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Leslie Sue Ritts

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## ENVIRONMENTAL PRACTICE NEWS

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MARSHALL-WYTHE SCHOOL OF LAW  
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### CONGRESS PASSES VERSION OF SUPERFUND

In the final hours of the 96th Congress, the House of Representatives approved a version of the Superfund. Pub. L. No. 96-510; see Cong. Rec. H11773-11802 (Dec. 3, 1980). Titled the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the Act responds to a growing public outcry over incidents of environmental contamination like that which occurred at Love Canal. The new law provides for state and federal responses to actual and threatened spills of hazardous substances from vessels and waste sites, establishes liability mechanisms, and creates a fund jointly financed by the chemical industry and the federal government to pay for damages and the costs of clean-up of hazardous wastes. Noticeably missing from the enacted version of the Superfund, however, are provisions covering oil spills and private recoveries for personal injuries caused by exposures to hazardous substances. Advocates of the final compromise, reached under massive industry opposition to the bill, rationalized that half a loaf of bread is better than none. They hope for amendment of the Act in the new session of Congress.

Section 104 of the Act authorizes the federal and state governments to take remedial measures to remove wastes and protect the public if hazardous wastes are released. Under section 105 of the Act, the President will revise the National Contingency Plan for the removal of oil and hazardous substances to reflect and effectuate the powers and responsibilities created by the new law. The President also is authorized to require the U.S. Attorney General to bring enforcement actions to enjoin the release of hazardous substances.

Section 107 of CERCLA provides that generators and transporters of hazardous wastes, as well as owners and operators of vessels and facilities, shall be held strictly liable for damages and governmental and private costs incurred as a result of hazardous waste releases. The Act establishes the following defenses to an action for damages: (1) that the act was an act of God; (2) that it was an act of war; or (3) that the act or omission was that of an independent third party if the defendant can show he has exercised due care with respect to that party and the alleged pollution. The third defense does not apply to the negligence of an employee. It does deviate, however, from a provision in legislation originally considered by the Senate which created joint and several liability between all owners, operators, generators, transporters, and treaters of hazardous wastes. See S. 1480, § 4(a), 96th Cong. 2d Sess. (1980). The enacted provision probably will not prevent state courts from imposing joint and several liability for "indivisible" injuries. Liability limits also are set in section 107, and releases of pollutants pursuant to federal permits, applications of registered pesticides and activities determined in environmental impact statements to involve no irreversible and irretrievable commitments of natural resources are exempted.

Section 221 of the Act establishes a \$1.6 billion Hazardous Substances Response Fund. It is financed by taxes on oil, petrochemical products and certain feedstock chemicals and from general tax revenues. When parties responsible for the release of hazardous substances cannot be identified or they are unable to provide redress for claims, a claim can be filed against the fund. The rights of the claimant are then subrogated to the Fund, and its administrators can bring an action against the responsible party or his surety. A special Post Closure Fund is also established under the Act to assume liability for damages that result at a closed site permitted under the Resources Conservation and Recovery Act. This fund is financed by a tax on the receipt of hazardous wastes. See section 231.

L.S.R. Environmental Law Institute.