REPORT 74-90* (1973). Negotiation can reduce, not only the sum of these costs, but each cost separately, in comparison to the strategy currently adopted by EPA.

215. The Agency has ample discretion to fashion the CERCLA implementation program of its choice, relatively free of rulemaking constraints or pre-expenditure or pre-enforcement judicial review. *See supra* text accompanying notes 197-203. Agency choice is expressly permitted by *Vernont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543 (1978) (Absent constitutional constraints or extremely compelling circumstances the "administrative agencies should be free to fashion their own roles of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."). Certainly the EPA has as much or more flexibility to respond to the impasse in CERCLA cleanups as agencies in general have to resolve the crisis of legitimacy arguably facing rulemaking by employing regulatory negotiation. *Cf.* Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982) (proposing negotiation between the agency and interested groups as an alternative form of rulemaking).

216. *See supra* text accompanying notes 69-75.

217. *See, e.g.,* Cox, Matey, Zoll, & Stoll, *supra* note 135, at 3-6. Lawyers for responsible parties have also been strong advocates of negotiating waste site cleanups. *See, e.g.,* Brown, *The Settlement Dilemma (A Tragedy in Two Acts)*, 5 HAZARDOUS WASTE REP. at 12 (Dec. 12, 1983); Rogers, *Three Years of Superfund*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,361 (1983); *Superfund—How to Rebuild a Badly Damaged Program*, *supra* note 134, at 19-32 (discussion of obstacles to settlement; arguing how the present confusion of the law promises extensive litigation for some time to come); Costle interview, *supra* note 14.

presents major evidentiary problems.<sup>218</sup> Unlike traditional regulatory pollution control schemes, which often reward the polluter who is able to delay the imposition of costly pollution reduction equipment, the CERCLA scheme forces responsible parties to bear both the incremental liabilities and the transaction costs associated with delay.

The possibility of a second generation of lawsuits, which seek compensation for personal and property injuries from hazardous wastes, also influences site users' attitudes about hazardous waste cleanups. Delays again increase potential compensatory liability. The industry sees the CERCLA cleanup program as a way to ascertain and limit tort liability.<sup>219</sup> It has coupled a willingness to clean up sites voluntarily with a call for a neutral institute for study of the health effects of wastes, and has eased its opposition to "right-to-know" laws intended to benefit plant workers and neighbors.<sup>220</sup>

The chemical industry, which contains the largest number of potentially responsible generators and the deepest pockets, perceives that an angry public has blamed it for the waste site problem.<sup>221</sup> Negotiated cleanup agreements may avoid the bad publicity of a government suit.<sup>222</sup> Anxious to protect its reputation, the industry has acknowledged that a serious problem exists and has endorsed expanding the Fund.<sup>223</sup> Its leaders have urged companies to come forward to accept site cleanup responsibility,<sup>224</sup> and one company indicated it had plans to act even before it

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218. In a reimbursement action, the government will argue that it has only to prove its costs—not that they were cost-effective. Evidence necessary to build a case against reimbursement will be controlled by the government, may be destroyed in the course of cleanup, and will in any event become stale "paper" evidence by the time a reimbursement action is filed. Parties are potentially liable for four times cleanup costs if they refuse to comply—the expense of cleanup, plus three times cleanup in "treble damages." CERCLA § 107(c)(3).

219. Telephone interview with Michael Brown (May 4, 1984). Mr. Brown represents a variety of responsible party chemical companies.

220. PESTICIDE & TOXIC CHEMICAL NEWS, Nov. 9, 1983, at 16-20 (Address to 37th semiannual meeting of the Chemical Manufacturers Association (CMA) by Louis Fernandez, CMA board chairman). See also 14 [Current Developments] ENV'T REP. (BNA) 268-69 (1983) (outgoing CMA board chairman William G. Simeral called for industry assumption of the cleanup burden and the creation of an "unimpeachable source" similar to the Federal Center for Disease Control to analyze the health effects of toxic substances, referring to the compensation issue as "growing" and a "potential Pandora's box").

221. Shabecoff, *The Chemical Lobby's "Turnaround,"* N.Y. Times, Nov. 21, 1983, at A16, col. 3.

222. Brown interview, *supra* note 179. Some attorneys expressed a preference for capturing final agreements in consent decrees rather than administrative consent orders, which would mean that at least formally responsible parties would have to be sued. Telephone interview with James W. Moorman (Apr. 12, 1984); telephone interview with James Rogers (Apr. 13, 1984). Of course, a contractual agreement is preferable to the responsible parties. *Id.*

223. See *supra* note 14; Shabecoff, *supra* note 221.

224. PESTICIDE & TOXIC CHEMICAL NEWS, Nov. 9, 1983, at 19-20; 14 [Current Developments] ENV'T REP. (BNA) 268-69 (1983).

obtained government approval to clean up sites at which it deposited wastes.<sup>225</sup> Part of the companies' motivation undoubtedly is to avoid inter-firm contribution actions in the tightly interdependent industry.<sup>226</sup> But its positive attitude, further illustrated by a "pioneering cooperative effort with the environmental community" to create a site cleanup organization,<sup>227</sup> cannot be explained completely by its concerns about cost control, public relations, and liability. Innovative leadership and economic success are also responsible for this turn of events.<sup>228</sup>

Environmental organizations have joined with industry to try to develop an alternative dispute resolution process for waste site cleanup, although some environmental lawyers are opposed to negotiation as the preferred method of cleaning up waste sites.<sup>229</sup> Representatives of persons who live near sites and may be injured by exposure to the wastes do not oppose negotiated agreements if they can be reassured by their own experts that the agreed-upon cleanup will protect their health and safety.<sup>230</sup>

At the EPA, officials fear the reaction of congressional subcommittees to negotiated cleanups but acknowledge that negotiation has produced many sound agreements and that its greater use could further increase the rate of cleanups. Agency leaders are seeking defensible means of increasing the use of negotiated agreements. They now feel that because their hand has been strengthened by favorable court opinions, they may be able to adopt a more flexible bargaining posture.<sup>231</sup> The Justice Department endorses negotiation, but only in the context of lawsuits that the Department believes are necessary to get responsible parties

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225. The Monsanto Company plans to spend up to \$25 million in 1984 to start cleanup at 30 sites where it discarded wastes. More may be spent in 1985 and 1986. *Monsanto moves voluntarily to spend \$25 million to clean up 30 waste sites*, 14 [Current Developments] ENV'T REP. (BNA) 1443 (1983).

226. See *supra* note 10.

227. See Shabecoff, *supra* note 221.

228. By contrast, heavy industry has produced almost no environmentally creative response.

229. See, e.g., remarks of Kristine Hall of the Environmental Defense Fund, in panel discussion, *supra* note 134.

230. Telephone interview with Lois Gibbs, President, Citizens Clearinghouse for Hazardous Wastes (Apr. 9, 1984). Ms. Gibbs, a former Love Canal area resident, stated that the key to citizen acceptance of a site remedy proposed by government or industry is review and approval of the cleanup plan by a technical consultant whom citizens trust, citing experience at the Brin Lagoon at Kennerdell, Pennsylvania, the General Electric site at Fort Edwards, New York, and the Stringfellow site at Riverside, California. She added that complete removal does not remain the citizens' remedy of choice when this condition is satisfied.

231. See Lee M. Thomas, Assistant Administrator for Solid Waste and Emergency Response, in discussions with the Judicial Review Committee of the Administrative Conference of the United States regarding recommendations based on this paper, May 14, 1984.

to take cleanup obligations seriously.<sup>232</sup> Some Justice Department lawyers are quite skeptical about the prospects for negotiated agreements and therefore favor strengthening the government's legal position under sections 106 and 107, the governmental control over the CERCLA priority agenda, and the standards the responsible parties must meet.<sup>233</sup>

But, after all, rapid risk reduction lies at the heart of the EPA's statutory mission. Shifting more of the management burden to responsible parties would free the Agency to concentrate on orphan sites and less-tractable responsible parties. Negotiation would permit the EPA to retain full control over site management and cost recovery, rather than sharing it with the Justice Department and the district courts. Reimbursement actions are particularly vulnerable; because the site will have been cleaned up, the Justice Department may not place as high a priority on prompt, full cost recovery as the EPA; and a court may not be as impressed by the need for Fund replenishment as for risk abatement. Possible adverse substantive rulings would be avoided, while an informal administrative common law of agreements would develop. Negotiation would permit long-term working relationships to develop between the Agency and major responsible parties with whom the EPA will have to deal repeatedly because of their involvement at a number of sites.

Although many parties favor negotiation, most of its proponents assume that only incremental changes in the existing negotiation process and Agency policies will be necessary.<sup>234</sup> But what is needed is a different, principled approach to negotiation that can break CERCLA negotiation free of its past and awaken a different set of expectations and responses among site cleanup constituencies. Does such a principled approach to negotiation exist? If it does, can it be applied to the waste site remedy problem? The obvious place to look is the recent experience and evolving strategies of the alternative dispute resolution movement. The movement's fresh look at established concepts suggests that improvements can be made in the existing rudimentary site negotiation process and in the policies EPA has adopted toward site negotiation. To appreciate this possibility requires a systematic look at how principled negotiation should proceed. After providing such a review, the next section proposes various changes to the waste site negotiation process that, in

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232. Telephone interview with Steven Ramsey, Chief, Environmental Enforcement Section, Land and Natural Resources Division, U.S. Department of Justice (May 4, 1984).

233. Telephone interview with Lois Schiffer, Special Litigation Counsel, Department of Justice (Feb. 29, 1984) (lead counsel for the Stringfellow site); Sniff interview, *supra* note 60 (Sniff estimates that 90% of NPL sites will be cleaned up eventually with Fund revenues).

234. The Interim Settlement Policy, *supra* note 99, 50 Fed. Reg. at 5034, noted responsible party concern, but then proceeded to make only minor incidental changes in EPA's then-existing negotiation policy.



conjunction with other reforms, should improve the rate and efficiency of site remedies under CERCLA.

### III. NEGOTIATION: CONTEMPORARY DEVELOPMENTS IN ALTERNATIVE DISPUTE RESOLUTION

Circumstances are ripe for a significant improvement in the federal waste site remedial program based on the expanded use of negotiated cleanups. But negotiation can take many forms. This section develops the dynamics of successful negotiation, measures its strength relative to traditional decisional processes, indicates the receptivity that exists among various groups to its use, describes its forms and techniques, and considers its role in the federal administrative process. The next section then develops a negotiation process specially tailored to the federal site remedy program.

Negotiation is currently enjoying a renaissance as a method of dispute resolution. Voluntary give-and-take among parties negotiating to improve their positions is, of course, a basic attribute of human conduct.<sup>235</sup> Yet, qualitatively and quantitatively, negotiation has entered a distinct new phase. Proponents are endeavoring to move negotiation back into administrative and judicial arenas where it has been in recent eclipse, and, at the same time, are institutionalizing negotiation approaches to enhance their acceptability for a broad range of applications and thereby ensure that the new field of "alternative dispute resolution" cannot be easily displaced in the future.<sup>236</sup>

Negotiation resists analysis, perhaps because it is so deeply imbedded in everyday experience. Even its cleverst apologists conclude by characterizing negotiation as "organize[d] common sense and common

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235. With respect to primitive legal systems, see *THE DISPUTING PROCESS—LAW IN TEN SOCIETIES* 10-11 (L. Nader & H. Todd, eds. 1978); B. NICHOLAS, *ROMAN LAW* 159 (1962) (early formal agreement in contracts). For negotiation in social contract theory and democratic pluralism, see Wolff, *Beyond Tolerance*, in *A CRITIQUE OF PURE TOLERANCE* 3 (1969) (R. Wolff, B. Moore, & H. Marcuse, eds.). See generally R. DAHL, *POLYARCHY* (1971); *POLITICAL OPPOSITION IN WESTERN DEMOCRACIES* (1969) (R. Dahl ed.); N. POLSBY, *COMMUNITY POWER AND POLITICAL THEORY* (2nd ed. 1980). For mediation and arbitration in the early American Republic, see J. AUERBACH, *JUSTICE WITHOUT LAW?* 4-5, *passim* (1983). For negotiation in traditional adversarial processes, see H. EDWARDS & J. WHITE, *THE LAWYER AS A NEGOTIATOR* (1977). Compare M. WESSEL, *THE RULE OF REASON: A NEW APPROACH TO CORPORATE LITIGATION* (1976). For negotiation in the administrative process, see *infra* text accompanying notes 310-22; Harter, *supra* note 215, at 32-38.

236. The proceedings of the annual meetings of the Society of Professionals in Dispute Resolution cover the spectrum of approaches. See, e.g., *Neutrals' Response to a Society in Dispute* (eighth annual meeting, Oct. 19-22, 1980). See also J. BROCK, *BARGAINING BEYOND IMPASSE* (1982) (recommends a new process for joint resolution of public sector labor disputes).

experience."<sup>237</sup> Negotiation involves a complex mix of self-interest, persuasion, compromise, and comity with one's bargaining partners. These are not difficult concepts, yet contemporary proponents usually discuss negotiation operationally rather than analytically.<sup>238</sup> Practitioners want ideas that will work in the field. Because negotiation is voluntary and, unlike dispute resolution by legislatures, agencies, and courts, does not owe its political legitimacy to the state, more considered theoretical rationales may be long in coming.<sup>239</sup> In the meantime, the problem of reconciling power-based negotiation techniques with the traditional tenets of democratic pluralism is largely passed over, perhaps justifiably so, because flexible consensus techniques produce superior dispute resolution for power-possessing majorities and may also be as effective as established institutions at protecting the interests of poor or unorganized minorities or of generations yet unborn.<sup>240</sup> For the moment then, there is a

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237. R. FISHER & W. URY, *GETTING TO YES* 153 (1981); see also White, *The Pros and Cons of "Getting to Yes,"* 34 J. LEGAL EDUC. 115 (1984) (criticizing Fisher and Ury for neglecting the "distributional" aspect of negotiating—where parties' interests sharply diverge and are not compatible).

238. Harter, *supra* note 215, at 52-53; Susskind & Weinstein, *supra* note 133, at 336-46 (nine steps tailored to the unique needs of environmental dispute resolution); Cormick, *Intervention and Self-Determination in Environmental Disputes: A Mediator's Perspective*, RESOLVE (CONSERVATION FOUND.) Winter, 1982, at 2; see also R. LIKERT & J. LIKERT, *NEW WAYS OF MANAGING CONFLICT* (1976). Case studies abound, e.g., *ROUNDTABLE JUSTICE: CASE STUDIES IN CONFLICT RESOLUTION* (R. Goldmann, ed. 1980); A. TALBOT, *SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION* (1983).

239. For analytic perspective the field does draw eclectically upon decision and game theory, legal writing, and social psychology, but these largely avoid the problem presented by political theory. See, e.g., H. RAIFFA, *supra* note 163; M. DAVIS, *GAME THEORY* (1983). Numerous articles in *The Journal of Conflict Resolution* apply the techniques. Law review articles include Fuller, *Mediation-Its Forms and Functions*, 44 S. Cal. L. Rev. 305 (1971); Eisenberg, *supra* note 204; Harter, *supra* note 215. In social psychology, see J. RUBIN & B. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* (1975); J. PFEFFER, *POWER IN ORGANIZATIONS* (1981); P. WEHR, *CONFLICT REGULATION* (1979).

240. In a brief exposition of the theory of negotiation that has become a *cri-coeur* of the negotiation movement, one of its leading proponents identified "self-determination" for all parties as the essential attribute of a legitimately mediated dispute. Negotiation through self-determination serves "widely and deeply held values" if three criteria are satisfied: understanding of the negotiation process, "relative power or influence," and opportunity for involvement. Power is key:

parties to a dispute must have an independent source of power and influence. Benevolence, patronage, or charity can never lead to self-determination in its true sense. . . . Successful negotiations require that each party recognize the right of all other negotiating parties to participate equally in the decision-making process. To achieve such "recognition" . . . challenging parties will require substantial power.

Cormick, *supra* note 238, at 3-4 (footnote omitted). For a thoughtful examination of the relation of negotiation to political theory by an advocate of negotiation, see Crowfoot, *Negotiations: An Effective Tool for Citizen Organizations*, NORTHERN ROCKIES ACTION GROUP PAPERS 22-44 (Fall, 1980) (analyzing the legitimacy of negotiation from consensus, pluralist, and elite dominance views of society).

Harter argues that regulatory negotiation is a cure for a "malaise" or crisis of political legitimacy afflicting the federal administrative process. Harter, *supra* note 215, at 1, 7. The political and

pragmatic preoccupation with the actual conditions under which negotiation succeeds or fails. Because the essence of negotiation is consensus, negotiation is vulnerable to disruption at any time. Negotiation is like a soufflé: If not made just right, it will collapse.

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legislative components of agency rulemaking have been expanded and highlighted by Congress's delegation of more quasi-legislative authority to agencies in recent years and by the ascendancy of the interest accommodation model of administrative policymaking. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (tracing the expansion of the traditional delegation doctrine and interest representation). These developments have undermined the traditional rationales underpinning the legitimacy of agency policymaking. Thus "[a]gency actions no longer gain acceptance from the presumed expertise of its staff. It is no longer viewed as legitimate simply because it fills in the gaps left by Congress, or because it is guided by widely accepted public philosophy." Harter, *supra* note 215, at 17. To restore legitimacy, Harter urges that affected interests should actually share in the ultimate judgment of the agency through consensual regulatory negotiation. Harter, *supra* note 215, at 79-80. In short, negotiation would implement democratic political theory in the administrative setting. Regulatory negotiation would enable administrative decisions to be made the same way other political decisions are made in the American system. See also J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980).

Yet power-based participation in negotiated solutions presents a challenge to traditional democratic theory that proponents of negotiation have not yet satisfactorily met. Bargained solutions may threaten the protection and political equality guaranteed minorities in our system if the poor, weak, absent, unborn, or disorganized who have almost no resources with which to bargain are unable to participate. Bargained solutions may also threaten majority rule if they are not subject to adequate public review, opposition, appraisal, amendment, or veto. See Dahl, *Epilogue*, in *POLITICAL OPPOSITION IN WESTERN DEMOCRACIES* 387, 396-97 (R. Dahl, ed. 1966); Rodwin, *Can Bargaining and Negotiation Change the Administrative Process?*, 3 ENVTL. IMPACT ASSESSMENT REV. 373, 375-79 (1982). It is not what powerful opposed interests agree should be done that is the essence of decision under a public program to correct a legislatively-proscribed social wrong, but rather what the agency decides to do after study, consultation, and review. Statutes legitimate an agency exercise of power which follows a complex process of democratic lawmaking. It may be true that agency policy decisions increasingly lack political credibility in a broad sense because even the interest accommodation model does not adequately provide for political representation. But the "legitimacy" of administrative decisions can hardly be doubted, and power-based negotiation appears capable of frustrating the operation of "legitimate" agency decisionmaking that many feel is better able than is negotiation to protect minority interests while ensuring that majoritarian solutions are effected.

A response to the democratic critique of negotiated solutions proceeds along the following lines: while on the one hand protection of minority interests within the system of effective majority rule presents a challenge to evolving negotiation strategies, on the other it is not clear that existing governmental decisionmaking institutions currently are capable of meeting this challenge any more effectively than are consensus-based approaches. Case-by-case experimentation with negotiation to develop detailed processes that are efficacious in protecting democratic values is therefore justified. The problem of the legitimacy of consensus-based dispute resolution where public rights are involved is similar to the problem of the legitimacy of adjudication of public law questions at the behest of "public interest" groups, and converges with it where, as is often the case, the court encourages the parties to negotiate a solution that is then approved in a consent decree. Responding to Professor Stewart's criticism of the potential inadequacy of interest group representation in public interest litigation, *The Reformation of American Administrative Law*, *supra* at 1684-88, Professor Chayes attacked the political legitimacy of administered dispute resolution in these terms: "[T]o retreat to the notion that the legislature itself—Congress!—is in some mystical way adequately representative of all the interests at stake, particularly on issues of policy implementation and application, is to impose democratic theory by brute force on observed institutional behavior." Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1311 (1976).

The fields of conflict in which negotiation techniques have been applied are varied: consumer disputes,<sup>241</sup> welfare regulation,<sup>242</sup> intellectual property and other commercial disputes,<sup>243</sup> domestic relations,<sup>244</sup> and international relations.<sup>245</sup> Surprisingly, environmental conflicts have proven to be among the most amenable to application of the new negotiation techniques, despite the widely-accepted tenet of the "Environmental Decade" of the 1970's that environmental disputes are too hotly contested, value-laden, redistributive, and multi-faceted to permit consensual solutions.<sup>246</sup> Environmental dispute resolution has compiled an impressive record of successes.<sup>247</sup> In particular, disputes over facility sites, including waste sites, have been an important proving ground for environmental dispute resolution techniques.<sup>248</sup>

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241. See AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION, CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES (1983).

242. See *infra* text accompanying notes 314-22.

243. See *infra* text accompanying notes 300-09.

244. See *Mediation Quarterly* (The Journal of the Academy of Family Mediators).

245. See R. FISHER, INTERNAL CONFLICT OF BEGINNERS (1969) and the *Journal of Conflict Resolution*, the masthead of which bears the caption, "Research on War and Peace Between and Within Nations."

246. Eighteen years of litigation over the Storm King Mountain pumped storage facility finally ended in a negotiated agreement. See *The Hudson River Power Plant Settlement* (R. Sandler & D. Schoenbrod, eds.) (materials for a conference at NYU School of Law, Dec. 10, 1981). But see Schoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 58 N.Y.U. L. REV. 1453, 1465-69 (1983).

247. G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (1985) (forthcoming). Bingham studied 162 mediated environmental disputes, 133 of which specifically sought to reach a decision or agree on a recommendation. Of these, 78% were successful, with the best results in site-specific negotiations. *Id.* at 7. The largest category were land-use disputes—neighborhood and housing, commercial and urban development, parks and recreation, agricultural lands preservation, facility siting, and transportation (70 site-specific, 16 policy disputes). Other broad categories in order of number of disputes mediated included natural resources and public lands management, water resources, energy, air quality, and toxics. *Id.* at 4. Surprisingly, private companies and environmental groups negotiated with each other in only 18% of the site-specific disputes, while government agencies (sometimes exclusively) negotiated in 81% of the cases, which bodes well for the type of negotiations cleanup will require. *Id.* at 5. Not only was agreement reached; in 93% of the site-specific disputes the agreements were fully (80%) or partially (13%) implemented. *Id.* at 8. See also A. TALBOT, *supra* note 238; ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS (L. Lake, ed. 1980); M. RIVKIN, NEGOTIATED DEVELOPMENT: A BREAKTHROUGH IN ENVIRONMENTAL CONTROVERSIES (1977); Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 18 (1981).

248. Because new hazardous waste facilities cause focused local amenity and safety losses but diffused economic benefits geographically, see generally M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965), and J. SELEY, THE POLITICS OF PUBLIC FACILITY SITING (1983), control over siting them has tended to move up the ladder of governments, to aggregate benefits and dilute intense local opposition. Municipal zoning to exclude hazardous waste facilities has been pre-empted by states under a variety of hazardous waste facility siting statutes. Tarlock, *Siting New or Expanded Treating, Storage, or Disposal Facilities: The Pigs in the Parlor of the 1980s*, 17 NAT. RESOURCES LAW. 429, 438-48 (1984). State-level attempts to exclude out-of-state wastes fail, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), but federal law is otherwise silent on the siting issue and

### A. *The Elements of Negotiation.*

1. *Joint Gains.* For bargaining to begin, each party must perceive the possibility of gain. Mutual gain, which game theorists have usefully called a “nonzero sum” or “plus sum” game or transaction,<sup>249</sup> is the goal of contemporary negotiation strategies. For example, negotiations between Spotsylvania County and the City of Fredericksburg, Virginia, over the city’s proposal to annex land were about to be terminated because joint gain appeared to be impossible. City and county interests appeared to be strictly opposed: the city could gain only if the county lost. Negotiations resumed when a city councilman raised the possibility of the city’s dropping its longstanding opposition to county purchase of a retired industrial plant for conversion to a wastewater treatment facility if the county would relent on annexation.<sup>250</sup>

2. *Power and Uncertainty.* Unless each party possesses both countervailing power and uncertainty about outcome, joint gain is virtually impossible. A powerless party cannot confer gains. Power usually consists of rights or assets protected by legal rules, and most bargaining is strongly guided by the framework of legal and social norms that surround it.<sup>251</sup> For example, when a power project sought to construct the Grayrocks Dam on the Laramie River in Wyoming to obtain cooling water for a new power plant, it was opposed by farmers concerned over irrigation water losses, by the downstream states of Colorado and Ne-

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interstate regional conflict over hazardous waste disposal, with the exception of radioactive wastes. See Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-d (1982). *City of Philadelphia*, 437 U.S. at 620 n.4, seems to hold that RCRA does not pre-empt state and local siting controls. For a general discussion of the siting problem, see D. MORELL & C. MAGORIAN, *SITING HAZARDOUS WASTE FACILITIES* (1982).

Three state siting statutes provide for negotiation between the local community and the site developer. See MASS. ANN. LAWS Ann. ch. 21D, § 12 (Michie/Law. Coop. Supp. 1985); R. I. GEN. LAWS §§ 23-19.7-5 to 6 (Cum. Supp. 1984); Wisc. Stat. Ann. § 144.445 (9) (West Supp. 1984-85). The Massachusetts approach has attracted scholarly attention. See Bacow & Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVT'L. L. REV. 265 (1982); Provost, *The Massachusetts Hazard and Waste Facility Siting Act: What Impact on Municipal Power to Exclude and Regulate?*, 10 BRIT. COLUM. ENVT'L AFF. L. REV. 715 (1983). Under the Massachusetts and Rhode Island approaches, approval of a state siting council is required, but the heart of the statutory scheme is a siting agreement to be negotiated between the developer and a site assessment committee composed of local officials and citizens.

249. H. RAIFFA, *supra* note 163. Raiffa shows how negotiators too frequently overestimate the value of self-interested bargaining (following a zero-sum strategy), instead of seeking joint returns. Practitioners of mediation emphasize joint gain. See, e.g., Susskind & Weinstein, *supra* note 133, at 341.

250. Richman, *Mediation in a City-County Annexation Dispute: The Negotiations Process*, 4 ENVT'L IMPACT ASSESSMENT REV. 55 (1983). For other examples see Harter, *supra* note 215, at 48-49.

251. See Eisenberg, *supra* note 204, at 680-81 (discussing the importance of norms in the negotiation process).

braska which were concerned about their water rights, and by environmentalists concerned about habitat loss for the endangered whooping crane. Although many fruitless negotiating sessions occurred, real bargaining did not begin until Nebraska and the conservationists obtained a court ruling that confirmed that the federal government and the power project were subject to certain limited study and permit obligations that had not been met.<sup>252</sup> Strong factual and equitable positions, political clout, or the ability to inflict cost and delay via the adversarial process are other sources of the power necessary for successful negotiation.<sup>253</sup>

Without some uncertainty about outcomes, there is no reason to negotiate. A negotiation presents the opportunity to bargain for a known gain in lieu of an uncertain larger gain or loss. In the Grayrocks Dam controversy, the dam's advocates had to decide whether to attempt to get approval for the dam from the special committee that was vested with life-or-death power over projects under the federal endangered species statute.<sup>254</sup> They ultimately opted for the less desirable but more certain path of a negotiated agreement.<sup>255</sup> If a party is so strong that it has no incentive to bargain away any of its strengths, that is, if it perceives itself as certain to prevail, other decisional processes—adjudication or voting, for example—will be considered more appropriate than negotiation, because these are more likely to permit the party to prevail completely.<sup>256</sup>

3. *The Incentive and Commitment to Bargain.* The parties must believe that it is in their respective interests to negotiate a solution.<sup>257</sup> The willingness to try negotiation involves more than a shrewd analysis of an opponent's position and one's opportunity for gain; it requires a measure of trust that the other side will be forthcoming—and a corresponding willingness to respond in good faith. Because bargaining substitutes joint problem-solving for institutional decisionmaking, it requires a measure of shared responsibility and compromise that all parties will

252. M. O'HARE, L. BACOW, & D. SANDERSON, FACILITY SITING AND PUBLIC OPPOSITION 120-27 (1983) (summarizing the Grayrocks Dam case).

253. See, e.g., Rogers, *supra* note 162, at 10,363 (providing an inventory of litigable issues which hazardous waste site users may exploit to develop countervailing power). Where environmentalists could at best only delay the issuance of a federal permit for a uranium mine by challenging the adequacy of an environmental impact statement, the mine owner nevertheless agreed to undertake specific impact mitigation measures in return for environmentalists' covenant not to sue. Harter, *supra* note 215, at 29-30.

254. Endangered Species Act, 16 U.S.C. §§ 1531-1542. See M. O'HARE, L. BACOW, & D. SANDERSON, *supra* note 252, at 123-24.

255. See M. O'HARE, L. BACOW, & D. SANDERSON, *supra* note 252.

256. Inducement to negotiate is a critical threshold problem which has received considerable scholarly attention. See Bacharach, Lauber, & Shedd, *Critique of Bargaining Theory*, in S. BACHARACH & E. LAUBER, BARGAINING: POWER TACTICS AND OUTCOMES 1-40 (1981); Eisenberg, *supra* note 204, at 675.

257. R. FISHER & W. URY, *supra* note 237, at 17-40, 55 (1981).

never accept some of the time and some parties will never accept all of the time. Compromise means that an adversary will be freely permitted to have or do something even though he may not possess the concomitant right or might actually be legally barred from asserting that right. For some, negotiation is condonation, and they prefer to rely on formal dispute resolution processes that tend to preserve principle and vindicate rights, albeit at a net loss to the interests of all the parties.

4. *Fundamental Values.* Some practitioners of negotiation counsel against trying to use negotiation where value conflict lies at the heart of a dispute.<sup>258</sup> Yet rejecting negotiation in such a situation may be premature if the value conflict is only dimly perceived, is based on inadequate or insufficiently understood data,<sup>259</sup> or is at bottom a conflict over means, not ends. Conflict over waste site cleanup easily could be classified as a dispute over means, were it not that environmental politics in the United States sometimes casts industrial polluters as evil-doers who must be punished. The legislative history of CERCLA is conspicuously free of the politics of blame. Yet the values implicit in traditional environmental politics may have reemerged in federal cleanup policy, as a reaction to the EPA's unfortunate prior practices.

5. *Exploring Many Options and Interests vs. Positional Bargaining.* Where countervailing power has created the uncertainty that makes joint gain possible, the parties must still find a way to convert their willingness to negotiate into a concrete bargain. Bargaining usually breaks down if negotiators limit their efforts to attempts to reconcile specific, hardened positions to which they have committed themselves in advance. Rather than focusing narrowly on the few issues over which differences are the strongest, successful negotiators seek to bring up as many items as possible for trading off, thereby creating options that make mutual gain possible. This requires going back to the parties' underlying interests and concerns,<sup>260</sup> the only fertile ground for compromise. As a part of the process of identifying points of agreement as well as difference, one party may well concede items of less importance to another party who thinks

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258. See Susskind & Weinstein, *supra* note 133, at 339. Other advocates of negotiation are cautious but sanguine about the prospects for negotiation even where value conflict is at the heart of a controversy. Still others take the more extreme view that many, perhaps most, value conflicts can be reconciled with the right conflict resolution strategy, a view vulnerable to parody as a "hot tub" theory of negotiation. "[I]f we only strip off the armor of an adversarial hearing, everyone will jump into negotiations with beguiling honesty and openness to reach the optimum solution to the problem at hand." Harter, *supra* note 215, at 31. "[T]he 'hot tub' theory is not true: people do not get together to resolve disputes with openness and reasonableness simply because the process is labeled nonadversarial." *Id.* at 42.

259. D. STRAUS & D. GREENBERG, *DATA MEDIATION OF ENVIRONMENTAL DISPUTES* (1977).

260. R. FISHER & W. URY, *supra* note 237, at 41.

them very important in return for like concessions when the tables are turned. Considering the broadest range of issues—interests, timing, priorities, beliefs, forecasts—maximizes the potential for joint gains. For example, the event that moved the Fredericksburg, Virginia, annexation dispute beyond an apparent confrontational impasse over the single issue of the geographic boundaries of the area to be annexed was the resurrection of the side issue of converting a retired industrial plant into a wastewater treatment facility. When Fredericksburg agreed to reopen that question, the impasse was broken and negotiations resumed. Significantly, the subsequent focus of bargaining was the interests to be served by purchasing the plant—certain local sewage treatment needs—and not the county's former position that a specific industrial plant should be bought and converted.<sup>261</sup>

A mismatch of intensity of preference about issues makes bargaining thrive, and mismatches are more likely to exist where several parties are in a dispute involving a variety of issues. For example, if the only issue is whether an energy facility is to be located in a pristine wilderness area, the environmentalists and the developers almost surely will hold strong opposing views that allow no compromise.<sup>262</sup> To create options, the parties must restate the issues broadly and reexamine their underlying interests to see if there is any room to maneuver. The environmentalists might find that while they did not agree with the energy facility developers' projections of future power needs, they held this view with considerably less conviction than they did the view that this particular wilderness area not be developed. The developers in turn might care little where the facility is located, so long as they are able to meet projected power demands. Consequently, the environmentalists might be induced to support locating the facility elsewhere in return for a promise on the part of the developers not to attempt to place any future facility in the wilderness area. Or, if there is no alternative site for the facility, the environmentalists may conclude that they are less concerned that a particular wilderness area be preserved than that comparable wilderness experiences are protected elsewhere in the region. They might then agree to

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261. Richman, *supra* note 250, at 60-66. In the Grayrocks Dam controversy, the first option was financial compensation (\$15 million) for the water used. When this offer ran afoul of state and environmental negotiators' fears that this would be perceived as a "sellout" or a bribe, other options surfaced. The solution involved a guarantee of a minimum in-stream flow for irrigation and habitat protection, coupled with a halved compensation payment, but to an independent trust which would purchase additional water rights and help maintain endangered Whooping Crane habitat. M. O'HARE, L. BACOW, & D. SANDERSON, *supra* note 252, at 124-25.

262. See Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1345 n.266 (1981).



withdraw their opposition in return for the developers' purchasing of wild land and dedicating it to that preferred public use.

6. *The Number of Parties.* While negotiations may fail in a dispute involving too few issues and interests, a dispute involving too many becomes more difficult to manage. First, as a practical matter, negotiation does not work as well when very large numbers of persons are brought together in an impersonal space. Fifteen to twenty persons appear to be workable numbers; the meeting space should be correspondingly intimate—larger than most hot tubs but smaller than most auditoriums.<sup>263</sup> Second, if the table—the ineluctably indispensable medium of all types of negotiation—is unable to accommodate all those who possess distinct interests and sufficient power to merit a place, then the negotiations cannot be described as consensual in any meaningful sense. The excluded parties may have sufficient power to undermine the final agreement.

Several techniques are now used to surmount these difficulties. The key is to focus on the interests at stake rather than upon the individual parties.<sup>264</sup> If interests can be legitimately aggregated, then interest group representation may be used. As the number of parties and interests increases, so does the desirability of a team approach, which to be successful requires the application of a number of negotiating skills—technical, political, and legal. Ensuring that negotiators maintain effective communication with constituents becomes harder as the process progresses because the negotiators may develop an empathy for other interests that is difficult to communicate to constituents who are not present. Selecting representatives by ballot, reliance on existing organizational networks—industrial associations, unions, environmental groups—or the judgment of an expert convener may help.<sup>265</sup> Side negotiations may resolve disputes over representation that arise between or within interest groups.<sup>266</sup>

7. *Mature Issues of Suitable Scope Inevitably to be Decided.* Negotiation is more likely to succeed if it addresses issues of well-defined scope that are ripe for resolution and will be resolved one way or the other in another forum unless negotiations are successful. The problem of issue definition typically arises when wide-ranging agreement on policy is sought through negotiation; the issues are rarely blurred in site-specific environmental negotiations. Nevertheless, if parties try to introduce too

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263. Harter, *supra* note 215, at 46. Some potentially responsible party meetings have been convened by EPA in auditoriums.

264. Susskind & Weinstein, *supra* note 133, at 337.

265. *Id.* at 338.

266. W. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 137-49 (1971) (discussing resolution of intra-union disputes and selection of negotiators).

many side issues, negotiators may lose sight of the principal matters that drew parties together. Unless interest groups have largely completed their efforts to establish countervailing power through legislation, public opinion campaigns, or lawsuits, they may not yet be firmly committed to the negotiation process. In fact, some parties may use participation in negotiations as a dilatory tactic while they try to enhance their position.<sup>267</sup> Their bad faith manipulation of the other parties may make subsequent negotiation impossible after the issues have ripened.

A decision may be made inevitable—and hence ripe for negotiation—in a number of ways, for example, by pending legislation or litigation, scheduled agency action, or prior agreement of the negotiating parties. Although not always necessary, an imminent deadline may give negotiations a focus that pushes bargaining past an impasse.<sup>268</sup> Even where a date certain has not been set, economic, scientific, and legal incentives may cause parties to agree to a deadline that they might otherwise have found unacceptable. Site users, for example, might accept a tight EPA negotiating schedule rather than incurring either the heavy expenses of an EPA-funded cleanup or the expenses involved in litigating and potentially losing a CERCLA reimbursement action.

#### B. *Formal Dispute Resolution and Negotiation: Relative Strengths and Weaknesses.*

The contemporary support for “alternative” dispute resolution is heavily based upon the perceived shortcomings of decisionmaking by courts and agencies.<sup>269</sup> These views mesh well with the expanding self-criticism in which the legal profession is engaged.<sup>270</sup> Some of this criticism may be overdrawn, and has become less important to negotiation specialists as they have gained confidence and experience. Resort to formal trials and hearings is a necessary option. It reinforces and protects diversity; it channels conflict through neutral forums that provide for the refinement of issues, fact-based inquiry, fair and methodical procedures for controverting opposing facts and views, and a final decision after a

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267. Harter, *supra* note 215, at 47.

268. *E.g.*, Metropolitan Water Roundtable negotiation, Denver, Colorado. See Kennedy & Lansford, *The Metropolitan Water Roundtable: Resource Allocation Through Conflict Management*, 4 ENVTL. IMPACT ASSESSMENT REV. 67 (1983).

269. See Susskind & Weinstein, *supra* note 133, at 317-21.

270. Self-criticism has a respectable history. See, *e.g.*, Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), reprinted in 35 F.R.D. 241 (1964) (current dissatisfaction originates in judicial organization and procedure); Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 79, 96 (1976) (courts are carrying too heavy a burden and are being asked to solve problems for which they are not institutionally equipped).

full opportunity to be heard;<sup>271</sup> and it provides an important alternative to dispute resolution by force, to the exercise of raw political power, and to homogenizing accommodation.<sup>272</sup>

The fewer and more focused the issues, the clearer and more bipolar the conflict, and the more vigorous the advocacy, the better formal adversarial processes function. Yet if overdone, or poorly suited to the types of conflicts that separate parties, these strengths become weaknesses that bargaining may avoid. Bargaining is premised upon a common effort by the parties to identify issues on which they can compromise. Unlike formal processes, bargaining exploits the different levels of intensity with which parties ordinarily approach the issues that separate them and the concerns they share.<sup>273</sup> Unlike formal processes, bargaining discourages the parties from arguing each issue with the same zeal. They can modulate their positions, thereby laying the groundwork for give-and-take in a final agreement. Moreover, in bargaining the parties need not conceal or distort the presentation of their true interests, as they might where a statute or policy addresses their concern only obliquely or not at all. Finally, joint problem-solving and the search for trade-offs tend to stimulate a freer flow of information between parties, while formal processes tend to restrict it.

Important subjective benefits conferred by bargaining ordinarily are also lacking in formal proceedings. As the search for common ground proceeds through negotiation, the parties' alignment against each other metamorphoses into joint alignment against the challenge of finding a bargained solution. At its best, such a realignment stimulates an iterative process: Reduced hostility produces a better understanding of an adversary, which leads to the identification of common ground and possible solutions, which further enhances understanding and communication, which in turn leads to solutions that had escaped notice.<sup>274</sup> A bargained solution also enjoys the support of the parties because, although they may be unable to claim "victory," they can hardly disown the agreement that they freely endorsed. Implementing a bargained solution may thus be easier than enforcing a judgment entered by an agency or court.<sup>275</sup>

Of course, formal processes and informal negotiation cannot be meaningfully compared without inquiry into the characteristics of the particular disputes. Disputes better resolved by means of traditional ad-

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271. See Thompson, *The Role of the Courts*, in FEDERAL ENVIRONMENTAL LAW 193, 219-37 (E. Dolgin & T. Gilbert, eds. 1974) (discussing the institutional characteristics of courts).

272. Schuck, *Litigation, Bargaining, and Regulation*, REGULATION, July/Aug. 1979, at 26.

273. R. FISHER & W. URY, *supra* note 237, at 58-83.

274. Schuck, *supra* note 272, at 30-31.

275. *Id.* at 31.

versarial mechanisms are those that involve matters of principle on which a party is unwilling to compromise, pit powerful against powerless parties, relate to only a few issues that are framed in the traditional bipolar mode, or depend upon policy determinations that, if resolved by Madisonian factions outside established legislative or judicial forums, would raise substantial questions about majority rule and the protection of the rights of minorities.<sup>276</sup> Yet a still-growing number of disputes challenge the capacity of agencies and courts to deal successfully with "polycentric" problems of complex scientific, economic, and social dimensions.<sup>277</sup> Some of these disputes are candidates for negotiated solutions, and environmental disputes head the list.

### C. *Interest Group Receptivity to Negotiation.*

Just as with administrative and judicial dispute resolution, interest groups vary in their receptivity to negotiation. To an extent, the general degree of receptivity by parties is influenced by the attitudes and actions of nonparties. Professor Reich has argued that attorneys, trade associations, public relations firms, and other groups constitute a network of "intermediaries" who specialize in conducting business between federal policymakers on the one hand and regulated businesses or protected constituencies on the other. These intermediaries tend to convert issues into the type of conflicts that formal processes can address, to provide exaggerated estimates of the level of conflict, to prolong and intensify conflicts, and to seek to ensure that the principals never meet.<sup>278</sup>

As the preeminent intermediary group, attorneys can have a powerful influence over clients' willingness to negotiate. A staple of law practice, negotiation is used to avoid formal processes in the overwhelming majority of disputes.<sup>279</sup> Yet attorneys sometimes stubbornly resist negotiation despite clients' wishes.<sup>280</sup> However, the profession is under in-

276. See *supra* note 240.

277. See, e.g., Stewart, *supra* note 240, at 1772; Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972) (Congress should respond to the polycentric value conflicts thrust upon agencies by minimizing statutory agency restraints).

278. Reich, *Warring Critiques of Regulation*, REGULATION, Jan./Feb. 1979, at 37.

279. Of all civil law suits filed in the federal courts, about 7% go to trial. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 238 (1981). The average cost to the federal court system of litigating a case is around \$3,000 (\$600 million federal judiciary budget divided by 200,000 litigated cases per year). See *id.* at 170, 363, 381, 410.

280. In a trade secrets dispute the Gillette Company hired outside counsel and found itself bogged down in an expensive lawsuit with no end in sight. "[W]e encountered tremendous resistance from our litigator. . . . [who] couldn't believe that we didn't want to have . . . depositions . . . documents and all of the discovery that . . . litigators are used to having. Well, this time our outside counsel was becoming somewhat like a sick mistress, very expensive and not much use, so we

creasing internal as well as external pressure to use informal negotiation to resolve disputes.<sup>281</sup> Indeed, there are some who favor the creation of a negotiation speciality,<sup>282</sup> and lawyers have developed new dispute resolution techniques, such as the mini-trial and the "judicial panel."<sup>283</sup> In negotiating solutions for environmental disputes, lawyers have played a more constructive role than they are given credit for by some mediation experts.<sup>284</sup>

Businesses generally favor negotiation, especially with respect to matters in which technical and managerial factors predominate. They supported "open planning" processes in the early 1970's as a technique for resolving facility siting disputes.<sup>285</sup> Industry participated in the National Coal Policy Project<sup>286</sup> and has founded or supported dispute resolution centers.<sup>287</sup>

Public interest groups are on balance cool to negotiation. Individual citizens, however, may react more warmly than intermediary national groups.<sup>288</sup> Historically lacking power to drive forceful bargains, and frequently involved in disputes over matters of principle, public interest groups have usually preferred to resolve those disputes by traditional adversarial means. To obtain the maximum impact with their scarce resources, public interest law firms prefer binding judicial precedents to

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put him on the shelf and managed to resolve that situation." Remarks of Joseph Mullaney, in *ALTERNATIVES TO BIG CASE LITIGATION* 25-26 (panel discussion at the American Bar Association Annual Meeting, Aug. 1, 1983).

281. W. BURGER, 1982 YEAR-END REPORT ON THE JUDICIARY 8-9.

282. Fisher, *What About Negotiation as a Specialty?*, 69 A.B.A. J. 1220 (1983) (recommends a two-track system: one lawyer, expert in negotiation, prepares a recommended settlement, while a litigator prepares for trial).

283. The Judicial Panel, composed of retired judges and attorneys who stand willing to serve variously as fact-finders, mediators, adjudicators, and neutral advisors, is the product of the efforts of the Center for Public Resources of New York and Dean Harry Wellington of Yale Law School. Some 24,000 asbestos injury claims involving as much as \$38 billion will probably be made by the end of the century. Sixty-three percent of awards in 3,800 of the first completed cases were consumed as transactions costs—defendants' and plaintiffs' expenses and attorneys' fees and insurance costs (excluding the costs of providing the judicial forum in the 4% of cases that went to trial). RAND INSTITUTE FOR CIVIL JUSTICE, *COSTS OF ASBESTOS LITIGATION* (1983). The Judicial Panel is seeking ways to resolve contests between the asbestos producers, their insurers, and claimants without formal trials. See panel discussion, *supra* note 280, at 44-46 (remarks of James F. Henry).

284. See A. TALBOT, *supra* note 238, at 97.

285. SPECIAL COMMITTEE ON ENVIRONMENTAL LAW, OF THE AMERICAN BAR ASSOCIATION, *INDUSTRIAL DEVELOPMENTS AND THE ENVIRONMENT* 4:17, A:12 (1973).

286. REPORT OF THE NATIONAL COAL POLICY PROJECT, *WHERE WE AGREE: SUMMARY AND SYNTHESIS* 1, 67 (1978).

287. *E.g.*, Center for Public Resources, New York, New York; ACCORD, Boulder, Colorado. The author serves on ACCORD's Board of Advisers.

288. Gibbs Interview, *supra* note 230. See also Reich, *supra* note 278.

case-specific negotiations.<sup>289</sup> Further, quiet negotiations do not offer the opportunities for public "consciousness-raising" that a lawsuit does.<sup>290</sup> Environmentalists in particular say mediation creates a congenial atmosphere that disarms and co-opts environmental participants.<sup>291</sup> Superior political and economic resources often enable pro-development participants to exact unfair concessions at the bargaining table.<sup>292</sup> Finally, the negotiating process redefines issues to favor interests inimical to environmental positions.<sup>293</sup> Nevertheless, alternative dispute resolution appears to have some credibility with environmental organizations. One national group, the Conservation Foundation, houses an environmental dispute resolution center. Another organization known for its litigation activities agreed to identify regulation rules that might become the subject of negotiation with the agencies.<sup>294</sup> And some public interest groups have become quite skillful at using lawsuits as a means of forcing agencies to negotiate changes in agency rules, thereby obtaining significant influence over policy decisions *without* the delays and cost of litigation.<sup>295</sup>

Federal administrative agencies are as yet relatively unfamiliar with the new negotiation strategies. The little evidence that exists regarding agency receptivity to site-specific environmental dispute resolution techniques is inconclusive. The classic study of the issue revealed strong agency resistance to their use,<sup>296</sup> but more recent work shows the opposite.<sup>297</sup> In one study, federal officials felt that the new techniques meant

289. Presentation by Patrick Parenteau, Counsel, National Wildlife Federation, at conference on environmental law co-sponsored by ALI-ABA Committee on Continuing Legal Education, Environmental Law Institute (Smithsonian Institute, Feb. 25, 1984, Wash. D.C.).

290. *Id.*

291. *Id.*

292. Responding to a *Federal Register* notice soliciting candidate rules for regulatory negotiation, the Detroit Area Sierra Club chapter commented that it was "vehemently opposed" to regulatory negotiation, because it did not have either the resources to participate or countervailing power. L. SUSSKIND, D. FISH, & N. BALDWIN, *THE ENVIRONMENTAL PROTECTION AGENCY'S NEGOTIATED RULEMAKING DEMONSTRATIONS* 36 (draft status report, Sept. 1, 1983). Other environmentalists complained that the same problem existed in traditional rulemaking as well and were apparently willing to try regulatory negotiation as a means of speeding up the writing of rules, obtaining better representation, addressing technical complexities more adequately, and obtaining better enforcement. *Id.* at 1.

293. Amy, *The Politics of Environmental Mediation*, 11 *ECOLOGY L.Q.* 1, 13-14 (1983). These criticisms, particularly the second, are consistent with the traditional critique of bargaining based on pluralist democratic theory. *See supra* note 240.

294. *See* L. SUSSKIND, D. FISH, & N. BALDWIN, *supra* note 292, at 34.

295. *See supra* text accompanying notes 260-62.

296. Sachs, *Nationwide Study Identifies Barriers to Negotiation*, 3 *ENVTL. IMPACT ASSESSMENT REV.* 95 (1982). A series of experiments with negotiation involved several federal subagencies and was performed under the sponsorship of the U.S. Geological Survey and the U.S. Council on Environmental Quality between 1977 and 1982.

297. Federal and state agencies and units of local government were involved in 81% of the 162 cases Bingham studied. G. BINGHAM, *supra* note 247, at 5. Many of these disputes involved govern-

more work, loss of control of the agency's agenda, and subsequent legal difficulties. They resisted the techniques because they were unprecedented and underfunded.<sup>298</sup> Regulatory negotiation encountered problems at the EPA, for many of the same reasons site-specific environmental negotiation failed when other federal agencies were involved.<sup>299</sup>

#### D. *Forms of Contemporary Negotiation.*

Negotiation can be described as dispute resolution in which parties choose to work out their differences themselves rather than to employ either traditional voting techniques or adjudication by a decisionmaker who hears reasoned arguments.<sup>300</sup> Thus defined, it covers a vast terrain in the field of human conflict resolution, and, like voting and adjudication, assumes many forms.<sup>301</sup> The various negotiation techniques suggested or employed by trained facilitators provide the means of effectively structuring dispute resolution in accordance with the demands of a particular conflict situation. Mediation, the best-known and most widely used negotiation technique, offers significant prospects for increasing the number of waste site cleanups. Mediation involves the use of a neutral outsider to help the parties reach a permanent resolution of a reasonably well-defined dispute. Collective bargaining in labor-management relations has contributed the bulk of the experience with mediation techniques<sup>302</sup> and has led to the creation of the American Arbitration Association and the Federal Mediation and Conciliation Service.<sup>303</sup> Mediators discharge such routine functions as scheduling, recessing, and

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ment agencies only. *Id.* Mediation seems in some cases to be government's preferred dispute resolution technique. Sachs, *supra* note 296.

298. Sachs, *supra* note 296, at 97. The major recommendations for changing this state of affairs suggested documenting case histories of successful negotiations involving governmental officials to reduce the novelty of the approach, training officials in conflict management techniques, and soliciting high-level agency authorization and support for collaborative dispute resolution processes. *Id.* at 99-100.

299. L. SUSSKIND, D. FISH, & N. BALDWIN, *supra* note 292, at 13-14, 31-37, 41-42.

300. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363 (1978).

301. See Bellman, Bingham, Brooks, Carpenter, Clark, & Craig, *Environmental Conflict Resolution: Practitioners' Perspective of an Emerging Field*, ENVTL. CONSENSUS, Winter, 1981, at 1 (exploratory analysis of similarities and differences in techniques by authors from separate environmental conflict or dispute resolution centers); see also Susskind & Persico, *Guide to Consensus Development and Dispute Resolution Techniques for use in Government-Industry Conflicts*, prepared for the Conference on Alternative Forms of Conflict Resolution, hosted by the Center for Business & Government, Kennedy School of Government, Oct. 30-31, 1983.

302. *E.g.*, W. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (1971).

303. The nonprofit American Arbitration Association, founded in 1926, has organized some 50,000 individuals into panels that arbitrate or mediate disputes technically involving workplace issues: wages, conditions, benefits, and hours. The Federal Mediation and Conciliation Service, created as an independent federal agency in 1947, provides mediation assistance to help prevent or help resolve collective bargaining disputes. Its approximately 300 commissioners may affirmatively

chairing meetings, suggesting a sequence of agenda items, and arranging for records to be kept. They may also facilitate communications outside the formal meetings, hold confidential talks with individual negotiators or groups, and suggest areas where the negotiators' positions may be unreasonable.<sup>304</sup> Mediators may go further and offer creative suggestions, remind the parties of the costs of failure to reach agreement, and possibly recommend the terms of agreement.<sup>305</sup>

Policy dialogue applies bargaining and joint problem-solving techniques to policy issues, usually of national importance.<sup>306</sup> This technique is inappropriate for negotiating individual site cleanups, although a policy dialogue might be useful in developing general policies to be used in negotiating site cleanups. For example, the National Coal Policy Project, organized by a group of business and environmental leaders, addressed the environmental aspects of the increased coal use suggested by national energy policy. Over two hundred recommendations emerged from the project, some of which appear to have influenced congressional policymaking.<sup>307</sup>

As its name implies, the mini-trial consists of an abbreviated, non-binding hearing on disputed matters before a jointly-selected expert advisor who renders a confidential opinion on the strengths and weaknesses of each party's case as an aid to settlement negotiations.<sup>308</sup> Procedures are informal and themselves negotiable. Conceived by practicing lawyers

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inquire if assistance in negotiating new contracts is needed but may mediate a dispute only at the request of the parties. See Susskind, *supra* note 247, at 4-5 n.9.

304. See W. SIMKIN, *supra* note 302, at 77-98.

305. *Id.* at 98-106; Susskind, *supra* note 247, at 16, 40.

306. Paulson, *Policy Dialogues: A Practical Primer on How to do Them*, 2 ENVTL F., May, 1983, 36, 36-37.

307. WHERE WE AGREE: REPORT OF THE NATIONAL COAL POLICY PROJECT 111 (1978) (summary and synthesis); Joint Hearings Before the Select Comm. on Small Business and the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs on Regulatory Negotiation, 96th Cong., 2d Sess. 7 (1980) (statement of Harrison Loesch). See Harter, *supra* note 215, at 38-40. See also CONSERVATION FOUNDATION, TRAINING SCIENTISTS FOR FUTURE TOXIC SUBSTANCES PROBLEMS (1978); CONSERVATION FOUNDATION, SITING HAZARDOUS WASTE MANAGEMENT FACILITIES (1983). Sam Gusman pioneered in the development of policy dialogues in his work at the Conservation Foundation.

Stimulated by the publication of a report to Congress on the adequacy of common law recovery for hazardous substance injury, SUPERFUND SECTION 301(e) STUDY GROUP, INJURIES AND DAMAGES FROM HAZARDOUS WASTES — ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, S. REP. NO. 12, 97th Cong., 2d Sess. (1982), and the subsequent resumption of Congressional interest in enacting victim compensation schemes, Outen, *Injury from Hazardous Chemicals: Compensating Innocent Bystanders*, 1 ENVTL. F. 6, 6-9 (Feb. 1983), the Keystone Center convened a group of about four dozen persons for a policy dialogue on the topic in 1983-1984. The author was a member of the Superfund Study Group and the Keystone policy dialogue group.

308. See Green, Marks, & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 LOYOLA L.A.L. REV. 493, 501-06 (1978) (description of a mini-trial); Green, *The Mini-trial Approach to Dispute Resolution*, CENTER FOR PUBLIC RESOURCES, CORPORATE DISPUTE MANAGE-



to reduce the delay and cost of resolving intercorporate disputes by conventional adversarial means, the mini-trial has been successful in dealing with a variety of intellectual property, product liability, breach of contract, and unfair competition cases.<sup>309</sup> The mini-trial does not seem particularly well-suited to waste cleanup negotiations, primarily because of the difficulty of framing cleanup issues in a way that makes them amenable to an informal quasi-adjudicatory analysis.

#### E. *Negotiation in the Administrative Process.*

Negotiations between agencies and their constituencies occur throughout the federal administrative process. The prospects for negotiating site remedies under CERCLA obviously will be influenced by the general norms for negotiation that prevail in the federal administrative process and by the extent to which the EPA in particular uses negotiation to resolve environmental disputes.

The consent decree<sup>310</sup> has become an important indicium of the use of negotiation in the administrative process, and CERCLA has already proven to be fertile ground for the use of decrees.<sup>311</sup> The use of consent

MENT: A MANUAL OF INNOVATIVE CORPORATE STRATEGIES FOR THE AVOIDANCE AND RESOLUTION OF LEGAL DISPUTES 7-12 (1982) (background discussion of mini-trials).

309. The number of mini-trials is unknown but probably not large—perhaps a dozen by 1981, perhaps as many as 100 by 1983. Steele, *Minitrials are Cheap and Quick*, INC. MAG., Oct., 1981, at 149. Unreported mini-trials have almost certainly occurred, protected by the parties' desire to keep them confidential. *Id.*

The summary jury trial, which resembles the mini-trial, facilitates pretrial case termination where the principal bar to settlement is a dispute regarding a jury's likely findings on liability or damages. A six-member jury returns a "verdict" after an abbreviated presentation of evidence and law. The presiding judge or magistrate then sets a timetable for settlement negotiations. M. JACOUBOVITCH & C. MOORE, *SUMMARY TRIALS IN THE NORTHERN DISTRICT OF OHIO* (Federal Judicial Center 1982); Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV.-MAR. L. REV. 43, 43 (1980).

310. See Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314, 1315 (1959) (discussing forms that a consent decree may take). Although a decree will be interpreted much like a contract, see *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), it is still a judicial act. *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). Thus in some instances it may be altered unilaterally by a judge in light of changing circumstances. See Note, *supra*, at 1317.

The most common use of the consent decree is by federal enforcement agencies, to expedite the resolution of litigation or other administrative action. Although an agency does not require express statutory authority to enter into consent decrees, the decree must be consistent with the statute that the agency is mandated to enforce. See *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125 (D.C. Cir. 1983). Consent decrees may also be entered into when federal agencies are sued. A significant opportunity thereby exists for agency policy to be modified by consent decree. The standards for the approval and review of consent decrees are supposed to be the same whether the federal agency is plaintiff or defendant. Compare *id.* at 1125, with *United States v. Hooker Chem. & Plastics Corp.*, 540 F. Supp. 1067, 1072-73 (W.D.N.Y. 1982).

311. Decrees are now monitored by EPA to strengthen CERCLA enforcement. 14 [Current Developments] ENV'T REP. (BNA) 1615 (1984). EPA appears ready to use the consent decree as a

decrees to implement federal policy has given rise to legislative and judicial concern,<sup>312</sup> because settlement by consent decree may undercut the roles of more formal administrative processes and of judicial review in policymaking.<sup>313</sup>

1. *Negotiation in the Early Phases of Administrative Policymaking.* Negotiation pervades the early stages of agency policymaking, although, like Molière's M. Jourdain—the bourgeois gentleman who was delighted to learn that he spoke prose—the participants may not always realize what their discussions are.<sup>314</sup> Such negotiation has rarely been conducted in accordance with “state of the art” standards, however; rarely is there full and simultaneous interest representation leading to a consensual result.<sup>315</sup> A private consensus may lead to the adoption of binding regulations, but ordinarily the agency does not participate in whatever negotiation processes—however exemplary—that led to the consensus.<sup>316</sup>

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major tool in its CERCLA implementation strategy. See 14 [Current Developments] ENV'T REP. (BNA) 1615 (1984).

312. The use of consent decrees in enforcing environmental laws provoked 28 C.F.R. § 50.7(1973), requiring 30-day public comment to the Justice Department prior to entry of judgment. Comments must be filed with the court. The extensive use of consent decrees in antitrust litigation led to enactment of the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 1, 2, 3, 16, 28, 29 (1982), 47 U.S.C. § 401 (1982), and 49 U.S.C. § 11,703 (1982). The Tunney Amendment, 15 U.S.C. § 16, provides elaborate procedures for notification to the public of proposed consent decrees, §§ 16(b),(c), requires the Attorney General to consider comments on the decree, § 16(d), and requires the court to determine if the decree is in the public interest, §§ 16(e),(f). The decree can be used as prima facie evidence by any other party that the defendant violated the law under which he was charged, § 16(a). See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 758 (1977). These provisions governed the consent decree under which AT&T was broken up. See *FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST 192-97* (L. Schwartz, J. Flynn & H. First, eds. 1984).

313. Because of the potential for abuse of consent decrees, courts are not merely to rubber-stamp negotiated settlements. *United States v. Hooker Chem. & Plastics Corp.*, 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982). When the consent decree involves enforcement of a federal law, the court must satisfy itself that the decree adequately protects the public interest and “is in accord with the dictates of Congress.” *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83, 86 (D. Alaska 1977) (citation omitted). The courts may allow interested parties to intervene and may require that public comments be made part of the court record. See, e.g., *Hooker*, 540 F. Supp. at 1071.

314. Eisenberg, *supra* note 204, at 673-75, distinguishes discussion from negotiation on the ground *inter alia* that discussion implies that one party has unfettered decisionmaking authority while negotiation implies equality, compromise, and the like. Why then are not almost all exchanges between an agency and those it regulates discussions? Because, as Eisenberg points out, a discussion may become a negotiation if a stronger party only insists on the trappings of superiority, e.g., the appearance of unilateral decisional authority, while actually behaving as if his power was limited. *Id.* at 674 n.111.

315. Philip Harter found only a half-dozen clear examples, voluntary consensus standards aside. For his list, see Harter, *supra* note 215, at 32-33 n.175.

316. See Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 *TEX. L. REV.* 1329, 1345-65, 1386-88 (1978) (discussing development of nongovernmental consensus standards and the experience of agencies adopting such standards); P. HARTER, *REGULATORY USE OF STANDARDS: THE IMPLICATIONS FOR*

“Sequential” agency bargaining,<sup>317</sup> and bargaining with only a few parties in interest, are far more common.<sup>318</sup> Recent legislative and judicial measures to ensure equal access to agency policymaking processes—the Federal Advisory Committee Act,<sup>319</sup> for example, and judicial decisions imposing restraints on ex parte decisions<sup>320</sup>—may inhibit sequential or one-sided agency negotiations. But the question remains whether these constraints on agency action will actually encourage truly participatory negotiations.

A new process called “regulatory negotiation” might bring a measure of legitimacy to agency negotiation of rules, and even warrant a relaxation of equal access safeguards.<sup>321</sup> In regulatory negotiation, affected parties meet and attempt to draft a rule that will be offered to the

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STANDARDS WRITERS (1979) (Nat. Bur. Standards); ACUS Recommendation 78-4, 1 C.F.R. § 305.78-4 (1981) (addressing manner in which agencies should interact with nongovernmental organizations that develop voluntary consensus standards). A not particularly successful instance of adoption of some 1,100 private safety standards into federal rules occurred at OSHA soon after it was created. Anderson, *supra* note 1, at 841-42.

317. “One party talks to the agency and then another and then another and so on.” Harter, *supra* note 215, at 32.

318. See, e.g., Marketing Assistance Program, Inc. v. Bergland, 562 F.2d 1305 (D.C. Cir. 1977), in which the Department of Agriculture received a draft proposal from the dominant milk cooperative in the area. The Department conferred extensively with the cooperative to develop its suggestion into a rule, while other producers were only allowed to correspond and were not permitted to have their counterproposals discussed at the public hearing provided. The negotiating tactic was sustained. *Id.* at 1309.

319. 5 U.S.C. App. §§ 1-15 (1982) (FACA). The Act requires approval by the OMB and the agency head of charters for advisory committees, *Federal Register* notice of meetings, open meetings (except for good cause), and agency control over schedules and agendas. See Center for Auto Safety v. Cox, 580 F.2d 689, 694 (D.C. Cir. 1978) (a select group became a FACA advisory committee when an agency official obtained its views on a regulatory proposal). See also ACUS Recommendation 80-3, 1 C.F.R. § 305.80-3 (1981) (regarding interpretation of FACA); Cardozo, *The Federal Advisory Committee Act in Operation*, 33 AD. L. REV. 1 (1981).

320. National Small Shipments Traffic Conference, Inc. v. ICC, 590 F.2d 345, 350-51 (D.C. Cir. 1978) (calling for review of use of ex parte contacts by the ICC); United States Lines, Inc. v. FMC, 584 F.2d 519, 537-43 (D.C. Cir. 1978); Home Box Office, Inc. v. FCC, 567 F.2d 9, 51-59 (D.C. Cir.) (reliance on non-public ex parte communications in framing regulations reduces public discussions to a “sham”), *cert. denied*, 434 U.S. 829 (1977). But see Hercules, Inc. v. EPA, 598 F.2d 91, 123-28 (D.C. Cir. 1978) (contacts between agency rulemaking staff and judicial officer held not improper); Action for Children’s Television v. FCC, 564 F.2d 458, 468-78 (D.C. Cir. 1977) (informal rulemaking proceeding did not deny meaningful public participation).

321. Philip Harter’s definitive study, *supra* note 215, has become the standard work, but see also the pre-1982 studies and articles cited by him in Harter, *Negotiating Regulations: A Cure for the Malaise*, 3 ENV’T IMPACT ASSESSMENT REV. 75, 80 (1982). Regulatory negotiation is a fledgling policymaking process, the future of which is still uncertain, as the text will develop. The success or failure of regulatory negotiation bears upon CERCLA remedial action, but only in terms of the receptivity of EPA and participants to new negotiation techniques in general. Regulatory negotiation and site cleanup negotiation are otherwise quite distinct: the former involves prospective policymaking, the latter individual informal adjudications. The former invokes a national perspective and involves groups nationwide; the latter is focused on concrete local conditions. The former requires legitimation as a law-making function, the latter only as a law-applying function.

agency as a formal proposal for subsequent notice-and-comment rulemaking. A neutral convener ordinarily seeks to identify the affected interests and the issues that need to be addressed. The conditions and procedures that enhance the likelihood of success of any negotiation apply in the field of regulatory negotiation.<sup>322</sup>

2. *Policy Case Settlement: Negotiation to Modify Agency Policy After It Has Been Set.* If, after an agency adopts a policy, affected interests file a lawsuit challenging that policy, both sides may be willing to bargain away some of their putative rights in order to reduce the uncertainty and delay involved in litigation. Particularly in complex technical or managerial disputes, both sides may conclude that a negotiated solution is preferable to surrendering control over the outcome to a relatively inexperienced judge. In fact, the agency may actually prefer settlement negotiations to the proceedings required by the Administrative Procedure Act or a specific governing statute: the issues are narrower, only a limited number of interests need be accommodated, *ex parte* restrictions and other procedural protections do not apply, and the negotiations may be conducted in secret. The agency may even be tempted to conduct the initial rulemaking in a *pro forma* manner, husbanding its energy for the ensuing settlement negotiations where it can engage in give and take with only a few of the most concerned and sophisticated parties in interest.

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322. Proponents are beginning to address the array of special issues, first canvassed by Harter, that are associated with regulatory negotiation. See, e.g., Gusman, *Selecting Participants for a Regulatory Negotiation*, 4 ENV'T IMPACT ASSESSMENT REV. 495 (1983).

EPA has selected Clean Air Act vehicle non-compliance penalty rulemaking as suitable for regulatory negotiation. 49 Fed. Reg. 17,576 (Apr. 24, 1984). The agency reviewed dozens of candidates. *Inside EPA*, Mar. 16, 1984, pp. 7-8. The first two candidates, selected after an arduous canvass, were low-level radioactive waste regulations and Toxic Substance Control Act § 6 regulation of the workplace chemical toluenedianiline (TDA), an intermediate used in manufacturing plastics. Radioactive waste seemed too controversial, TDA so noncontroversial that it failed to attract the interest of key groups.

A negotiated Federal Aviation Administration (FAA) rule would have set revised flight duty and rest period requirements for aircraft crews. 48 Fed. Reg. 21,339 (1983) (proposed May 12, 1983) (establishment of advisory committee to develop a rulemaking proposal concerning flight time, duty time, and rest time). See Leinpert, *Participants See Value in Reg-Neg's First Flight*, *Legal Times of Wash.*, Oct. 10, 1983, at 2 col. 1. Negotiations failed, but the FAA built upon the group's weak consensus to fashion its own proposed rule. Harter, *Regulatory Negotiation: The Experience Thus Far*, RESOLVE, Winter, 1984 at 1, 5-6.

The Occupational Safety and Health Administration (OSHA) sought a negotiated revision of the workplace exposure standard for benzene. Union and Industry: Still Stalking a Benzene Rule, *CHEMICAL WEEK*, Jan. 11, 1984, at 35. A 1978 revision, adopted after a particularly bitter rulemaking proceeding, had been invalidated by the Supreme Court. *Industrial Union Dept., AFI-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980). In early 1984, after several meetings, the effort fell apart. Panel presentation by Christopher Kirtz, Director, EPA Regulatory Negotiation Project at ALI-ABA Conference on Environmental Law, co-sponsored by the ALI-ABA Committee on Continuing Professional Education, the Environmental Law Institute, and the Smithsonian Institute, Washington, D.C. Feb, 25, 1984.

From the point of view of the affected parties, informal negotiation may allow them to bargain with agency officials more nearly as equals, not only over the content of specific rules, but over broader issues of policy and program management as well.

One illustration of these dynamics will suffice here, although many others are available.<sup>323</sup> The 1972 Federal Water Pollution Control Act

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323. Three additional examples from EPA's experience are given here. Harter, *supra* note 215, at 36-37 nn.196-97, provides still others.

(1) Test rules for chloromethane and chlorinated benzenes were proposed in mid-1980 after *Natural Resources Defense Council v. Costle*, 10 ENVTL. L. REP. (ENVTL. L. INST.) 20,274 (S.D.N.Y. 1980), in which EPA was ordered to initiate rules for the first 18 chemicals that a statutory "Interagency Testing Committee" placed on a priority list. EPA had attempted to remove the 18 chemicals from the priority designation. In defending its failure to act, EPA pleaded manpower and financial difficulties. Subsequent negotiations enabled NRDC to participate in TSCA policymaking by negotiating with EPA the schedule for compliance with the court's mandate.

(2) In late 1982 the Environmental Defense Fund brought suit to compel EPA to establish the Agency for Toxic Substances and Disease Registry (ATSDR) required by § 104(i) of CERCLA, 42 U.S.C. § 9604(i) (Supp. IV 1980). EPA had refused to establish ATSDR because of funding limitations. The Chemical Manufacturers Association intervened as plaintiffs in the suit in order to be involved in settlement negotiations. Stoll, *The 104(i) Litigation and the Chemical Industry's Concerns About Recent Compensation Proposals*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,119 (1984). The federal government subsequently agreed to establish ATSDR within the Center for Disease Control. Marzulla, *The Government Response to the Environmental Defense Fund/Chemical Manufacturers Association § 104(i) Litigation*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,120 (1984). Further negotiations to settle the rest of the suit continue. Stoll, *supra*, at 10,119.

(3) An EPA management initiative spanning several regulatory programs was put in a type of judicially-supervised settlement "receivership" when a phalanx of industrial and citizen group plaintiffs challenged certain agency consolidated permit regulations. When EPA promulgated final rules consolidating its permitting procedures under the Safe Drinking Water Act, minor provisions of the Clean Air Act (PSD), the Clean Water Act and the Resource Conservation and Recovery Act, 45 Fed. Reg. 33,290 (May 19, 1980), a number of industrial and environmental plaintiffs brought suits in different circuit courts. After a long procedural battle, the actions were consolidated for briefing and argument in the District of Columbia Circuit. The Parties—trade associations representing the chemical, oil, paper, auto and iron and steel industries, public utilities, and citizens groups—began to negotiate toward a settlement. The negotiation process with respect to its Underground Injection Control program aspects is detailed in Walpole, *Settlement in Regulatory Litigation: The UIC Example*, 15 NATURAL RESOURCES LAW NEWSLETTER 1 (Winter, 1983). The court did not actively promote settlement, although it did quickly agree to motions to consolidate issues and defer briefing. The Chief Staff Counsel for the D.C. Circuit, however, did play a relatively active role in facilitating negotiations. Interview with Alan Eckert, EPA Senior Litigation Counsel (May 15, 1984). From the challengers viewpoint, a long list of hypothetical possible problems motivated the suit, which contained 54 NPDES issues, 93 underground waste injection issues, and several dozen RCRA issues. Interview with Turner Smith, Esq. (May 13, 1984). For many of these potential problems, the risk of running afoul of the Agency was not great, but clarification had to be sought before the statutory period for direct substantive challenges to the rules expired. Negotiation was better suited to this clarifying process than litigation. Further, one could never be sure of the outcome of litigation, the Agency enjoyed a presumption of regularity and a deferential standard of review, and the decision would be binding. *Id.*

Government and private lawyers expressed slightly different views about why the earlier notice-and-comment process had failed to provide adequate issue resolution. For the government, litigation imposed a discipline on the process, narrowed issues, reduced the number of interests, and "like hanging, concentrated the mind wonderfully." Eckert interview, *supra*. For industry, some felt that

Amendments<sup>324</sup> included stringent health-based standards for toxic effluents. When the EPA fell behind in implementing the standards, environmental groups sued, but soon negotiated an agreement with the Agency that required it to promulgate technology-based rules governing the discharge of sixty-five specified pollutants by twenty-one industries and mandating the use of certain scientific methodologies and decisionmaking criteria in determining whether additional controls and new pollutants should be included in the regulatory scheme. A consent decree approved the agreement. In denying motions by the industries to intervene, the court directed their legal challenges to the forthcoming formal rulemaking process.<sup>325</sup> When the EPA again fell behind in its implementation of the 1972 legislation, the environmental plaintiffs moved to enforce the consent order. The industries intervened, only to find that the EPA and the environmental plaintiffs had again negotiated their differences. The EPA had agreed to provide the plaintiffs with detailed progress reports in return for more time and flexibility in implementing the decree.<sup>326</sup> In continuing litigation, the intervenors stiffened their opposition to EPA policymaking by negotiated settlement. But the Court of Appeals for the District of Columbia Circuit held that the district court was not barred from enforcing the terms of the decree that went beyond the scope of the 1972 Amendments, and that EPA discretion to manage toxic effluent regulation in the manner it thought best was not impermissibly constrained by the decree. The court remarked that it would be

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the lack of an opportunity for exchange of views past one set of comments and one agency response left too many questions about the scope of the agency program unsettled. Also, the Agency did not interpret the law as desired, some new concerns appeared for the first time with the final rules, and the public hearing was too brief and unfocused, with no give-and-take. Smith interview, *supra*.

Interestingly, the parties agreed that some 17 issues were not yet ripe for review. Thus EPA was able to postpone further refinement of difficult policy issues, while the remaining parties succeeded in creating a subsequent right of appeal that otherwise would lapse by operation of statute. Together the agency and challengers effectively "contracted" and obtained judicial approval of a rulemaking process different from that contemplated by the relevant legislation. In a sense, the negotiating parties have institutionalized themselves as an *ad hoc* public and private program policy group for the consolidated permit program. The type of "relief" private parties obtained in the settlement dramatically illustrates the point: explanatory language in the regulatory preamble; guidance documents distributed to regional personnel; exchanges of correspondence; and Regulatory Interpretation Memoranda, as well as substantial changes in the repropounded rules. See Walpole, *supra*, at 6-9.

324. 33 U.S.C. § 1317 (1982). See generally Hall, *The Control of Toxic Pollutants Under the Federal Water Pollution Control Act Amendments of 1972*, 63 IOWA L. REV. 609 (1978).

325. *Natural Resources Defense Council v. Train*, 6 ENVTL. L. REP. (ENVTL. L. INST.) 20,588 (D.D.C. 1976). Industrial dischargers successfully intervened a year later. *Natural Resources Defense Council v. Costle*, 7 ENVTL. L. REP. (ENVTL. L. INST.) 20,547 (D.C. Cir. 1977).

326. *Natural Resources Defense Council v. Costle*, 9 ENVTL. L. REP. (ENVTL. L. INST.) 20,176 (D.D.C. 1979), *aff'd sub nom. Environmental Defense Fund v. Costle*, 636 F.2d 1229 (D.C. Cir. 1980) (Congress did not intend to supersede the original decree, and its terms were not rules requiring APA notice-and-comment rulemaking).

unfortunate if a lack of judicial restraint stifled the evolution of less adversarial approaches to the development of regulations.<sup>327</sup>

This type of policy-oriented settlement negotiation may occur after a court ruling as well as before.<sup>328</sup> Sensing its inability to fashion complex prospective relief, a court may ask the parties to negotiate an order.<sup>329</sup> An order that approximates as nearly as possible a consensus solution between a specialized agency and the affected interests will be both less likely to require judicial oversight and more likely to be accepted as politically "legitimate" in an era of administrative governance by accommodation of interests.<sup>330</sup>

Both pretrial settlement of disputes over how regulatory programs are implemented and the consensual fashioning of court-ordered relief are apparently increasing in number and importance, and both depend crucially upon negotiation.<sup>331</sup> What is not clear is how beneficial this development is. On one hand, although such proceedings have been criticized for causing inefficiency and overjudicialization of the administrative process, settlements and consent decrees may be more socially beneficial than is generally thought.<sup>332</sup> On the other hand, case settlement and consent decrees may confer a form of insider status on the participants that undercuts the model of open administrative policymaking that has evolved in recent years. Others interested in the policy decisions restructured by settlement may have great difficulty monitoring an agency's revised program and influencing the development of that program. And Congress may not be able to play its traditional legislative and oversight roles when de facto control over substantive agency action is to any significant extent assumed by private parties making skillful use of the courts.

3. *Enforcement Case Settlement: Negotiation With Respect to Informal Agency Action.* The traditional factors considered by the sanctioning

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327. *Citizens For a Better Environment v. Gorsuch*, 718 F.2d 1117, 1127 n.11 (D.C. Cir. 1983).

328. Chayes, *supra* note 240.

329. A recent example is *The Gray Panthers v. Schweiker*, 716 F.2d 23 (D.C. Cir. 1983) (district court sought the redrafting, by the Department of Health and Human Resources and the plaintiffs, through negotiations of an inadequate notice form for medicare beneficiaries in what the appeals court called a classic public law litigation case, i.e., one "designed to affect public policies and procedures on a nationwide basis").

330. Stewart, *supra* note 240.

331. Chayes, *supra* note 240, at 1299. Harter, *supra* note 215, lists some examples at 36-37. *Cf.* Note, *Implementation Problems in Institutional Reform Legislation*, 91 HARV. L. REV. 428, 445-53 (1977) (discussing the role of the judiciary in the monitoring of negotiations and the subsequent enforcement of a settlement in the context of mental health litigation); Note, *Judicial Control of Systemic Inadequacies in Federal Administrative Enforcement*, 88 YALE L.J. 407 (1978); Morgan, *Towards a Revised Strategy for Ratemaking*, 1978 U. ILL. L.F. 21, 69-76 (urging that agencies empowered to establish rates increase settlement of rate cases to speed the ratemaking process).

332. Chayes, *supra* note 240, at 1303-09, 1313-16.

agency in the exercise of its enforcement discretion could not be meaningfully applied without a significant amount of negotiation.<sup>333</sup> Plea bargaining is the easy instance, but CERCLA remedial agreements and consent decrees also illustrate this point.<sup>334</sup> Negotiated cleanup orders, consent decrees, and negotiated compliance schedules are the means by which flexibility is introduced into command-and-control legislation. Negotiated compliance may also be the device by which Superfund staff maintain control that otherwise would have to be shared with CERCLA enforcement personnel or surrendered to the Justice Department. The enforcement of environmental standards has traditionally been subject to bargaining between agency program officials and those allegedly responsible for pollution. Both sides strive to maintain amicable longterm relationships.<sup>335</sup> Thus, the EPA has more experience with negotiated solutions to source-specific pollution disputes than is commonly acknowledged. In particular, it has made frequent use of negotiation in the context of informal adjudication,<sup>336</sup> the common category of administra-

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333. The APA also expressly contemplates negotiated case settlement in formal proceedings. 5 U.S.C. § 554(c) (1982) (requiring that "interested parties" be granted an opportunity to negotiate towards a settlement).

334. See *supra* text accompanying notes 69-75.

335. See W. HINES, PUBLIC REGULATION OF WATER QUALITY IN THE UNITED STATES 5806-09 (1971) (National Water Commission) ("Public regulation is largely a bargaining process in which considerable freedom of action on the part of the regulating agency is required to obtain desired compliance. To restrict discretion in the pursuit of conciliatory settlements . . . could lead to a reduction in pollution control efficiency."), quoted in ENVIRONMENTAL LAW INSTITUTE, ENFORCEMENT OF FEDERAL AND STATE WATER POLLUTION CONTROLS 27-39 (1975) (National Commission on Water Quality).

The bargaining model was partially eclipsed in the 1970's when Congress restricted agency enforcement discretion. The legislative evolution of the detailed enforcement provisions of the Clean Air Act provides an intriguing case study of the interplay of agency, state, congressional, and judicial roles in selecting an appropriate enforcement strategy for a complex modern welfare statute. Clean Air Act § 113 channels and restricts enforcement discretion to a far greater extent than the traditional model of unreviewable agency discretion would suggest. See generally F. ANDERSON, D. MANDELKER, & A. TARLOCK, *supra* note 150, at 313-26 (1984). But in Europe, the bargaining model still prevails. See S. KELMAN, REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY (1981).

336. For example, EPA has negotiated outcomes in disputes involving pulp-and-paper mill conversion to low sulfur fuel, chemical plant compliance with wastewater treatment standards, power plant air quality impacts on pristine air quality in Montana, and wastewater treatment construction grants for Jackson, Wyoming, and Denver, Colorado. RESOLVING ENVIRONMENTAL REGULATORY DISPUTES 2 (L. Susskind, L. Bacow, & M. Wheeler eds. 1983). These case studies were culled from a candidate list of 70 disputes in which EPA appeared to rely significantly on negotiation to achieve its objectives. *Id.*

Perhaps the best-known EPA example involved its attempt to negotiate chemical testing agreements under TSCA, Notice, 46 Fed. Reg. 53,775 (1981) (explaining the EPA's decision not to proceed with the development of test rules on the health effects of alkylphthalates or butyl-benzylphthalate pending review of public comment); Notice, 47 Fed. Reg. 335 (1982) (confirming the EPA's decision not to develop test rules). For detailed discussion of the program, see EPA Office of Toxic Substances, *Guide to the TSCA Section 4 Process* (Apr. 1984). Despite praise, GENERAL AC-



tive action that most accurately describes waste site cleanup decisionmaking.

#### IV. A PRESCRIPTION FOR CHANGE: NEGOTIATED CLEANUPS UNDER CERCLA

The preceding suggests that negotiation could be used to improve the efficacy, lower the cost, and accelerate the cleanup rate of the Superfund program. This section draws upon recent developments in the field of alternative dispute resolution to fashion a negotiation process that capitalizes upon the desire of a wide variety of stakeholders to participate, satisfies the EPA that it should further encourage negotiation, and reassures congressional committees that negotiated cleanups protect the public interest.

The process described is premised on negotiation before a lawsuit is filed. While settlement of a lawsuit may be successfully negotiated using the principles developed here, negotiation in the shadow of the courthouse is not likely to achieve as much as negotiation before judicial sanctions are invoked. The settlement of a lawsuit is in a sense a less principled negotiation: the public is excluded. Guidelines are sparse. The EPA's substantive guidance on cleanups does not necessarily apply to the terms on which a lawsuit is settled. Thus, for example, although responsible parties are typically given a sixty-day notice period during which they can negotiate a cleanup agreement with EPA,<sup>337</sup> after imminent hazard or cost recoupment actions have been brought, comparably strict negotiation deadlines do not apply, and such deadlines are usually crucial to the success of a negotiation process.

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COUNTING OFFICE, EPA IMPLEMENTATION OF SELECTED ASPECTS OF THE TOXIC SUBSTANCES CONTROL ACT (1982) a court has invalidated the negotiated testing program. *Natural Resource Defense Council v. EPA*, 21 ENV'T REP. CAS. (BNA) 1625, 1629-30 (Aug. 23, 1984). Congresswoman James Florio (D-N.J.) introduced legislation to permit negotiated testing in 1983. H.R. 4304, 98th Cong., 1st Sess. § 3 (1983).

Finally, TSCA § 5(e) empowers EPA to issue orders requiring that the manufacture, processing, other use, or disposal of chemicals subject to pre-manufacturing notice (PMN) be limited or restricted in the event they may present an unreasonable risk to health or the environment. "Consent § 5(e) orders" are informally negotiated between the manufacturer and the agency. They are attractive to EPA, because they allow it to impose use, packaging, and handling restrictions in lieu of testing which is administratively more difficult to obtain. The orders enable EPA to monitor and enforce the restrictions the PMN preparer usually intended to observe in any event. Some testing had been built into a few recent consent orders. Between 30 and 40 consent § 5(e) orders are negotiated annually. Interview with Ruth Bell, EPA Associate General Counsel (May 15, 1984); *see also* EPA OFFICE OF TOXIC SUBSTANCES, 5 TSCA CHEMICALS-IN-PROGRESS BULL. 5-6 (May 1984).

337. *See supra* note 70.

A. *The Catalyst for Cleanup: The Convening and Mediating of Negotiations.*

A mere relaxation of EPA's current negotiation policy probably would suffice to stimulate a larger number of productive negotiations. No catalyst may be needed for some situations. The EPA and the parties will work things out as they have before, through the RI/FS process and meetings called by the EPA with waste site users, without need for special assistance. But to encourage negotiated cleanups at additional sites, the services of conveners and mediators may be needed. Initiating a negotiation and actually carrying it out are very different processes that must be analyzed separately; however, as explained below, the convening and mediating functions are usually combined in practice.

Appropriate conveners and mediators can be selected from among the responsible parties themselves, independent specialists paid for by the parties, the EPA itself, independent specialists paid for by EPA, other federal agencies, or state or local governments. But not all of these possibilities would be equally efficacious. Site users are neither suitable nor likely to play a wider direct role in stimulating negotiations. Few are likely to seek the role, in part because an interest in negotiation on their part may be taken as a sign of weakness. Even if they do make the effort, other parties who will end up as principals in the negotiating sessions are not likely to be forthcoming when solicited by a potential adversary. This situation frustrates some large companies with wastes at a number of sites that believe negotiation is the preferable alternative at most sites for virtually all interests but have felt that the EPA has resisted overtures by private parties in order to exact unacceptable preconditions to bargaining talks.

Faced with disincentives under present EPA policy, site users have adopted another strategy for negotiating cleanups: the use of an independent entity supported with private funds. An informal group composed of representatives from major waste generators, major environmental groups, and the Chemical Manufacturers Association has organized a new quasi-public entity to "coalesce" negotiating sessions at which responsible parties would apportion liability for a particular site among themselves.<sup>338</sup> Initial funding was provided by a number of cor-

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338. STEERING COMMITTEE ON HAZARDOUS WASTE CLEANUP, CLEAN SITES AND PRIVATE ACTION: A PLAN TO ACCELERATE PRIVATE HAZARDOUS WASTE CLEANUP (Conservation Foundation, May, 1984); see also *Industry Drafts Toxic Move*, N.Y. Times, Apr. 3, 1984, at 11, col. 1; Meier, *Plan to Fund Cleanup of Toxic Waste Sites is Being Developed by Chemical Industry*, Wall Street J., Feb. 22, 1984, at 7, col. 1; Fox, *Breaking the Regulatory Deadlock*, HARV. BUS. REV., at 97 (Sept.-Oct. 1981) (discussing the confrontational nature of regulatory procedures).

porations.<sup>339</sup> Clean Sites, Inc. (CSI) will not expand negotiations beyond site users; its efforts focus on obtaining agreement among the potentially responsible parties regarding the apportionment of costs and cleanup responsibilities.

In a sense, the EPA already convenes negotiations. Notice letters inform site users that they will have an opportunity to discuss privately-financed cleanup with agency personnel. When dealing with multi-user sites, the letters also encourage the formation of steering committees composed of representatives of responsible parties. After the RI/FS, the EPA informs parties that they have sixty days to complete negotiations in accordance with a schedule dictated by the Agency. Quite apart from the fact that these notice letters read more like ultimatums than invitations to negotiate, the EPA itself is not a suitable convener or mediator.<sup>340</sup> EPA will be a party to virtually all site cleanups. It will be the one to determine the standards that remedies must meet, to pay for a number of cleanups, and to ask that suit be brought for direct cleanup or reimbursement in the event negotiations fail. As so active a party, the EPA cannot expect that other principals will confide in it the type of information an effective convener or mediator needs. Moreover, a preliminary negotiating group convened by the EPA may appear to be selected to enhance the Agency's position when bargaining begins.<sup>341</sup>

The experience with regulatory negotiation suggests that placing even an "independent" site cleanup mediation office within EPA is inadvisable, just as drawing conveners from within the Agency would not be likely to produce the optimal number of site negotiations. Conceivably, an "impenetrable wall" could be erected between a new EPA mediation office and the CERCLA program and enforcement offices,<sup>342</sup> and tradi-

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339. STEERING COMMITTEE, *supra* note 338.

340. Persons interviewed early in the EPA regulatory negotiation process expressed their strongest agreement about the need for an outside mediator. L. SUSSKIND, D. FISH, & N. BALDWIN, *supra* note 292, at 18.

341. An Agency official who suggested that someone from the EPA Office of Standards and Regulations facilitate the Agency's first regulatory negotiation succeeded in provoking a major debate over whether selecting an inside facilitator would violate the principle of neutrality. He felt that the office was appropriate because it deals only neutrally with the regulatory process. It could assume the costs of facilitating the negotiation and soon would accumulate general expertise in conducting regulatory negotiations. EPA decided nevertheless to use an outside facilitator, apparently yielding to the argument that the still-experimental process might be damaged if perceived to be controlled by the Agency. *Id.* at 26-28.

342. The phrase "impenetrable wall" was used by a leading negotiation specialist in commenting on the development of an EPA regulatory negotiation process:

It is common wisdom that the mediator/facilitator of a dispute must be neutral. . . . Yet EPA is, as I understand it, expecting to play a significant role—perhaps the dominant role—in facilitating negotiations [as of 1982], and also expects to participate as one of the negotiators. The Agency's rationale appears to be that an EPA program office will negotiate the issues while the policy office will be involved in the facilitation. The Agency's

tional administrative law techniques could be used to police this separation of functions. But the successful adaptation of somewhat unwieldy formal safeguards to informal discretionary CERCLA decisionmaking seems unlikely. And, even if a formal separation of functions is achieved that satisfies the severest judicial or academic critics, the stakeholders in a site negotiation might still be reluctant to accept the negotiation proposals of an arm of the EPA.

Other affected interests, such as state and municipal governments and citizens' groups, that might initiate and mediate negotiations are vulnerable to some of the same criticisms as site users and the EPA. Moreover, local governments and citizens' groups typically lack significant resources, although if the circumstances are right convening a negotiation may be quite inexpensive. Towns and counties may have direct contact with the significant users, citizens, and governmental agencies involved with local waste sites and may be uniquely situated to accelerate cleanup beyond the contemplation of the EPA agenda. But without some minimum level of skills and resources, local government is not likely to be able to capitalize on its unique position.

Independent federal entities not directly involved in waste site cleanups could play a role. The Federal Mediation and Conciliation Service (FMCS) was created to provide mediation services in labor-management conflicts.<sup>343</sup> Its commissioners are stationed across the country, which would be an important factor in the event they served as conveners and mediators for site cleanups. However, the FMCS commissioners are usually selected from labor or management backgrounds. Environmental dispute resolution presents a quite different set of demands. The option of seeking legislation to expand the FMCS role to include CERCLA disputes should be explored, even if the FMCS does not at first glance appear to provide the specific convening or mediating skills that site cleanup requires.

There are other federal options. The Council on Environmental Quality and the Administrative Conference of the United States are more likely alternatives than the Office of Management and Budget. The former are more likely to welcome the role than the latter, which in any

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approach could conceivably work in the long run if EPA demonstrated that it had built an impenetrable wall between the program offices and the policy office, and that the Administrator and senior officials would neither hold the policy office responsible for the outcome of the negotiations nor try to influence the outcome through the policy office. The likelihood of this strains credibility, though it is not necessarily impossible.

Gusman, *Regulatory Negotiation*, paper presented at conference entitled *The Reagan/Gorsuch EPA—Its Impact on Industry*, sponsored by *Inside EPA Weekly Report* and the Center for Energy & Environmental Management, Wash., D.C. (Nov. 8, 1982), at 6-7.

343. See *supra* note 303.

event would encounter skepticism from some parties who view the OMB as an adversary in other contexts. But all three of these offices have roles that fully occupy their small staffs at the present time. Moreover, their staffs have no particular expertise in initiating cleanup negotiations so that skilled conveners and mediators would have to be hired. Carrying out these new functions would require additional funds—most likely a transfer of EPA funds.

Conveners and mediators must be paid. Locating financial support is problematic, because a stakeholder who is willing to pay may only succeed in creating the impression that the facilitator is somehow obligated to the stakeholder or, worse, has been “bought.” Some foundations support alternative dispute resolution centers,<sup>344</sup> but foundation priorities are focused on providing initial support for innovative programs. Foundations are not likely to subsidize waste cleanup dispute resolution, a long-term effort with limited opportunities for innovation after the first negotiated agreements set the pattern. Nevertheless, foundation-supported centers could play a useful initial role in demonstrating the viability of mediation in CERCLA cleanups. Apparently no foundation-supported group has thus far conducted a site cleanup negotiation.

To play a creative role in promoting negotiated cleanups, the EPA has not only to overcome the reluctance that it shares with other federal agencies to try contemporary negotiation techniques, but also to provide some impetus toward the initiation of each individual negotiation process.<sup>345</sup> This could be accomplished by contracting with skilled conveners—professional facilitators, attorneys experienced in negotiation, former public officials—to seek to bring the major interests at each site together to see if a negotiated agreement is possible. EPA financial support for an independent convener or mediator is less vulnerable to criticism than the provision of an EPA employee. Flexible cost-plus personal service contracts, perhaps using Fund resources, would permit the EPA to underwrite the initial phases of negotiation. It is extremely important that the independent contractor be accountable in the first instance to the site dispute stakeholders, not to the Agency, except for housekeeping matters such as verification of expenses.

Hazardous waste cleanup negotiation should not require skills radically different from those appropriate in other polycentric disputes where the facts and issues are uncertain and the stakes comparably high. Still, the experience with environmental mediation suggests a number of variants that may enhance the chances of success in site cleanup negotia-

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344. The Ford Foundation in particular became active in the mid-1970's. See *New Approaches to Conflict Resolution: A Ford Foundation Report 62-73* (1978) (explaining the Foundation's rationale).

345. See *supra* notes 296-98 and accompanying text.

tions.<sup>346</sup> While the primary emphasis should lie on mediation skills per se, it might prove useful if waste site mediators possessed relevant technical, political, and legal skills as well. Few individuals are so endowed; a team approach, however, might be tried. A number of environmental disputes and policy dialogues and a regulatory negotiation have been co-facilitated or co-mediated.<sup>347</sup>

In some environmental disputes, elected politicians provided the persuasion necessary to convene the stakeholders and keep them on track. Politicians are also useful in opening up the range of options, thereby converting dispute resolution into a plus-sum game. Such help may not be frequently needed, but the intervention of mayors, state legislators, and occasionally a representative or senator might prove extremely effective.<sup>348</sup>

Attorneys are skilled in directing parties toward a single-text negoti-

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346. See *supra* notes 240-48 and accompanying text.

347. E.g., Sam Gusman and Verne Huser co-mediated an agreement that identifies the particular kinds of port-related development that might be appropriate at specific sites in the Columbia River Estuary. Gusman & Huser, *Mediation in the Estuary*, 11 *COASTAL ZONE MGT. J.* 273 (1984). John Folk-Williams and Sam Gusman are co-facilitating a policy dialogue on coal development in the San Juan River Basin of New Mexico. Philip Harter and Gerald Cormick co-facilitated the regulatory negotiations over the OSHA benzene workplace exposure standard.

348. Congressmen and senators have been able to convene parties, act as go-betweens, and keep the parties at the table until an agreement is reached, using their positions in the manner that settlement-minded judges use theirs to pressure litigants into a solution. Governor Richard Lamm was instrumental in launching and mediating the Denver Water Roundtable. Kennedy & Lansford, *The Metropolitan Water Roundtable: Allocation Through Conflict Management*, 4 *ENVTL. IMPACT ASSESSMENT REV.* 67 (1983). Representatives Timothy Wirth (D-Colo.) and Patricia Schroeder (D-Colo.) worked successfully to convene the stakeholders in the Denver Foothills water treatment project dispute. Congressman Wirth attended meetings, including the first meeting which he chaired, and pushed the negotiations toward the final agreement. Susskind, *supra* note 247, at 33-35. Senator Frank Church (D-Idaho) helped mediate the Gospel-Hump Wilderness dispute by bringing together environmentalists, timber interests, and economic stakeholders. *Id.* at 44 n.127.

In early 1970, the author was involved as an attorney for the West Virginia Highlands Conservancy in a similar dispute in which Senator Jennings Randolph convened timber, coal mining, and environmental interests, three local mayors, several members of the state legislature, and officials of the U.S. Forest Service at Blackwater Falls Lodge near Davis, West Virginia, to discuss the future of Otter Creek, a nearby area proposed for logging by the Forest Service, coal mining by the Island Creek Coal Company which owned the mineral rights, and wilderness protection by the Conservancy. The Conservancy had obtained an injunction against prospecting at 25 test holes to be drilled by bringing equipment in by truck on roads cut by a bulldozer. Congress would not put the area in the National Wilderness Preservation System until the depth and value of the coal seams had been ascertained, and the private mineral rights would not be extinguished in any event. At the meeting, the Participants discussed helocoptering the equipment in, an alternative which the Senator, who did not chair the meeting, promoted informally as he circulated at the gathering. Subsequently, as the search for a creative solution continued under Senator Randolph's prodding, a local farmer came forward to propose using his horses to bring the equipment in over existing trails to a reduced number of test sites, at a fraction of the original estimated cost. This plan was accepted, the coal proved too deep to mine economically, and Congress placed Otter Creek in the Wilderness System.

ating document and formulating specific enforceable agreements.<sup>349</sup> Sometimes useful expertise is possessed by activists, persons who are experienced in the subject matter of a negotiation and who typically have strong personal views on a dispute and how it should be resolved. Surprisingly, some activists have been successful in obtaining acceptance as mediators and in working toward the results that they advocate.<sup>350</sup>

Finding a sufficient number of talented convenors and mediators with the specific qualifications necessary to deal with waste site cleanup disputes poses a serious but not insurmountable problem. First, facilitators are available who have directly relevant experience: those who have conducted negotiations in rather complex environmental disputes with numerous stakeholders.<sup>351</sup> A handful of persons led these negotiations, and while not all of them began as experienced mediators, they now constitute an experienced handful—some three dozen individuals.<sup>352</sup> Second, a group of attorneys now exists that has participated in site cleanup negotiations, usually on behalf of site users. Some of them may no longer have site users as clients and therefore might be employed as mediators. Despite the view that attorneys are conflict-promoters, some who have participated in environmental negotiations have received praise for playing constructive roles.<sup>353</sup> Indeed, attorneys skilled at dispute resolution might be attractive as mediators despite their lack of direct environmental experience. Third, mediation skills have been developed by a variety of individuals in recent polycentric disputes or conflicts of non-environmental origin. Their skills, often based on the latest negotiation techniques, should be readily transferable to the environmental arena. Fourth, some 300 of the 50,000 panelists of the American Arbitration Association (AAA) reportedly have had experience with environmental disputes;<sup>354</sup> other AAA members without environmental experience nevertheless have mediation skills that might be applied to the waste site problem. Finally, the Federal Mediation and Conciliation Ser-

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349. For example, attorneys played this constructive role in the successfully-mediated Fredericksburg annexation dispute, see Richman, *supra* note 250, at 62.

350. See Susskind, *supra* note 247, at 39-40. Congressman Wirth mediated the Foothills water project dispute despite his public stance in favor of the project. *Id.* at 33. Verne Huser of Seattle's Mediation Institute served successfully as mediator of a dispute over recreational boat use permits despite his considerable expertise and strong views as a former river runner. Huser interview (Feb. 10, 1984).

351. G. BINGHAM, *supra* note 247, and Bingham interview (May 16, 1984). See also Susskind, *supra* note 247, at 2, n.6, 18, n.50, 41, n.123 (noting documented successful environmental mediation efforts).

352. New environmental mediation organizations are periodically listed in a special alternative dispute resolution section of the quarterly ENVIRONMENTAL IMPACT ASSESSMENT REV.

353. A. TALBOT, *supra* note 238, at 97.

354. Susskind, *supra* note 247, at 4 n.9.

vice has not been adequately explored as a source of waste site dispute mediators.

### B. *Setting the Negotiation Process in Motion.*

Once the services of a qualified convener and mediator have been secured, work may begin. Negotiation has two particularly critical phases: obtaining the initial agreement of the parties to try to negotiate a solution, and then, once the parties are assembled, deflecting them from an adversarial contest into joint problem-solving.<sup>355</sup> To agree to negotiate, parties must already have made a preliminary assessment of their willingness to negotiate and the probability of success of the negotiation.

In some situations initiation is easy. The parties communicate willingly and informally and agree to meet. Thus, established bargaining relationships, as in the labor relations field, or prior business relationships and a shared professional viewpoint, as found in the interfirm disputes negotiated through mini-trials,<sup>356</sup> may postpone the need for intermediaries until an impasse is reached. Some CERCLA cleanups fit this model. The EPA and certain large interstate responsible parties have already met several times to negotiate about certain sites. In such circumstances a convener may be unnecessary and might actually complicate things unnecessarily. If federal and state governments have filed a lawsuit, no convener is needed. A mediated case settlement, however, is still possible. Judges may play the key role in initiating mediated settlement negotiations. Courts encourage and facilitate settlement by a variety of means,<sup>357</sup> and a large number of CERCLA cases have been settled.<sup>358</sup> Some proponents of negotiation would welcome greater judicial involvement in promoting negotiated solutions to environmental disputes.<sup>359</sup> Rule 16 of the Federal Rules of Civil Procedure was recently amended to encourage pre-trial settlement; the Rule seems to allow a

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355. See *supra* notes 249-56 and accompanying text.

356. See *supra* notes 308-09 and accompanying text.

357. Judge Robert E. Keeton of the District Court for the District of Massachusetts encourages early settlement by giving parties a Memorandum and Draft Settlement Procedures Agreement and Order (Revised Jan. 14, 1980). See generally Craig & Christenson, *The Settlement Process*, in REPORTS OF THE CONFERENCE FOR DISTRICT COURT JUDGES, 59 F.R.D. 252, 252-57 (1973) (report on a seminar discussing the most recent thinking and experience in the process of settling litigation prior to trial). Settlement approvals may be reviewed for abuse of discretion. See, e.g., *Patterson v. Newspaper & Mail Deliverers Union*, 514 F.2d 767 (2d Cir. 1975). Administrative law judges have been encouraged to promote settlements, some agencies have adopted settlement procedures, and settlement appears to be well-regarded among ALJ's. M. RUHLEN, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* 11-13 (rev. ed. 1982).

358. For discussion see *supra* notes 63-75.

359. E.g., Susskind & Weinstein, *supra* note 133, at 349.



court to appoint a mediator.<sup>360</sup> Courts have exercised their power to appoint third parties to assist in reaching a settlement, assigning the attendant costs to the litigants.<sup>361</sup> Other proposals also have been made to encourage settlement.<sup>362</sup>

But in some non-CERCLA environmental disputes where negotiation did eventually succeed, initiation of the process was the critical step.<sup>363</sup> Such disputes usually have involved a large number of parties who have not worked together or resolved disputes before and who probably disagree significantly as to the facts, law, and perhaps principles. Although site disputes involve a more focused set of issues and fewer policy disagreements than many of the environmental disputes already successfully resolved through negotiation, there is enough similarity to provide a lesson for the future. The optimal number of site cleanup negotiations is not likely to be achieved without careful attention to attracting the parties to the table for the first time.

A skillful convener can substantially increase the likelihood of a negotiated solution to site cleanup. Parties—including government agencies—may have to be shown why it is in their interest to negotiate. A convener could inquire quietly and informally to see whether there is interest in a negotiated solution, who the parties are, and whether enough common ground exists for an eventual agreement. In seeking to define the issues and identify a viable negotiating group, the convener might have to call or visit more than once with site users, government officials, and citizens. A convener would have to make it clear that his sole mission is to explore the possibility of convening a first bargaining session, and that all preliminary communications would remain confidential. After such intervention, the parties could then decide for themselves whether to continue.

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360. Amendments to the Federal Rules of Civil Procedure, 103 S. Ct. No. 16 at 5 (Apr. 28, 1983) (Advisory Committee Note to Rule 16). This language, while not explicitly offering third-party assistance, does endorse broad court discretion to further settlement through all appropriate means.

361. See *In re* FTC Line of Business Reporting Litigation, 626 F.2d 1022, 1027 (D.C. Cir. 1980); cf. *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (referring to "the power inherent in every court to control the . . . causes on its docket with economy of time and effort"). See also FED. R. CIV. P. 83 (liaison counsel).

362. A proposed change in Rule 68, FED. R. CIV. P., would provide that if a plaintiff or defendant makes an offer that is not accepted and if the offeree loses or receives a judgment that is less favorable than the settlement offered, then "the offeree must pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the making of the offer . . . [plus interest]." See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 339, 361-67 (1983).

363. See *supra* note 351.

Conveners will inevitably encounter resistance to negotiation with respect to some sites. Discussing the likely impact of the EPA proceeding to use the Fund or to enforce cleanup under section 106 may convince recalcitrant parties at least to try negotiation. Not every holdout will be important enough to merit abandoning the attempt to convene a negotiating group. The holdout may later change its mind, or it may be adequately represented by interests that have already indicated their willingness to negotiate. Embarrassing the recalcitrants into bargaining may be counterproductive, because they may then bargain in bad faith, manipulating the sessions to accomplish some ulterior purpose or merely to create delays. Bargaining with resistant parties should not be attempted unless they can be coaxed to the table believing that their self-interest requires them to bargain in good faith.<sup>364</sup>

The convener may discover that limited-purpose agreements are necessary in order to induce or continue negotiations.<sup>365</sup> This is a permissible procedure, but only if used in moderation, because it risks becoming a technique that would enable parties to shoehorn in "non-negotiable demands" that should properly be the subject of later negotiations. Still, potentially responsible site users might be willing to agree, at the start, that *if* a final document is signed, it will contain contingent liability provisions—including perhaps insurance contracts or escrowed funds—adequate to cover specified categories of currently unidentified groundwater contamination problems. Or the EPA might agree that *if* an agreement is reached, it will first seek any reimbursement for cleanup tasks outside the agreement from the non-negotiating site users and support with legal and technical assistance the defenses of any settling parties who are later subject to contribution claims from the non-negotiators. Similar preliminary agreements might govern the subsequent use of information disclosed during negotiations, regardless of whether negotiations succeed or fail. Similarly, site users might provide assurances to citizens living near the site that *if* they negotiate and an agreement is reached, at a minimum the users will provide temporary relocation assistance, a property buy-out, specified medical tests, or other specific damage mitigation or injury avoidance measures triggered by the occurrence of particular contingencies, such as groundwater contamina-

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364. See *supra* note 267 and accompanying text.

365. When Bloomingdales' parent company proposed constructing a shopping area, the White Flint Mall, in suburban Montgomery County, Maryland near Washington, D.C., it agreed to construct a protective berm to shield the surrounding residential neighborhood and to indemnify certain local homeowners in the event their property values dropped. These agreements allowed negotiations with local residents to continue over the design of the mall, and the proposal eventually went unopposed by local citizens. M. RIVKIN, NEGOTIATED DEVELOPMENT: A BREAKTHROUGH IN ENVIRONMENTAL CONTROVERSIES 7-14 (1977).

tion, off-site seepage, or air emissions at specified levels. Thus the risk that government funds might be unavailable or slow in coming can be anticipated by a side agreement with private corporations. Potential victims of hazardous waste enter the negotiations assured of a "floor" below which their future safety will not fall.

The convener must lay a careful foundation with the parties in order to establish his objectivity. He would have to explain that a convener owes professional allegiance to a process, not to the government or any other party, and that a convener's skill is measured by how well judgment has been exercised in identifying relevant parties, setting forth issues, and convincing the parties to meet to discuss the issues. The convener's independence is indispensable.

Assuming a skilled, disinterested convener can be located and funded, at what point should he begin to make inquiries? Much could be gained by encouraging negotiated cleanups in advance of the rather extended EPA schedule: public health risks would be reduced; public fears assuaged; program entanglements avoided; Fund resources conserved; and commitments secured while private funds are available and before tensions rise. NPL sites not slated for Fund-financed RI/FS in the immediate future and sites not yet on the NPL may already be ripe for negotiated cleanups. But the EPA has made it clear that it does not want even to consider private cleanup initiatives at these sites—and there are scores of them—until it has Fund reserves and staff resources adequate to do the job itself. This approach does not make optimal use of the total pool of public and private resources available to achieve CERCLA's ultimate objective of eliminating the inactive and abandoned waste dump problem. Risk priority is not likely to correlate highly with the myriad of additional factors that contribute to the ripeness of a site for cleanup—party solvency, state resources, neighborhood cooperation, available leadership, corporate goodwill, removed-waste disposal capacity, and the like.

There are obvious advantages to cleaning up NPL sites in rank order of risk, but the cleanup expenses and transaction costs associated with this strategy are also high. Diverting some attention to sites of lower priority is a less defensible policy, but if negotiation produces reasonably prompt agreements, cleanup expenses and transactions costs are likely to be markedly lower as well. This suggests a change in the EPA approach to negotiation in order to make optimal use of all the resources available for cleanup: employ a portion of Superfund revenues and staff time in trying to bring about some "unscheduled" negotiated cleanups, but only if the net effect of these "unscheduled" cleanups will advance CERCLA objectives to a greater extent than a continued exclusive focus

on the NPL sites. The first step toward implementing this new policy is an affirmative effort to locate likely "unscheduled" sites by putting skilled conveners in the field.

A commitment to support conveners and to engage in negotiations could not be criticized as a renewal of the discredited negotiation policy. An approach to cleanups based on a realistic evaluation of the negotiation opportunities available would allow more sites to be cleaned up with the same investment of agency resources. Negotiations that are likely to bog down or are not likely to produce large net gains need not be pursued. When negotiation begins but proves counterproductive, Agency personnel would withdraw and invest their energies at sites where more progress can be made.

C. *Who Presides? The Use of Mediated Negotiation.*

The convener's role is to try to get the relevant interests together for a first meeting. A small group of less than twenty persons is desirable, even for this initial session, although larger groups previously may have held organizational meetings to select representatives. The participants at the initial session will have a number of critical tasks: deciding if others should also be present, describing the limits of their authority to sign a cleanup agreement, determining the agenda, adopting a tentative schedule, and defining the ground rules for the ensuing negotiations. An especially important ground rule involves the meaning of consensus: Will each party possess a veto power? May dissents be entered? If the convener has correctly sized up the parties and issues, the result will be a series of bargaining sessions leading eventually to an agreement. If things do not go well, the participants may conclude that negotiation will not work, or that they are not yet prepared to commit to substantive bargaining.

Another crucial issue that must be addressed at the initial session is who will preside at the bargaining sessions. With the convener's work done, the participants have a variety of choices about how to proceed. They may be content simply to designate one of their number to chair the sessions, or the chairmanship can be rotated.<sup>366</sup> In some instances, an EPA or other governmental official will prove to be an acceptable chair.<sup>367</sup>

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366. In labor disputes and corporate mini-trials, mediators or other neutral advisors are sometimes perceived as slowing down dispute resolution because they must be informed about the dispute or particular technical matters. See Mullaney, *supra* note 280, at 15.

367. Government officials are generally unwilling to chair or for that matter participate in negotiations, because of their "natural reluctance to deviate from the statutory norm." *Id.* at 17. Legal norms guide and define mediated negotiations, see *supra* note 204 and accompanying text, and will

Not all CERCLA site negotiations will require an outside facilitator once the relevant interests have met and organized their bargaining forum. Thus, a mediator is not indispensable. But a chair is not the same as a mediator. A neutral mediator can be expected to receive and protect confidences, meet with parties individually, act as go-between for two or more groups, suggest confidentially that a party's position is unreasonable, and explore fruitful lines of discussion to pursue at the next session—all of these are functions that mediators can and do assume to shepherd negotiators toward mutually agreeable solutions.<sup>368</sup>

Mediation can significantly improve the chances of success in site cleanup negotiations. Frustration, suspicion, or hostility may momentarily prevail in the web of relationships among waste site operators, waste generators, government officials, and local citizens. Where the convener was necessary as a catalyst, a mediator may be necessary to continue to act as go-between and ice-breaker. The latter can also help to define the problems and their possible solutions. Some parties will have considerable technical knowledge, others none. Consequently, a shared understanding of the dimensions of the problem at a site, even if the RI/FS are underway or completed, may be slow in developing. Site users possessing information about the types and quantities of waste present, their condition, and the resources available to help put together a remedy may be initially reluctant to share these data. Government officials may find it hard to communicate informally with other parties. Situations in which these conditions exist may seem destined for solution by a judicial forum. And yet good mediators thrive in such an environment. The presence of multiple diverse interests creates opportunities for joint gain.<sup>369</sup> Uncertainty of outcome for any of the large number of parties creates the potential for a negotiated solution. The varied interests present—local, state, federal, and private—represent an impressive array of resources to effect a solution. The task is to guide them into a common assault on the problem.

Locating and funding a mediator who is acceptable to the parties could prove difficult. In most negotiations the convener becomes the mediator.<sup>370</sup> This pattern is likely to prevail in CERCLA cleanups. After all, the participants will have already placed a certain amount of trust in this individual, who will also probably know quite a lot about the site.

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certainly continue to figure prominently in CERCLA negotiations. Yet statutory norms are only one element in determining the rather complex set of bargained arrangements that will be necessary to bring about site cleanups. Viewing the statute invariably as a constraint on the imaginations of the parties will undercut the attempt to develop opportunities for joint gains.

368. See *supra* notes 302-05 and accompanying text.

369. See *supra* notes 260-62 and accompanying text.

370. Interview with Gail Bingham, Santa Fe, New Mexico (Oct. 20, 1984).

But that person may not be available. And although they may want to negotiate, the participants may not want the individual who convened them to remain as mediator. Thus, the issues first faced in locating the convener may have to be faced anew: What type of person is best suited to mediate? Are such persons available? Who pays? How can the mediator be made accountable for his or her performance?

Although no third-party facilitator was involved in the Hyde Park landfill case, the court noted a "clear policy" in favor of encouraging settlements when it approved an agreement that provided for the cleaning up of the site.<sup>371</sup> In the *Stringfellow* case, the court ordered the state and federal plaintiffs and the defendant site users to consider third-party assistance in negotiating the cleanup.<sup>372</sup> Plaintiffs suggested locating a mutually-acceptable mediator from a panel of professional mediators, retired judges, and practicing lawyers, but defendants preferred that the court appoint a settlement judge.<sup>373</sup> Because of the defendants' opposition to a mediator, the court will probably select a settlement judge rather than pursuing mediation, which a federal counsel in the case called "an exciting possibility to facilitate settlement of these complex hazardous waste cases."<sup>374</sup>

The movement toward encouraging mediated settlements may help reduce transaction costs for CERCLA cleanups that require that lawsuits be filed. There are fewer problems of mediator accountability and payment if the mediator is appointed by a judge. But, of course, a site cleanup dispute that has already resulted in litigation has missed its best opportunity for a negotiated solution.

#### D. *Who Sits? The Parties and Their Roles.*

Most cleanup settlements to date have involved only governmental plaintiffs and potentially responsible parties—the defendants who have the funds to clean up the site. Certainly these are indispensable stakeholders in any site cleanup negotiation. But other interests may also deserve a place at the table: other site users, other units of local, state, or even federal government, and citizens who may be harmed by the site.

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371. *United States v. Hooker Chem. & Plastics Corp.*, 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982).

372. *United States v. Stringfellow*, Civ. No. 83-2501-MML (Mcx.) (C.D. Cal. 1983).

373. *Id.*, Plaintiffs' and Defendants' Joint Status Report re: Settlement (Sept. 9, 1983). Although their position is unclear, defendants do not appear to be arguing that delegation to a settlement judge or mediator of the role of court assister is barred by Article III. For a discussion of the issue see *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (U.S. Bankruptcy courts are not article III courts and are therefore unconstitutional).

374. Letter from Special Litigation Counsel Lois J. Schiffer, Department of Justice, to Gerald W. Cormick, President, The Mediation Institute, Jan. 4, 1984.

Anyone who would be materially affected by an agreement if one were reached, who will negotiate in good faith, who is not otherwise represented by parties already at the table, who cannot assert his rights in a timely fashion through the courts or otherwise, yet who could exercise countervailing power to frustrate or delay general agreement, has a valid claim to a seat at the table.

Of course, *all* interests cannot be represented. Most sites affect widening circles of interests, including at the outermost perimeter the regional and national economy, future generations, and the overall ecological system.<sup>375</sup> The more parties that are present, the harder it is to focus on and reach an agreement. Many “yeses” are needed in consensual bargaining, but it takes only one “no” to derail it. As numbers increase, side arrangements and concessions become too numerous and difficult to incorporate into the final agreement, and divisive coalitions within the bargaining groups are likely to form.<sup>376</sup>

Defining a viable negotiating group of fifteen to twenty persons will be difficult; however, as in the case of regulatory negotiation,<sup>377</sup> the formation of bargaining committees of responsible parties, the representation of citizens by local governmental leaders or the heads of public interest groups, and the designation of a bargaining leader for the federal and state agencies will help solve this problem. The key factor in the successful use of individuals to represent larger groups is whether the person or team has been delegated adequate authority to propose, compromise, and agree.<sup>378</sup> Having principals at the table helps achieve this objective. Principals include officials of the corporations that are site users, program officers from agencies, local elected officials, and citizens who live near the site.

1. *The Agency.* A cleanup negotiation is not likely to take place without the EPA's participation. Even with reference to sites that have not yet been placed on the NPL, the EPA is a practically indispensable party, because if a cleanup is negotiated there is no guarantee that the Agency will subsequently agree that the responsible parties properly discharged their liability. Getting the EPA to agree to participate faces several policy-based obstacles, all of which were discussed earlier: the political history of negotiation at the Agency, the fear of losing control of the cleanup agenda, and the desire to implement programs by regulatory

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375. See Cormick, *supra* note 238.

376. R. FISHER & W. URY, *supra* note 237, at 7.

377. Harter, *supra* note 215, at 54-55.

378. For example, in the Fredericksburg Annexation dispute, Richman, *supra* note 250, at 58, the negotiation teams were able to make good progress because they had the authority necessary to commit their respective organizations to an agreement.

fiat. The reluctance of federal officials to experiment with an untested implementation measure also is likely to discourage negotiation, as the EPA experience with regulatory negotiation suggests. If mediated negotiation to obtain more private site cleanups is to succeed, the EPA Administrator must support the concept visibly and forcefully, must take an active interest in its implementation, and must defend the Agency's exercise of judgment in the agreements reached against second-guessing by congressional oversight committees and other critics. Middle-level officials at a variety of federal agencies have confirmed that they would remain cool to a new process as bureaucratically risky as mediation until they received approval from their leadership.<sup>379</sup>

Leadership and guidance are therefore necessary, but this should not be overdone. Much of the responsibility and the opportunity for successful negotiation lies beyond the Agency's control. Because agencies are highly skilled at, and biased in favor of, constructing implementation systems, perhaps the EPA needs to be cautioned against attempting to fashion, by itself, a comprehensive mediated negotiation program for CERCLA cleanups. Its willingness to negotiate and its financial resources are needed, but its talent for specialization and organization should not lead it to attempt to control the negotiation process and its outcome.<sup>380</sup> A policy dialogue might serve to sensitize the EPA to these important considerations.

Most of the EPA's difficulties with negotiation under CERCLA have occurred because CERCLA burdens the Agency with a profound role conflict. The Agency cannot be expected to modify its current policies to encourage negotiated cleanup, nor to participate either willingly or meaningfully in cleanup negotiations, until it has sorted out its disparate roles and recombined them to accommodate the statutory scheme. On the one hand, the EPA must ensure that sites are cleaned up adequately, a familiar standard-setting exercise that draws upon the EPA's regulatory strengths. But on the other hand, CERCLA does not define the standards to be developed and appears to contemplate case-by-case decisions about site cleanups.<sup>381</sup> As a regulatory agency EPA is also familiar with the role of enforcer, and CERCLA imposes sweeping liability

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379. W. EMRICH, *NEW APPROACHES TO MANAGING ENVIRONMENTAL CONFLICT: HOW CAN THE FEDERAL GOVERNMENT USE THEM?* 36 (1980); *see also* Sachs, *supra* note 296, at 95, 99 (Recommendation three).

380. The initial EPA experience with regulatory negotiation is instructive. From the rather straightforward conclusion that some EPA proposals for negotiation might be appropriate for negotiation soon developed an entire tentative program for regulatory negotiation: an official head office for facilitation, training programs for participants, a consultant to evaluate the process, etc. *See* Gusman, *supra* note 342, at 5.

381. *Supra* note 37.



for cleanup costs on site users. But the statute does not specify how liability is to be apportioned nor how the Agency is to select among enforcement options.<sup>382</sup> Yet CERCLA also requires the EPA to play a role very much like that of a responsible party with direct site cleanup obligations—a role more like that of a regulated industry than a regulating agency. The EPA must clean up priority sites if site users do not; it is, in effect, the responsible party of last resort. Further, although the EPA is striving to avoid such situations whenever the Agency contemplates paying the orphan share of a site cleanup rather than obtaining one hundred percent of costs from the identifiable responsible parties on a pro rata basis, it may become one among several equal share-takers—*primus inter pares*, perhaps, but still in the role of a cost-minimizing responsible party. The EPA's posture in reimbursement actions, its contingent liability after it grants releases from liability, and its competition with other parties for information about waste site hazards reenforce this second role.

Consequently, Agency officials are certain to feel conflict and confusion about the attitude they should adopt toward negotiation. They feel compelled to be norm-defining regulators, enforcers, and monitors while also functioning as a deep pocket that will try to minimize its obligation. This mixed mission is a far cry from the New Deal model of an agency as standard-bearer for the public interest, which it protects by the application of technical expertise and specialized functions. Nor does it square with the more recent model of the agency as an accommodator that synthesizes the viewpoints of the various interest groups importuning it.<sup>383</sup> Nor, for that matter, does it square with the model of an agency as fiscal agent or construction company for Congress's public works projects.<sup>384</sup> In this predicament, the EPA has attempted to return to its strength, which is in its regulatory programs.<sup>385</sup> But the dominance of the regulatory role has led the Agency to offer a species of "negotiation" that does not possess the key characteristics of true negotiation. Current policy allows responsible parties to make offers of payment to execute an EPA plan, but not to work out a comprehensive agreement after give-and-take between the interests involved.

How should the EPA approach negotiation? First and foremost it should view negotiation as a means of improving its implementation of CERCLA. Negotiation can save the EPA money and time, even if it requires the agency to step out of the norm-defining regulator's role. The

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382. *Supra* note 27 and accompanying text.

383. *See* Stewart, *supra* note 240.

384. *See generally* R. Haveman, *supra* note 17.

385. *See supra* text accompanying notes 76-81.

Agency need not negotiate, nor continue to negotiate, when the opportunity to save time and money evaporates. This is basic: A negotiation must always continue to present an opportunity for joint gain—even for federal agencies.

Second, EPA must accept the uncomfortable position of becoming just another party. It lacks the power to achieve faster, cheaper cleanups unilaterally. Choosing compulsion over persuasion forces it to follow a course mined with state participation constraints, federal procurement policies, time-consuming litigation, limited Superfund revenues, and its own intricate guidelines. If the EPA will accept that other interests possess some measure of countervailing power with respect to waste site cleanups, it may be able to join in an effort to identify alternative cleanup plans acceptable to all the affected parties.

Third, a small negotiating team that can speak authoritatively for the EPA will have to be designated. At least one technical person and an attorney should be in the group.<sup>386</sup> Failure to designate officials who have the confidence of, and ready access to, principals with power to bind the agency may result in indecisiveness and delay that might cause negotiations to break down.<sup>387</sup>

Regionalization of negotiations should be stressed because it comports well with the Agency's generally decentralized management style. Regional officials often have developed prior working relationships with state and local officials who may be parties to the negotiations. Regional officials also usually are excellent pulse-takers of local public sentiment, and can be helpful in this regard even if—or especially if—local citizens groups are present at the table as stakeholders. Whether the Agency's national headquarters should participate directly depends on the importance of a given site and the perceived need for direction from Washington. A more appropriate role for headquarters is review of overall negotiation policy and final approval of individual agreements. With respect to the approval of negotiated agreements, headquarters should consider integrating its current disparate approval authorities and procedures into a review panel that will be available to discuss proposed negotiations and provide the EPA's representatives with a set of flexible

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386. Roger Fisher has proposed that two types of counsel be assigned to cases: a lawyer from the firm's negotiation division who counsels the client on settlement and attempts to settle the case, and a lawyer from the litigation division, who works on developing the client's legal case as its best alternative to a negotiated agreement. *What About Negotiation as a Specialty?*, 69 A.B.A. J. 1221, 1223 (1983). If staff resources are available, his idea might be adapted for use in CERCLA negotiations.

387. G. BINGHAM, *supra* note 247, at 9, says the most significant factor in the likelihood of success in implementing the scores of agreements that she studied was whether those with authority to implement the decision participated directly in the process.

guidelines within which they can negotiate without fear of subsequent reversal.

Fourth, the Agency will have to forego to some extent its tough enforcement-oriented negotiation posture. The EPA's litigation posture is strong but beset by uncertainties about how the courts will handle certain issues, such as joint and several liability when actual apportionment is possible.<sup>388</sup> Some changes would be procedural, for allowing only sixty days for negotiations to be completed prior to the commencement of litigation<sup>389</sup> hardly conveys a sense that the Agency expects negotiation to work. And to the extent that the Agency is actually bringing some enforcement actions merely to obtain impressive case settlements or doctrinal precedents,<sup>390</sup> this policy should be abandoned.

An overly litigation-oriented approach to negotiation has discouraged the productive sharing of information between the EPA and site users.<sup>391</sup> Obviously, both the EPA and site users may weaken their positions in subsequent litigation if in the course of negotiations they share data the other side would not otherwise have. Yet both sides also stand to gain if by sharing information in a negotiation they can reach an acceptable agreement. Recently developed techniques for collecting and sharing data, such as data mediation,<sup>392</sup> may assist this effort. Still other devices would permit freer sharing of data without prejudicing a position in later litigation; these include agreements based on an adaptation of the evidentiary rule prohibiting the use of settlement offers at trial<sup>393</sup> and protective orders for data shared in the course of discovery or settlement negotiations.<sup>394</sup>

Finally, the EPA could better promote negotiation if it directed its guidance memoranda at the public safety interests that it perceives it must protect under CERCLA, rather than at the positions it will take in negotiation. Currently, EPA has defined a rather narrow window of opportunity for negotiation by stating precisely when it will negotiate and on what terms.<sup>395</sup> Each such condition restricts the opportunity for initiating discussions. Of course, it is ultimately substantive policy that must provide the justification for the Agency's stance. The suggestions made

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388. See *supra* text accompanying notes 207-10.

389. See note 125 *supra*.

390. *Supra* note 205.

391. See Susskind & Weinstein, *supra* note 133, at 320 ("the adversary system introduces an unfortunate 'gaming' aspect. . . . The parties and their attorneys have far more and more accurate information than they are willing or allowed to communicate.").

392. *Supra* note 259.

393. FED. R. CIV. P. 68; FED. R. EVID. 410.

394. See Harter, *supra* note 215, at 85.

395. See *supra* text accompanying notes 127-34.

here that EPA widen the window of opportunity are not intended to persuade the Agency to change its basic interpretation of CERCLA; rather, they invite the EPA to consider whether the potential gains to the overall CERCLA program that can be derived from negotiation warrant relaxation of those implementation guidelines that make negotiation less likely to take place.

As Professor Davis has often observed, definition and self-limitation in the exercise of broad discretion are hallmarks of sound administrative practice.<sup>396</sup> Lack of policy guidance once seriously jeopardized the CERCLA cleanup effort. Now a surfeit of it could equally jeopardize the program. Discretion need not be formally channeled to prevent its abuse; other techniques can be employed to check agency overreaching and arbitrariness. Consensus-based negotiations with the full range of stakeholders at CERCLA sites would tend to promote a principled exercise of EPA discretion far more effectively than a quasi-regulatory regime under which the Agency compels rather than convinces. Policy guidance is needed, but of a type that allows the EPA to move quickly and flexibly to capitalize on circumstances in which negotiation appears to benefit the public.

There are certain specific changes to existing EPA policy that would foster productive negotiation on waste site cleanups. For example, the Agency might agree to let site users perform "unscheduled" RI/FS, if they agree to pay for an expert overseer selected by the Agency to monitor the work while it is under way and review the study results. A consent decree might be used to capture the terms of such an agreement. As a second example, suppose that in the course of negotiations some site users made a firm offer to provide fifty percent of cleanup costs, if the EPA and the affected state government would agree to pay the remainder. The Agency might be tempted to accept this offer but for its current policy of seeking total cleanup costs.<sup>397</sup> As an implication of its legal position that CERCLA imposes joint and several liability, the EPA will want to persuade the negotiating site users not to ask for releases from liability. To sweeten this proposal, the EPA can agree first to seek Fund reimbursement from non-negotiating responsible parties and to help defend contribution suits brought against those who participate in the negotiated agreement.<sup>398</sup> The EPA might even agree to urge a court in any subsequent suit to give positive consideration to those site users who vol-

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396. K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 8, 9 (2d ed. Supp. 1982).

397. See 50 Fed. Reg. at 5039.

398. EPA does not intend at present "to defend on behalf of a settlor or to provide direct indemnification." *Id.*

untarily came forward early.<sup>399</sup> If liability is ultimately judicially apportioned, the government could undertake to adjust the shares of the negotiating parties to take account of their early payment.<sup>400</sup>

A final example of a needed policy change also involves the EPA's current position that imposes one hundred percent liability on every site user that can be identified and found.<sup>401</sup> This is a sensitive policy area, because the Agency is reluctant to endorse any type of federal and private joint funding or "commingling" that might weaken its legal campaign to establish total joint and several liability. But if the EPA were to agree to pay for the verifiable orphan share of wastes at a site—with the calculations based on the combined data developed by the Agency and the responsible parties—the prospects for negotiated cleanups would be enhanced.<sup>402</sup> From a process-oriented perspective, the EPA would significantly enlarge its flexibility and bargaining position by adopting an approach based on percentage contribution and participating in finding arrangements when necessary to cement an agreement.

If responsible parties use the negotiation process to haggle with the EPA over shares, the government can break off the negotiations as dilatory and counterproductive. But it is equally likely that, as a result of change in the policy on contribution, some negotiations will be able to achieve a critical turning-point—instead of focusing on each others' positions, the parties will redirect their efforts toward the problem of the cleanup. And if this point is reached, non-negotiating responsible parties might well wish to reconsider and join in. If they do not, the non-cooperating parties would be forced to defend a section 107 reimbursement action in which they might well have to face the combined legal and technical resources of the EPA and the cosigners of the agreement. The incentive for recalcitrant site users to join the negotiations would be even further enhanced if the EPA, instead of bringing a section 107 action, makes it known that it will issue administrative orders seeking reimbursement from the hold-outs; failure to reimburse under the order would expose the recipients to damages three times the cleanup contribution assessed by the Agency.<sup>403</sup> A bargaining approach based on the concept of percentage contribution will not necessarily deplete the Fund, especially if the number of Fund-financed cleanups is reduced, if Con-

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399. Since my original study, *supra* note 41, EPA has basically adopted this proposal. *Interim Settlement Policy*, *supra* note 99, 50 Fed. Reg. at 5039.

400. *Interim Settlement Policy*, *supra* note 99, 50 Fed. Reg. at 5039.

401. *Id.* at 5035.

402. The EPA did agree to consider paying orphan shares from the Fund in its *Interim Settlement Policy*, *id.* This policy change occurred after this study was prepared for the Administrative Conference.

403. 42 U.S.C. § 9607(c)(3)(1982).

gress expands the Superfund,<sup>404</sup> and if the EPA and the contributing private parties combine their legal and technical talents to seek reimbursement from the nonparticipating site users for the remaining non-orphaned shares of liability.

2. *Site Users: The "Potentially Responsible Parties."* All site users are stakeholders in the negotiation, because they may be jointly and severally liable for the complete cleanup. Organizing the numerous parties to negotiate continues to present a major challenge.<sup>405</sup> The waste generators usually are the focus of governmental attention, because they have resources that normally are adequate to fund the cleanups. In earlier negotiations involving RCRA and CERCLA cleanup suits, important differences emerged between large and small generators.<sup>406</sup> In general, smaller generators were less willing to settle on terms favorable to the government, because they had fewer resources to contribute, often were in financial difficulty, sometimes had only contributed small amounts of wastes to the sites, and were less concerned about their public images than the larger national or multinational companies. A strong incentive to find a solution to the hazardous waste site problem exists among the larger chemical corporations, who are each others' customers and suppliers in the complex market of chemical feedstocks, ingredients, and finished products. These companies do not look forward to filing scores of lawsuits against each other for contribution at sites where the government has been successful in holding one or a few of them jointly and severally liable for total cleanup costs.<sup>407</sup>

The composition of the bargaining team for the responsible parties presents the same basic challenge as representation for other stakeholders. Principals generally will have better access to specific technical data and advice. Further, the presence of corporate executives at the table may have symbolic value to governmental officials and, especially, to the public. Their presence may tacitly convey the message that they have nothing to hide and that they value a negotiated solution highly enough to meet face-to-face with officials and those at risk. Their absence may tacitly convey the message, "Talk to my lawyer." Nevertheless, a strong case exists for attorney presence on the site user bargaining team. Many lawyers are experienced at settlement negotiations; others have been successful at organizing site users into committees, a task requiring attor-

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404. See *supra* note 16.

405. See *supra* text accompanying note 338.

406. For example, a major controversy erupted over whether the small generators at the Seymour site were unfairly treated as a result of the bargain struck between the government and the larger generators. See *supra* note 63.

407. See *supra* note 14.

neys' process skills. Attorneys have traditionally been a part of negotiations and, as professional advocates, they can usually be relied upon to remain cool when tensions rise among the parties directly involved in the dispute. Moreover, site users may end up litigating against the government, and they are likely to want the ongoing advice of counsel.

Substantively, the difficulty of securing site user participation in negotiations centers on the absence of sound techniques for apportioning cost shares and the issue of EPA-approved ceilings on user liability. Reliance on a simple waste volume formula to determine each user's individual share of the total cleanup costs, although strongly favored by some generator groups,<sup>408</sup> does not seem adequate in circumstances where toxicity, mobility, and other factors figure more prominently in hazard and cost estimates than does volume. The district court in the *Chem-Dyne* decision seemed to acknowledge as much,<sup>409</sup> creating doubts that the courts would go along with a volumetric approach and strengthening the hand of generators who oppose that solution. A cost allocation model used to help settle the *Petro Processors* case<sup>410</sup> was apparently strong enough to satisfy the allocating burden placed on the defendants in the *Chem-Dyne* case, but closer examination casts doubt on its general applicability.<sup>411</sup> At present there is no obvious alternative to the admittedly inadequate volumetric apportionment method.

The issue of ceilings on responsible parties' liability necessarily raises the twin problems of the EPA's release policy<sup>412</sup> and its site cleanup standards.<sup>413</sup> The EPA and site users frequently reach an impasse because the users take the position that they should be able to obtain a release from further liability in return for the payment of a sum certain. Releases are rarely granted, and then only with respect to discrete aspects of a waste site situation, not including groundwater contamination and other long-term contingent liabilities.<sup>414</sup> In discussing even limited releases, the EPA's estimates of their "price" tend to be high, in order to cover the possibility that a site will require more extensive reme-

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408. COMMENTS OF THE CHEMICAL MANUFACTURERS ASSOCIATION ON EPA'S DEC. 12, 1983 DRAFT HAZARDOUS WASTE CASE SETTLEMENT POLICY 12 (Jan. 12, 1984).

409. *United States v. Chem-Dyne Corp.*, 19 ENV'T REP. CAS. (BNA) 1953, 1959 (S.D. Ohio) ("the volume of waste of a particular generator is not an accurate predictor of the risk associated with the waste because the toxicity or migratory potential of a particular hazardous substance generally varies independently with the volume of the waste").

410. Rosebrook, *Abandoned Waste Site Cleanup Cost Allocation Model*, 7 CHEM. & RAD. WASTE LITIG. REP. 398 (Jan. 1984).

411. Interview with Michael Brown (Jan. 10, 1984).

412. *Interim Settlement Policy*, *supra* note 99, 50 Fed. Reg. at 5039-40.

413. Proposed NCP Revisions, *supra* note 84, 50 Fed. Reg. at 5865-66.

414. *Id.*

dies than predicted. Each office reviewing the estimate may add another layer of security, and soon the cost estimates exceed what the site users are willing to pay and what they estimate they could do the same task for if given the opportunity.

By focusing on the unfortunate position that this release policy puts them in, the site users tend to limit their negotiating strategy. To get away from this, a former EPA chief enforcement lawyer suggests abandoning the quest for releases and instead trying to negotiate an agreement in which site users agree to perform cleanup tasks under technical standards mandated and overseen by the EPA.<sup>415</sup> Attention is thus directed away from exaggeratedly high estimates of the maximum liability parties may incur. The same approach can be applied to the long-term groundwater contamination problem. In return for the EPA adopting a cleanup plan based on the "most probable" remedy that the site requires, the users might agree to pay for long-term monitoring that, if predetermined contaminant levels are detected, would trigger expenditures from an escrow fund, insurance contract, or other secure financial source.

3. *State, County, and Municipal Governments.* State and local governments are also indispensable stakeholders in cleanup negotiations, because they represent citizens' interests and because effective cleanups are unlikely without their full cooperation. Tensions can develop, however, not only in connection with "coordinate" federal and state efforts,<sup>416</sup> but also among local governments.<sup>417</sup>

The federal government must consult with the states before selecting "any appropriate remedial action"<sup>418</sup> or bringing a section 106 action.<sup>419</sup> To promote state or local government site cleanup initiatives, the President may delegate to them, not only the authority to obligate Fund revenues, but also "to settle claims."<sup>420</sup> Such a delegation has not yet been made. The 1984 EPA remedial action plan assigned a state leadership role to forty-five percent of the 235 sites covered.<sup>421</sup> Thus, although CERCLA does not provide for state management of program operations, the statute does create something of a federal-state partnership, but with the federal government indisputedly the senior partner.

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415. See Brown, *supra* note 217, at 14.

416. For example, a federally-negotiated consent decree with Homestake Mining Company for supply of clean drinking water to residents near a uranium mill tailings pile near Milan, New Mexico was disfavored as a "sweetheart deal" by the state, which apparently pushed for relocation assistance. 14 [Current Developments] ENV'T. REP. (BNA) 1535-36 (1984).

417. See Richman, *supra* note 250.

418. 42 U.S.C. § 9604(c)(2) (1982).

419. CERCLA § 106(a), 42 U.S.C. § 9606(a)(1982).

420. 42 U.S.C. § 9611(f)(1982).

421. See *supra* note 80.



State governments have strong incentives to promote negotiation.<sup>422</sup> If, for example, Fund revenues have to be spent, a state must provide ten percent of the cleanup costs, fifty percent if the state or local government owned the site at the time any disposal took place.<sup>423</sup> Further, to draw freely on the Fund the state must ensure that a RCRA-permitted facility is available for wastes moved from the site and must have signed a contract or cooperative agreement with EPA.<sup>424</sup> Perhaps twenty percent of the sites currently on the NPL may trigger the fifty percent contribution requirement, and for many state or local governments that cost will be prohibitive. Negotiation provides a way around these requirements and financial difficulties, and also allows states to impose their own requirements or to apply their own mini-funds in lieu of CERCLA's.<sup>425</sup>

The state-federal scheme puts a premium on amicable state-federal relations, but at the same time the scheme may destabilize them.<sup>426</sup> Conflicts may surface during the bargaining process, and the federal and state negotiating teams may have to enter into side agreements to resolve various basic problems between them. First, because states may take the lead with reference to cleanups and be delegated the authority to obligate money in the Fund and to settle claims, there may be disagreement between the EPA and a state as to which one should take the lead in the negotiating sessions. Second, there are times when the federal government and the states are in an adversary relationship. Third, it is unclear how a local government should be aligned when it was the owner or operator of a facility for hazardous waste disposal. It may be both a claimant and a liable party under such circumstances.<sup>427</sup> Fourth, and perhaps most significantly, state law might impose greater liability on responsible parties than is mandated by CERCLA.<sup>428</sup> In that event, a state may be more demanding in the settlement process than the federal government. Thus, even though the EPA might wish to adopt a flexible attitude, a state might take a tougher negotiating stance.

4. *Citizen Participation: But at the Table?* Citizens who live near a hazardous waste site should be party to any cleanup agreement vitally affecting their health and property. If they are perceived as lacking a stake, it is because they lack power. Yet their powerless position may

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422. Cf. Note, *The Preemptive Scope of the Comprehensive Environmental Response, Compensation and Liability Act of 1980: Necessity for an Active State Role*, 34 U. FLA. L. REV. 635 (1982).

423. See CERCLA, 42 U.S.C. § 9604(c)(3)(C)(i) and (ii)(1982).

424. *Id.* at § 104(c)(3)(A)&(B).

425. Stricter requirements are not pre-empted under CERCLA. See 42 U.S.C. § 9614(a)(1982).

426. See Note, *Superfund and California's Implementation: Potential Conflict*, 19 CAL. W.L. REV. 373, 392-95 (1983).

427. See 42 U.S.C. §§ 9607(a)(1), 9607(c)(4)(A)(1982).

428. See 42 U.S.C. § 9607(j), 9619(a)(1982).

itself, in a democratic society, become a source of power to challenge, delay, and even block agreements, because their plight is politically attractive to elected officials. Judges, too, are likely to be solicitous of these citizens' health and safety claims.

Persons living near a waste site are precisely those whose health and safety are to be protected by the governments that implement CERCLA and other hazardous substances control laws. But their interests may be less well served when government is bargaining than when it is remediating or litigating. The factors that shape a negotiated agreement or a case settlement are not well articulated, and they may not even be made public.<sup>429</sup> The more that governmental representatives are perceived as motivated by factors ordinarily associated with their private sector adversaries—limiting expenditures and long-term contingent liability, for example—the less members of the public will be inclined to trust their representation.

Ordinarily, however, citizens living near dump sites do not possess enough countervailing power to entitle them to the status of parties. In several much-studied disputes, even mediators sensitive to environmental concerns were not overly troubled when powerless or inarticulate groups failed to secure a place at the table.<sup>430</sup> Indeed, some observers argue that local citizens are too emotional about the dispute, do not have the technical training to appreciate either the risk analyses performed or the remedial measures available, and can therefore only present unreasonable one-sided demands.<sup>431</sup> Directly affected residents have no incentive to agree to on-site waste stabilization, and will bear none of the responsibility for securing an off-site RCRA-permitted alternate facility or funding the large public works project required for a complete removal.

The case against citizens at the table is probably overstated. Whether affected citizens are typically "hysterical" about waste sites is doubtful and bears closer examination;<sup>432</sup> their concerns are aired differently depending on the forum available. Citizens may well appreciate that certain demands may be unacceptable. They also can appreciate that a Fund remedy is subject to the Fund-balancing criterion while a negotiated solution is not, that funding the state share of the costs of a

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429. F. ANDERSON, D. MANDELKER, & A. TARLOCK, *supra* note 150, at 326.

430. Susskind, *supra* note 247, at 38.

431. See MacMillan & Miller, *Flaws of RCRA Amendments Can Be Minimized*, *Legal Times*, Jan. 30, 1984, at 12, col. 3 ("citizen suits" would complicate waste cleanups). Bacow & Milkey, *supra* note 248, at 267-69, canvass the costs and benefits of new hazardous waste disposal facilities as perceived by local citizens, concluding that their intense opposition is not counterbalanced by similarly focused gains among the widely dispersed beneficiaries, thus making the siting "largely a problem of managing local opposition." *Id.* at 269.

432. Schwartz, *supra* note 11.

non-negotiated cleanup might delay risk reduction, and that litigation would delay cleanup even further. Most citizens understand that demanding terms so onerous that an agreement would be impossible could only result in recourse to alternatives where they gain less, or lead to their exclusion from the negotiation and consequently their loss of the opportunity to influence the terms of any agreement that the remaining negotiators approve. The leader of the principal national waste site victims' organization believes persons living near sites want medical examinations, immediate risk avoidance measures, and a rapid but reasonable remedy. Above all, they want their own trusted expert to say that the proposed remedy is adequate.<sup>433</sup> Their power to affect CERCLA implementation may become not only significant, but disproportionate, if their first real opportunity to be heard occurs only at a well-orchestrated congressional hearing. By way of contrast, consider the impact of congressional testimony from citizens who participated in a cleanup negotiation and are willing to defend the results achieved.

On balance, affected citizens should be invited to participate in negotiating the type and level of the remedy. Their presence is less appropriate with respect to subjects like cost allocation among the site users. Responsible parties can be expected to resist citizen participation in cost allocation on the grounds that local residents have no greater interest than any other member of the public in making sure that each site user contributes appropriately to cleanup; governments are the most appropriate overseers of cost allocation. Phased negotiations in such circumstances would allow citizens' representatives to participate fully in those aspects of the negotiations in which they have a vital interest and to which they can contribute meaningfully.

In some special situations, responsible parties may see advantages in having citizens become involved in all aspects of the bargaining process. Acting together, responsible parties and citizens could galvanize local and federal governments into action, speeding up cleanup by dramatically altering the expected alignment of interests. Governmental participation in the initial phases of these arrangements might even be prohibited.<sup>434</sup> Responsible parties would play the leading role, encouraging citizens to participate and to agree on a final cleanup program by means of side transactions that address citizen concerns about preventive health care and effective exposure mitigation measures. The result might

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433. Gibbs interview, *supra* note 230. Where fully informed residents of two communities in Alberta, Canada, voted on siting an integrated hazardous waste facility in their communities, 75% of those voting approved. McGlennon, *Needed: More Software in Siting* (unpublished paper, May 1984).

434. Bacow & Milkey, *supra* note 248, at 277.

well be a more rapid remedy that allows the affected community to plan more sensibly for the future.

No significant citizen involvement in waste site negotiations has ever occurred, however. Citizens ordinarily have been excluded altogether, as they were from the deliberations over the Velsicol site in St. Louis, Michigan, despite their request to participate.<sup>435</sup> In some instances, committees of citizens have been kept informed of progress in waste site negotiations.<sup>436</sup> A citizens advisory panel was formed to assist the negotiations of the Metropolitan Water Roundtable in Denver.<sup>437</sup> But much more needs to be done in this area. Short of either complete exclusion or full participation, many acceptable and productive arrangements can be established.

The current EPA approach to citizen participation is conservative. There is a strong public information program but citizen participation in all types of CERCLA implementation, including negotiation, is limited. Current policy guidelines make clear that the EPA intends to control all contacts with the public during a CERCLA response, before, during, and after negotiations, and possibly even when site users perform the RI/FS and conduct cleanup operations.<sup>438</sup> Community relations plans are to be prepared for each site and specify "when and how the public will receive information about the negotiations."<sup>439</sup>

There are currently no provisions for citizens to participate in site negotiations.<sup>440</sup> The bargaining apparently will be restricted in all cases to agency officials and the site users, although guidance on sites where a state will take the lead has not yet been issued. Resulting consent decrees are to be placed in the *Federal Register* and indirect citizen participation is solicited by means of a thirty-day public comment period when comments can be submitted to the Justice Department.<sup>441</sup> Administrative consent orders must be similarly publicized by the EPA. The conduct and deliberations of the negotiating parties are to be kept permanently confidential, however.

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435. Rikleen, *Negotiating Superfund Settlement Agreements*, 10 B.C. ENV'T'L AFF. L. REV. 697, 713 n.62 (1982-83).

436. *Id.* at 713.

437. Interview with John Ehrmann, Keystone, Colo. (Jan. 13, 1984).

438. "Community relations" guidance is under development by an EPA consultant. See COMMUNITY RELATIONS IN SUPERFUND, A HANDBOOK, *supra* note 92. Chapter 6 of this Handbook, Community Relations During Enforcement Actions, was drafted and circulated by EPA in 1983, 14 [Current Developments] ENV'T. REP. (BNA) 99 (1983), then revised in early 1984 when it was sent as draft guidance to regional offices and appropriate headquarters staff. *Supra* note 92.

439. HANDBOOK, *supra* note 92, at 5.

440. *Id.* at 3.

441. 28 C.F.R. § 50.1.

The Ninety-Eighth Congress considered certain citizen-suit amendments that would have practically guaranteed that affected citizens would have a place at the negotiating table. Under both Senate and House proposed amendments to section 7003 of RCRA, which is virtually identical to section 106 of CERCLA, citizens could either sue directly to enjoin anyone whose hazardous waste disposal may be contributing to an "imminent and substantial endangerment" or intervene in pending federal section 7003 actions to compel abatement and cleanups.<sup>442</sup> Should these provisions be enacted by a subsequent Congress, dissatisfied citizens excluded from pre-litigation or settlement negotiations could simply bring their own section 7003 action to seek a more agreeable court-ordered cleanup. Government attorneys' attempts to shield CERCLA section 106 actions from the RCRA citizens' suit would almost certainly fail. These RCRA amendments may provide citizens the countervailing power they formerly lacked. Moreover, an amended section 7003 would considerably diminish the site users' incentive to bargain with federal and state governments, at least without key citizens present at the table. In this respect, the proposed amendments may be too much of a good thing. Providing citizens with precisely the same power government has to abate imminent hazards may lessen the overall incentive of all the stakeholders to bargain for a consensual solution.<sup>443</sup>

## V. CONCLUSION

The EPA was severely harmed by the politicizing of federal hazardous waste site cleanups, particularly negotiated ones, during CERCLA's first three years. As a result, the Agency instituted reforms that made such abuse much less likely to occur in the future. The Agency's new strategy stresses federally-funded cleanups coupled with reimbursement actions or, as a fallback, judicially-ordered private cleanups. The Fund-first approach was intended to make the sharpest break possible with the earlier Fund-last strategy, and the liberal use of litigation meshed well with Congress's get-tough attitude toward hazardous waste site users.

At EPA today it is safe to spend and sue, but dangerous to negotiate, despite the increased cost and decreased pace of the resulting cleanup program. CERCLA's silence on the requirements for negotiated or judicially-ordered cleanups is more than offset by a plethora of statutory and regulatory requirements that burden direct Fund remedies. Moreover,

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442. H.R. 2867 and S. 757, 96th Cong. 2d Sess. (1983). The Senate version does add that intervention can be opposed by the government if it can show that "an applicant's interest is adequately represented by existing parties."

443. See MacMillan & Miller, *supra* note 431, at 12.

federal cleanup at the moment vitally depends upon replenishment of the Fund either through reimbursement actions that will take years to complete or additional congressional appropriations. The EPA has allowed negotiation to continue and acknowledges that the majority of cleanups have been negotiated on terms favorable to the government and without Fund expenditures, but the Agency has put negotiation on a very tight leash. The result has been an administrative hardening of the arteries.

Negotiation could overcome many difficulties that now impede the CERCLA mission. But a new negotiation strategy would have to avoid the abuses of CERCLA's first three years and thereby satisfy EPA that a highly-administered program is really not necessary to assure adequate cleanup within the agenda of priorities established by the National Contingency Plan. Such a strategy can be fashioned, on the one hand, from the discretion Congress granted to the EPA in CERCLA, and, on the other hand, from the experience and new techniques of the field of alternative dispute resolution. The EPA can modulate its cleanup strategy as it sees fit; indeed, there is such a paucity of CERCLA law to apply to program management that one wonders whether pre-enforcement judicial review is even available to challenge the Agency's choice of remedies, much less basic cleanup strategies.<sup>444</sup> The EPA has fashioned its current policy through a series of difficult-to-obtain internal guidance memoranda that function increasingly like the legislative rules applicable in the EPA's regulatory pollution programs but which in form and manner of adoption are much less formal.

A new negotiation strategy would not replace, but would supplement, the Fund and litigation strategies. EPA would have to show its willingness to negotiate, both formally by amending or simply withdrawing its existing rule-bound guidance on negotiation, and informally by inducing top officials to back the negotiation concept publicly and if necessary defend particular negotiated cleanups before congressional oversight committees.

The process could be quite straightforward. A skilled convener might first inquire with respect to sites slated for eventual cleanup who the key parties are, whether there is an interest in a negotiated solution, and whether enough common ground exists for an eventual agreement. If successful, the convener ordinarily would proceed to mediate an agreement. The convener-mediator might have to be funded by the EPA, with safeguards for his or her neutrality, because funds are not likely to be available from other neutral sources. The criteria that provide a principled foundation for negotiations include the existence of issues ripe for

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444. See *supra* text accompanying notes 197-211.

decision, an absence of conflict over values, adequate representation and organization of key interests, an opportunity for gain by all with a stake, a balance of power among participants, commitments to bargain in good faith and share information, and a willingness of units of government to participate as equal parties.

The relevant interests that need to be represented in negotiations include the EPA, potentially responsible parties, and state and local governments. Some problems exist with organizing bargaining teams, but none is insurmountable. Citizens whose health and property are potentially affected are stakeholders in the cleanup level selected and should be invited to the table for that portion of the negotiations.

The obvious sites for convenor attention appear on the National Priority List. But the many sites not on the list should also be examined, despite the EPA's view that until it has listed the sites and has the funds and staff to do the job, its bargaining power will be weak and it may lose control of cleanup quality and the cleanup schedule. If negotiation at some sites produces prompt and less costly cleanups, risks will be quickly controlled and administrative and legal costs will probably be markedly lower as well. This is because risk priority alone—the EPA approach—is not likely to correlate highly with the host of additional factors that contribute to site "ripeness" for cleanup: party solvency, state resources, neighborhood cooperation, leadership, corporate goodwill, removed-waste disposal capacity, media attention, and the like. Performing some "unscheduled" cleanups is thus likely to produce greater net program progress, using the same agency resources.

The approach recommended here is not a panacea, of course. Some cleanups will still require the more deliberate Fund-based approach because of site conditions, party recalcitrance, and disparities in party size and resources. Some sites for which negotiation works will not require conveners and mediators. Some sites will go to litigation and be settled there. Others may be fought out in court trials to the bitter end. Still, scores of sites remain at which the approach recommended here could work.

Consensus-based problem solving does not have an easy time of it in a regulated society. Alternative dispute resolution has had to contend under detailed regulatory statutes with government reluctance to participate where an agency feels it must function as a law-giver, unilaterally writing rules and imposing solutions. Admittedly, CERCLA does not elude entirely the fundamental conflict in our pluralist democratic system between power-based consensual problem-solving and decisionmaking by delegated authority. But the waste cleanup problem presents circum-

stances particularly conducive to negotiation, and CERCLA itself is free of the imperatives of most environmental legislation.

CERCLA goes even further. It presents an opportunity to test a consensus-based solution, not only against traditional administrative solutions, but also against a judicial solution. At a time when the search for alternatives to decisionmaking by agencies and courts is at a peak, it seems fortuitous that such a focused test of the conflict-resolving power of negotiation might be possible. The opportunity should not be lost. While not a panacea, site cleanup negotiation might still become the bellwether for many types of negotiations to come.