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# EXPEDITING PRODUCTIVE REUSE OF SUPERFUND SITES: SOME LEGISLATIVE SOLUTIONS FOR VIRGINIA AND THE NATION

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Congress explicitly enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") to protect human health and the environment.[1] While these values are clearly important, it has also become clear that productive reuse of Superfund sites is important to adjoining communities to improve local employment and to restore the property as a source of taxation revenue to support essential municipal infrastructure. Productive reuse of such sites also serves to abate serious environmental nuisances which may deter or discourage community growth.[2]

Historically, the cleanup of Superfund sites has been slow and expensive.[3] Since 1980, when Congress enacted the earliest Superfund statute, only 84 sites have been removed from the National Priorities List ("NPL").[4] During the same period, 1,238 sites have been identified as requiring prompt cleanup under the criteria established by the Environmental Protection Agency ("EPA") for listing sites on the NPL.[5] The NPL is simply the "tip of the iceberg;" it is a list of sites that score high on the Hazard Ranking System, but does not include many of the sites that are releasing or threatening to release hazardous substances into the environment. Remediation of Superfund sites is a national problem. Every state and territory faces, as of January 1989, the legal duty to clean up at least one site polluted enough to be included on the NPL.[6]

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[1] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980), *amended by* Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601-9626, 9671-9675 (1988 & Supp. IV 1992).

[2] In addition to these socio-economic factors, the cleanup and restoration of Superfund sites also addresses the attainment of other ecological values such as the protection of "biodiversity." *See, e.g.*, A. Dan Tarlock, *Biodiversity Federalism*, 54 MD. L. REV. 1315 (1995).

[3] *See* WILLIAM N. HEDEMAN ET AL., SUPERFUND TRANSACTION COSTS: A CRITICAL PERSPECTIVE ON THE SUPERFUND LIABILITY SCHEME, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,413, 10,423 (July 1991) (estimating that average cost of remediation per site is $29 million).

[4] 60 Fed. Reg. 50,435 (1995). The NPL is the list of Superfund sites determined by the EPA to be most in need of cleanup based upon the Hazard Ranking System established by § 105(a)(8) of CERCLA. 42 U.S.C. § 9605(a)(8) (1988). The Hazard Ranking System is a mathematical evaluation which undertakes to assess sources, pathways, and receptors of hazardous substances to determine whether the site is sufficiently polluted to present a risk to human health and the environment so serious that it requires prioritized cleanup and remediation. *Id.*

[5] 60 Fed. Reg. 50,435 (1995).

[6] In addition to the published NPL sites, there are inevitably an unknown number of Superfund sites that: (1) have not been evaluated and ranked, (2) are still involved in the NPL evaluation process, (3) have not yet been evaluated at all, or (4) have not yet been recognized as possible sites requiring

Placing a site on the NPL is a two-step process. First, the EPA must propose a site for inclusion on the NPL, and provide an opportunity for interested persons to comment.[7] After the comment process is completed, the EPA undertakes to compute the site's initial score under the Hazard Ranking System.[8] The EPA may decide that: (1) the site qualifies, and may be placed on the NPL, (2) the site should be kept on the NPL-candidate list for additional review in the future, or (3) the site should be removed from consideration for listing on the NPL.[9] In the latter instance, the EPA may classify the site as a Superfund site but not accord it priority for cleanup by listing it on the NPL.

If the EPA determines, based upon facts adduced during the Site Investigation, the Preliminary Assessment, and public hearing, that the site's score under the Hazard Ranking System mandates action, the EPA will place the site on the NPL, and then determine if the site score is sufficiently high to mandate prompt action.[10] If so, the EPA institutes the second major phase of the Superfund process—the Remedial Investigation/Feasibility Study ("RI/FS") Phase. The RI/FS Process is especially important because it adduces the site-specific data contained in the record of decision ("ROD").[11] The Phase I and Phase II data are indispensable in selecting and carrying out the Phase II remedial action and work plan decisions, which lead to the completion of the overall remedial action in Phase III.

In practice, when a site is listed on the NPL, the EPA or the responsible state agency[12] prepares a scoping document to serve as the initial planning step for site remediation.[13] The goal is to further refine the boundaries of the NPL sites. Originally promulgated to provide assistance in the clean up of military installations, the EPA guidance was based upon the precept that it was inferentially legal to identify clean parts of a military site which could then be conveyed to states and communities for productive reuse before those portions of the site that were actually polluted had been fully cleaned up.[14] By such action, the EPA would be achieving an early productive reuse of the affected site. The "clean" portions of the site could be reused long before the formal Superfund cleanup process would be

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hazard assessment.

[7] *See* 42 U.S.C. § 9617(a). The EPA must publish notice of proposed plans, provide an opportunity for the submission of oral and written comments, and provide an opportunity for a public meeting. *Id.*

[8] *See id.* § 9605.

[9] *Id.*

[10] *Id.*

[11] *See* GENE LUCERO & KATHERINE MOERTL, SUPERFUND HANDBOOK 55-56 (1989). The ROD is issued by the EPA after reviewing the RI/FS. *Id.* The ROD states a remedy and gives an explanation for why it was chosen. *Id.*

[12] *See* 42 U.S.C. § 9621(d)(2)(A)(ii), (d)(2)(C)(ii), (e), (f) (1988 & Supp. IV 1992).

[13] LUCERO & MOERTL, *supra* note 11, at 49.

[14] *See generally* Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623 (1988); Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510 (1990) (both statutes are codified at 10 U.S.C. § 2687 (1988 & Supp. III 1991)).

completed for the entire military installation under the established Superfund remediation process.

With the end of the Cold War and the dissolution of the Soviet Union, Congress enacted legislation that would assure productive reuse of military bases deemed to be no longer necessary.[15] By productive reuse, Congress sought to offset the elimination of federal employment related to and caused by military base closures, and to avoid delaying the transfer and private development of military base property that had not been environmentally contaminated.[16] In addition, in October 1992, Congress amended the Superfund legislation ("CERCLA/SARA") specifically affecting section 120, which applies to the cleanup of federal facilities.[17] Previously, Congress had amended section 120 of CERCLA/SARA to render the Solid Waste Disposal Act[18] and the liability provisions of section 107 applicable to military bases and other federal facilities.[19]

## I. LEGISLATIVE STANDARDS TO PROTECT COMMUNITY AGENCIES AND "FRESH START" USERS OF SUPERFUND SITES FROM LIABILITY

Many of the communities with a Superfund site located in or near it have formed committees of business leaders and civic officials to clean up and reuse the contaminated site or facility as soon as possible.[20] The business leaders and civic officials generally have no economic interest in the Superfund facility, which constitutes a conflict of interest or provides a basis for liability under Superfund.[21] Nevertheless, because neither CERCLA nor SARA contain specific, individualized liability provisions other than the general liability provisions contained in section 107,[22] the specific standards for liability have been formulated by a "common law," decided under the aegis of CERCLA/SARA.[23] A judicial consensus emerged concluding that the standard was "strict, joint and several liability and the liability

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[15] *See generally id.*

[16] *See* Community Environmental Response Facilitation Act of 1982, Pub. L. No. 102-426, 106 Stat. 2174 (1992) (amending 42 U.S.C. § 9620(h)(3), (4) (1988 & Supp. IV 1992)).

[17] *Id.*

[18] Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (1988).

[19] Specifically, CERCLA was amended to make its provisions applicable to federal facilities: "[e]ach department, agency, and instrumentality of the United States . . . to the same extent, both procedurally and substantively, as any non-governmental entity, including liability under section 9607 of this title." 42 U.S.C. § 9620(a).

[20] *See, e.g.*, A.S. Andrew, *Brownfield Redevelopments: A State-Led Reform of Superfund Liability*, 10 NAT. RESOURCES & ENV'T, Winter 1996, at 27.

[21] *Id.*

[22] For the general statutory provision pertaining to CERCLA liability, see 42 U.S.C. § 9607.

[23] The leading case on the scope of liability under Superfund is United States v. Northeastern Pharmaceutical and Chem. Co. ("NEPACCO"), 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part and rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

was retroactive," subject only to the statute of limitations.[24]

Because there is substantial vagueness in the case law as to what conduct qualifies as meeting the "owner" or "operator" status for liability, these committees raise novel liability issues. The major goal of the committees is to attract "fresh start" users to occupy facilities in a productive manner. Civic leaders, however, are reluctant to serve on such committees unless legislation is enacted that clearly exempts them from liability for the release or threatened release of hazardous substances which they did not actually generate or release, as they were not actually owners or operators of the facilities that have become Superfund sites.[25] Similarly, prospective fresh start users can be attracted to use the facility only if clear legislation exists that exempts them from future liability should there be a release of hazardous substances for which the new user is not the proximate cause.[26] Congressman Frank R. Wolf (R-Va.) introduced legislation which would amend CERCLA/SARA "to exempt certain state and local redevelopment boards or commissions and fresh start users of facilities purchased from those boards or commissions, from the liability under that Act."[27] The Wolf bill would also amend CERCLA by altering section 101(35), adding subparagraph (b) to define fresh start users:

> (b) FRESH START USERS.—Section 101(35)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by striking "described in clause (i), (ii), or (iii)" and inserting "described in clause (i), (ii), (iii), or (iv)" and by adding the following after clause (iii):
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> (iv) The defendant acquired the facility from a person exempt from liability under section 107(n) and has not engaged in

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[24] *See* 42 U.S.C. § 9612(d).

[25] *See* Andrew, *supra* note 20, at 27.

[26] A variety of states have legislation addressing this problem. *See, e.g.*, Environmental Cleanup, Liability, and Financing Act of 1994, 1995 N.J. Laws 140; Land Recycling and Environmental Remediation Standards Act, 1995 Pa. Laws 2; Environmental Cleanup Act of 1994, 1994 Wis. Laws 453; Ohio Real Estate, Reuse and Cleanup Act, S. 221, 1995 Ohio Laws 121.

[27] This legislation would amend § 107 of CERCLA by adding subsection (n):

> (n) REDEVELOPMENT AUTHORITIES.—No State or local board, commission, or other entity, or any member thereof, appointed or elected pursuant to State or local law to plan for or implement the redevelopment or reuse of a facility shall be liable under this section for costs or damages with respect to any release or threat of release from the facility to the extent such liability is based solely on the entity's status as an owner of the facility under paragraph (1) of subsection (a) if such entity—
>
> (1) has not engaged in any response action at the facility;
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> (2) owns the facility or any portion thereof only on a temporary basis prior to transfer to another entity; and
>
> (3) has not engaged in the generation of any hazardous substance disposed of at such facility.

H.R. 3105, 104th Cong., 2d Sess. (1996).

> (I) any response action at the facility, (II) disposal of any hazardous substance at the facility, or (III) the generation of any hazardous substance disposed of at such facility. This clause shall not apply to any person who impedes the performance of a response action or natural resource restoration at the facility concerned.[28]

This legislation would correct the present deficiencies in the liability system of CERCLA/SARA as they pertain to the activities of redevelopment authorities transferring "fresh start" status to new users of a Superfund facility.

## II. PROTECTION OF THE CIVIC REUSE ENTITY AND THE FRESH START USER FROM TOXIC TORT LIABILITY

Another risk to persons serving on a civic entity committed to achieving productive reuse of a Superfund site by a "fresh start user" is exposure to toxic tort liability under state law. Roughly contemporary with the development of Superfund law, there emerged a body of law in state courts referred to as toxic tort law.[29] Toxic tort law, a modern adaptation of traditional tort law, copes with the hazardous conditions, in both the community and the workplace, caused by the growth in the manufacture and use of toxic substances in the period following World War II. As one text on toxic torts points out:

> An exact count of known chemical substances cannot be stated, but there are approximately 5,000,000 organic chemicals and 500,000 inorganic substances. More importantly, approximately 10,000 new chemicals are synthesized in the research laboratories of the world each year, of which 1,000 enter commerce.[30]

Unlike the liability discussed in Part I,[31] toxic tort liability may arise if hazardous substances are released from a Superfund site.[32] Thus, both a fresh start user and a person serving on a civic entity that takes title to an allegedly clean

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[28] *Id.*

[29] G. Z. NOTHSTEIN, TOXIC TORTS: LITIGATION OF HAZARDOUS SUBSTANCE CASES ix - x (1984).

[30] *Id.* at 2.

[31] CERCLA/SARA does not contain a provision addressing the individual standard of liability. Instead, the case law comprising the "common law of Superfund" clearly establishes that liability under CERCLA is strict. *See NEPACCO*, 579 F. Supp. at 843-44. Similarly, the case law is equally clear that liability under Superfund is joint and several unless a party can prove that the harm is divisible. *Id.* at 844-45. The burden of proving that the harm is divisible is placed on the responsible parties. *Id.* at 845. The only defenses are those listed in § 107(b) of CERCLA. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

[32] Artesian Water Co. v. Gov't of New Castle County, 659 F. Supp. 1269, 1299 (D. Del. 1987).

portion of a Superfund site in order to transfer title to the fresh start user may incur liability under a toxic tort suit. Such claims might be brought, for example, by a neighboring landowner because of the passage of hazardous substances through groundwater moving from the Superfund site to the neighboring property. To protect against such liability, state legislation is necessary.

It is conceptually more difficult to devise a means to protect a civic board, its members, and a fresh start user from liability under state toxic tort law. The problem raises complex issues not posed by federal environmental law. First, such toxic tort law will vary by state, and necessitates individual state legislative action to correct the problems it poses to productive reuse.[33] Second, the elements that comprise the toxic tort coincide with those establishing jurisdiction under Superfund: a release from a "facility"[34] of a "hazardous substance."[35] When jurisdiction is triggered, the remedial action mandated under federal law is described in section 104 (Response authorities) and section 106 (Abatement

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[33] A toxic tort action may take the form of a civil lawsuit in a state court, an administrative action for the cleanup of hazardous waste, a workers compensation claim based upon worker injury caused by workplace exposure, or various other types of tortious actions based on *ex delicto* events. The toxic tort associated with a Superfund site arises from the release of hazardous substances (including wastes) from the site which impacts owners of contiguous or adjacent property, *e.g.*, trespass of polluted groundwater from a Superfund site into the groundwater of an adjacent or contiguous property owner, the contamination of wells resulting from such trespass of Superfund site pollution, the personal injury resulting from exposure to or the consumption of such polluted groundwater, the nuisance (either private or public) that such polluted groundwater causes, and any negligence that may have caused the passage of polluted groundwater onto the adjacent or contiguous property. Comparable examples based upon air pollution and the precipitation of airborne contaminants upon contiguous or adjacent property is an additional example of a "toxic tort." *See generally* Thomas J. Schoenbaum & Ronald H. Rosenberg, ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 332 (2d ed. 1991).

[34] Under CERCLA § 101(9)(B), a "facility" is "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9)(B).

[35] A "hazardous substance" means:

> (A) any substance designated pursuant to section 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. §§ 6901 *et seq.*] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(14).

actions) of CERCLA/SARA.[36]

In addition, section 105 of Superfund requires the EPA to promulgate a National Contingency Plan ("NCP").[37] The NCP, a device originally employed by section 311 of the Clean Water Act,[38] is a kind of "super regulation" that provides more detailed provisions governing the aforementioned statutory actions, section 311 actions, and actions brought under the Oil Pollution Act of 1990.[39]

The nucleus of operative facts that trigger "statutory" actions under Superfund, the Clean Water Act, or the Oil Pollution Act comprise facts which may also provide the basis for bringing a toxic tort suit in the jurisdiction in which the site is located. Accordingly, for at least the past two decades, plaintiffs have, with increasing frequency, brought suits based upon the cause of action contained in Superfund and also toxic tort actions available under state law.[40]

In Virginia, for example, there is reluctance to embark upon the reuse of the so-called Avtex-FMC Superfund site located in the town of Front Royal due to concerns over liability.[41] In order to protect fresh start users, civic entities, and their members from toxic tort liability under state law based upon the physical passage of the pollution from a Superfund site to contiguous or adjacent areas, it seems clear that state legislation is necessary to offset this tortious liability.[42]

In *Feikema v. Texaco, Inc.*,[43] the Court of Appeals for the Fourth Circuit in March 1994 made it clear that designated federal environmental statutes do not preempt or preclude state toxic tort actions based upon the facts that underpin the federal actions. The court found that:

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[36] Superfund thus provides a choice of remedies: § 104 Response authorities or § 106 Abatement actions. 42 U.S.C. §§ 9604, 9606. In addition, § 106 authorizes the issuance of an administrative order by the EPA which imposes severe sanctions if the order is not obeyed or is not successfully challenged in a judicial action.

[37] *See* 42 U.S.C. § 9605 (requiring that the NCP specify the "procedures, techniques, materials, equipment, and methods to be employed in identifying, removing, or remedying releases of hazardous substances").

[38] 33 U.S.C. § 1321 (1988 & Supp. V 1990). The NCP was subsequently amended and expanded to address actions under the Oil Pollution Act of 1990. *See* 33 U.S.C. § 1321(d) (1992).

[39] 33 U.S.C. §§ 2701-2761 (Supp. II 1990).

[40] Plaintiffs who are devoted to bringing more exhaustive federal suits may bring actions based on provisions in Superfund (a § 104 or §106 action, suits for contribution under § 113, and natural resource claims under § 107(f)), the Resource Conservation and Recovery Act, the Marine Protection, Research and Santuary Act and other federal environmental statutes, as well as allege counts under applicable state toxic tort law.

[41] For more information on the Avtex-FMC site, see FMC Corp. v. U. S. Dep't of Commerce, 29 F.3d 833. Part IB of the opinion contains judicial findings describing the site. *FMC*, 29 F.3d at 835.

[42] A possible alternative basis for relief from concern over toxic tort liability asks whether the applicable federal environmental statutes preempt resort to state toxic tort law. The answer to this question appears to be clear and explicit in the Fourth Circuit after the decision in Feikema v. Texaco, Inc., 16 F.3d 1408 (1994). *See infra* text accompanying notes 43-47.

[43] 16 F.3d 1408 (1994).

> The RCRA [Resource Conservation and Recovery Act] contains no provision which mandates comprehensive preemption of all state laws in the field of hazardous waste removal being regulated by the Act. The task, therefore, is to determine whether the regulatory scheme is so comprehensive in that field as to leave no room within which the states may act, or whether any provisions in the Act actually conflict with the state causes of action.[44]

In pursuing this inquiry, the court utilized the Supreme Court's standard concerning preemption articulated in *Nader v. Allegheny Airlines, Inc.*:[45]

> [A] common-law right, even absent a saving clause, is not to be abrogated "unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."[46]

Given these pronouncements by the Fourth Circuit and the Supreme Court, it seems evident that no new user of a site, such as the Front Royal site in Virginia, would risk liability, especially since the *Feikema* decision ultimately ruled that in determining whether federal law preempts state tort law, state law will *not* be abrogated unless it is found that the common law tort action is so repugnant to the federal statute that survival of such right would in effect deprive the federal statute of its efficacy.[47]

## III. CONCLUSION

It is clear that the toxic tort law of the State of Virginia needs to be amended to preclude explicitly plaintiffs from bringing toxic tort suits against civic boards and fresh start users based upon the escape of pollutants, contaminants, or hazardous substances from a Superfund site when the EPA has asserted jurisdiction and is proceeding to assure completion of remedial action at the Superfund site.[48] Thus, the effective reuse of cleaned up Superfund sites can be achieved in Virginia only after the enactment of such state legislation. Unless such state legislation is passed, together with the corresponding federal legislation discussed in Part I, it is highly unlikely that a new commercial or industrial user could be found to utilize such Superfund sites, however clean they appear to be, due to the threat of liability

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[44] *Id.* at 1413.

[45] 426 U.S. 290 (1976).

[46] *Id.* at 298. (quoting Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907).

[47] *Feikema*, 16 F.3d at 1417.

[48] As of the date this issue went to press, such legislation had passed both houses of the Virginia General Assembly and is awaiting a decision by Governor George Allen. Telephone Interview with Virginia General Assembly, Office of Legislative Information (Mar. 22, 1996).

should previously undetected contamination be subsequently found.[49]

[49] In addition to the Avtex-FMC site in Front Royal, there are currently 23 other Superfund sites in Virginia, and others may exist which have not as yet been designated or placed on the NPL. *See* 60 Fed. Reg. 20,330-53 (1995). It can be presumed that all communities that are adjacent to such sites have an interest in the enactment of the federal and state legislation discussed in this article.