

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

1-1-1983

## Defending Superfund and RCRA Imminent Hazard Cases

Jeffrey G. Miller

*Elisabeth Haub School of Law at Pace University*

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

Jeffrey G. Miller, Defending Superfund and RCRA Imminent Hazard Cases, 15 Nat. Resources Law. 483 (1983), <http://digitalcommons.pace.edu/lawfaculty/248/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).



## Defending Superfund and RCRA Imminent Hazard Cases

The federal government may seek an injunction to abate the release of a hazardous waste to the environment under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)<sup>1</sup> or to abate a threat to public health or the environment from hazardous wastes under the imminent and substantial endangerment provisions of the other environmental statutes, including the Resource Conservation and Recovery Act (RCRA).<sup>2</sup> The states may seek comparable action under their own authorities.<sup>3</sup> Under Superfund, the Environmental Protection Agency (EPA) has the option either (1) to issue an administrative order or to seek an injunction ordering responsible parties to prevent or mitigate a release of hazardous substances to the environment,<sup>4</sup> or (2) to perform the action itself and later seek reimbursement of its costs from the responsible parties.<sup>5</sup> To obtain relief under the more limited imminent and substantial endangerment provisions, EPA must show that the release endangers or threatens to endanger public health or the environment. Under these provisions EPA does not have authority to perform the required action itself and later seek reimbursement.<sup>6</sup>

Developing strategies to defend these cases is complicated by ambiguities in the Superfund statute, the lack of reported cases, and ambivalence in EPA's intentions. Despite uncertainties, however, several defenses suggest themselves from the face of the statutes, their legislative history, and the small body of case law. Moreover, various tactics suggest themselves from what is known of EPA's operations and philosophy. Com-

---

\*Partner, Bergson, Borkland, Margolis & Adler, Washington, D.C.

<sup>1</sup>Pub. L. No. 96-150, 94 Stat. 2767, to be codified at 42 U.S.C. §§ 9601 et seq.

<sup>2</sup>Section 7003 of RCRA, 42 U.S.C. § 6973 (1976 and Supp. III 1979); § 303 of the Clean Air Act, 42 *id.* § 7603; § 504 of the Clean Water Act, 33 *id.* § 1364; § 1431 of the Safe Drinking Water Act, 42 *id.* § 300; and § 6 of the Toxic Substances Control Acts, 15 *id.* § 2606.

<sup>3</sup>*See, e.g., Nat'l Wood Preserves, Inc. v. Dep't of Environmental Resources*, 14 ERC 1486 (Pa. 1980).

<sup>4</sup>Pub. L. No. 96-510, § 106, 94 Stat. 2767, 2780, to be codified at 42 U.S.C. § 9606.

<sup>5</sup>Pub. L. No. 96-510, § 107, 94 *id.* at 2782, to be codified at 42 U.S.C. § 9607.

<sup>6</sup>Such action is possible pursuant to § 311 of the Clean Water Act, 33 U.S.C. § 1321 (1976 and Supp. III 1979), and was possible under § 504(b) of that act, a section that was never funded and was repealed by § 304(a) of Superfund.



bined, these defenses and tactics allow development of successful and sometimes imaginative defense strategies. Most of the defenses and tactics apply equally to state cases, although the applicable statutory framework may vary. The type of inquiry suggested here should be useful in developing a defensive strategy for any hazardous waste case in which the government is the plaintiff.

The successful defense of these cases begins with early identification of suspected government actions and development of strategies to deal with them. Failure to act quickly may foreclose both tactical and strategic options. Failure to demand split samples from the moment the first government inspector appears, for example, will foreclose potential challenges to the government's evidence. Failure to deal with particularly toxic wastes as soon as their presence becomes known may foreclose the strategy of eliminating the endangering nature of a problem to avoid or lessen government involvement.

Early development of a strategy involves a thorough knowledge of the facts of the case, a knowledge of possible legal defenses, and an ability to predict governmental concerns and actions. Since the facts will differ from case to case, no single strategy can be recommended although a number are suggested. The following discussion of possible legal defenses is by no means exhaustive. The government's announced intentions and attitudes are examined, together with some of the relevant forces at work on and in the government. From considering the facts, possible defenses, are probable government reactions, strategies can be developed and tactics employed.

## **I. POSSIBLE LEGAL DEFENSES**

Defenses may vary depending on the relief sought by the government. The government may seek to recover expenditures for removal or remedial measures it took under Superfund. It also may seek remedial action under Superfund or under one of the emergency provisions of other environmental statutes. Tactical options may differ, depending on whether action is being sought by administrative order or by injunctive relief. A number of defenses are common to all situations.

### ***A. Common Defenses***

#### **1. NO IMMINENT OR SUBSTANTIAL ENDANGERMENT**

Proof that public health or the environment is endangered is a prerequisite to use of one of the emergency provisions, but not of Superfund, which depends only upon the release or threatened release of a hazardous substance. It is discussed as a common defense because the degree and imminence of endangerment are factors which a judge will consider in any request for an injunction and which EPA must take into account in framing its actions under Superfund.



The degree of imminence and seriousness of endangerment that the government must prove varies from statute to statute and each should be looked at with care.<sup>7</sup> The government generally must show that one or more hazardous substance is being released, migrating on an exposure route, and reaching a predictable number of people on whom it is having a predictable adverse health impact or that such chain of events is probable in the future unless remedial action is taken. This causation chain may be attacked in several places. The credibility of the government's evidence should be carefully examined.<sup>8</sup> The migration route, particularly if it is underground, may be highly questionable. The potential damage caused if exposure does result will often be open to substantial question.<sup>9</sup> There is no unanimity in the scientific community on the use of animal data to establish human carcinogenicity or on the existence or level of a threshold for exposure before the danger of cancer exists. The government is reassessing its previous position that such data should be used and that no threshold levels can be established.<sup>10</sup> Expert opinions on both sides of these issues probably can be found within the plaintiff agency with regard to many chemicals it alleges to be toxic. The standards used for animal studies and epidemiological studies are exacting and the scientific credibility of many studies on which experts base their opinions may be attacked. Comparisons with risks voluntarily or involuntarily born by the population at risk, such as smoking or remaining in the company of people who are smoking, may undercut the apparent severity of the projected risk. All of the problems of causation in this uncertain area are multiplied when the risk is in the future and speculative.

Despite these difficulties, the government has been fairly successful in convincing judges of endangerments.<sup>11</sup> Nevertheless, the argument is worth making. At the very least, doubts raised as to the seriousness of the endangerment may be reflected in the judge's ruling on the reasonableness of the remedy. This will vary considerably with the nature of the action taken or requested. If an apparent emergency exists and quick action is necessary, most judges will be more willing to defer to the government's judgment. However, in the remedial states, where there is time for study and analysis, judges should examine the government's judgment more critically. This is underscored by the statutory and regulatory structure governing EPA's responses under Superfund which require it to justify its actions with progressively more care as the danger grows less immediate.<sup>12</sup>

---

<sup>7</sup>See Skaff, *The Emergency Powers in the Environmental Protection Statutes*, 3 HARV. ENV. L. REV. 298-325 (1979).

<sup>8</sup>See text following note 19, *infra*.

<sup>9</sup>See text following note 22, *infra*.

<sup>10</sup>See *Inside EPA*, October 16, 1981, p. 12.

<sup>11</sup>See *Reserve Mining v. EPA*, 514 F.2d 492 (8th Cir. 1975), 543 F.2d 1210 (8th Cir. 1976); *United States v. Solvents Recovery Service of New England*, 496 F. Supp. 1127 (D. Conn. 1980); *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980); and *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138 (N.D. Ind. 1980).

<sup>12</sup>See note 17, *infra*.



## 2. THE REMEDY IS INAPPROPRIATE

The remedy may not really cure the alleged problem or may cause more problems than it solves.<sup>13</sup> It may go beyond what is necessary to protect public health. Its costs may outweigh its benefits. There may be other more or equally effective remedies that cost less. In injunction cases courts must strike a balance of equities, even when the complained of activity is in violation of a statutory mandate.<sup>14</sup> These arguments are strengthened by the emphasis placed on the cost effectiveness of remedies in Superfund.<sup>15</sup>

## 3. THE ACTION IS NOT IN ACCORD WITH THE NATIONAL CONTINGENCY PLAN

Actions taken by EPA under Superfund are governed by the National Contingency Plan (NCP) required in section 105 of the act. Remedial actions which EPA wishes to undertake or for which it seeks reimbursement and enforcement actions which it takes are all variously governed by the NCP.<sup>16</sup> EPA's enforcement under the emergency provisions of the other environmental statutes is affected by the NCP, both because section 106(c) of Superfund requires EPA to establish guidelines for such enforcement consistent with the NCP and because the NCP is the most comprehensive, explicit, and current policy statement by the government on the manner with which such situations should be dealt. For the latter reason the standards for action established by the NCP can be used as a hallmark against which to judge the reasonableness of actions taken or demanded by other federal or state agencies.

Although the NCP is regrettably vague in many material respects, it may be possible to argue that action taken or sought by EPA is beyond that authorized because the need for the action is less urgent than thought by EPA,<sup>17</sup> the action is not cost-effective,<sup>18</sup> or the need for and costs of ac-

<sup>13</sup>See *O'Leary v. Moyer's Landfill, Inc.*, 11 ELR 21005 (E.D. Pa. 1981), in which the court refused a requested injunction to close a leaking landfill because leachate would continue to escape after cessation of operation. Instead the court ordered the landfill to develop and execute plans to stop leachate from escaping its boundaries. According to the defendant's counsel, the continued operation of the landfill was the only source of revenue to correct the environmental harm it was found to have caused.

<sup>14</sup>*Weinberger v. Romero-Barcelo*, 102 S. Ct. 1798 (1982).

<sup>15</sup>See Pub. L. No. 96-510, § 105(7), 94 Stat. 2767, 2779, to be codified at 42 U.S.C. § 9605(7), and 40 C.F.R. § 300.68(g)-(j), 47 Fed. Reg. 31217 (July 16, 1982).

<sup>16</sup>EPA is authorized to take remedial or removal actions only if they are consistent with the NCP, Pub. L. No. 96-510, § 104(a), 94 Stat. 2767, 2774, to be codified at 42 U.S.C. § 9604(a). It can secure reimbursement of expenditures for remedial actions only if they are consistent with the NCP under § 107(a) of Superfund. EPA's enforcement of Superfund is impliedly to be consistent with the NCP. See note 4, *supra*.

<sup>17</sup>Immediate removal, planned removal, and remedial actions are authorized for descending levels of imminence of hazard. Since there are differing restrictions on EPA's authority to act under each of these various levels, wrongful classification of imminence could result in unauthorized government action. See Pub. L. No. 96-510, § 104, 94 Stat. 2767, 2774-79, to be codified at 42 U.S.C. § 9604, and 40 C.F.R. §§ 300.64 to .68, 47 Fed. Reg. 31214-17 (July 16, 1982).

<sup>18</sup>See note 15, *supra* and 40 C.F.R. § 300.68(g)-(j), 47 Fed. Reg. 31217 (July 16, 1982).



completing the action are insufficiently documented.<sup>19</sup>

#### 4. EVIDENCE IS NOT CREDIBLE OR SUFFICIENT

Underlying all of these cases will be evidence based on sampling and analysis, much of it performed by contractors and states. It can be attacked on grounds of credibility and sufficiency.

Questions of credibility go to whether the evidence is reliable. Were the samples put in containers that were properly cleansed and not likely to contaminate the samples? Were the samples properly preserved and chilled? Were the samples representative of the discharge, emission, or release? Were they taken by trained and qualified personnel? If taken by automatic sampling equipment, was it properly calibrated and routinely checked for proper operation? Were the samples properly stored in the laboratory? Were they analyzed within the proper holding time? Were they analyzed using standard methods? Were they analyzed by trained and qualified personnel? Were the analytical instruments properly calibrated? Did the laboratory follow adequate quality control procedures? Did it follow quality control procedures established by the agency? Had the laboratory been audited and rated for quality control? Were different results on split samples obtained by other laboratories? Were adequate chain-of-custody procedures followed throughout the taking and analysis of the samples? These inquiries may lead to surprising results. For example, in *United States v. Moss-American, Inc.*<sup>20</sup> the government's case was dismissed when discovery turned up falsified chain-of-custody tags revealing that a relevant sample had not been taken at the location represented by the government.

A similar series of questions can be raised on the sufficiency of the evidence. Were samples taken fully representative of the conditions they purport to represent? Were enough samples taken to be statistically significant? Were they taken in enough locations to preclude other conclusions being drawn? Were they taken over a sufficient length of time to be relevant? Were the same analytical methods used on all samples? Were the same analytical methods used as were used to establish any relevant comparative benchmark, *e.g.*, a standard or threshold level of risk?<sup>21</sup> What is the predicted range of error in the analytical method?<sup>22</sup>

#### 5. SCIENTIFIC CONCLUSIONS ARE NOT CREDIBLE

Scientific conclusions are normally drawn by expert witnesses and countered by other expert witnesses. The credibility of the government's experts may be undercut by questioning the validity of studies on which the opinion is based or by establishing that the government in other contexts does not act as if it believed its expert's opinion.

<sup>19</sup> See 40 C.F.R. § 300.69, 48 Fed. Reg. 31217-18 (July 16, 1982).

<sup>20</sup> 78 F.R.D. 214 (E.D. Wisc. 1978).

<sup>21</sup> See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 369 (D.C. Cir. 1973).

<sup>22</sup> See *Amoco Oil Co. v. EPA*, 502 F.2d 722, 743 (D.C. Cir. 1974).



The studies on which expert opinions are based should be examined to determine whether they were carried out using accepted methods; were subject to peer review; are generally accepted by the relevant scientific community; and are supported or questioned by other studies. The studies should be examined critically using many of the questions suggested above regarding credibility and sufficiency of evidence. Methodologies in particular should be viewed skeptically.

If the government does not act consistently with its expert's opinion in other contexts, it can be argued that the government does not believe the opinion is credible. This argument is particularly appealing if the plaintiff agency does not act consistently with the opinion. If the opinion, for instance, is that chemical *X* poses a risk of cancer at certain exposures, does the agency regulate *X* in other contexts? Does it regulate the chemical to prevent the exposures suggested? Are there important scientific officials in the agency who do not agree that the chemical poses a risk of cancer at those levels?

#### 6. GOVERNMENT ACTION PRECLUDES THE RELIEF

Reliance on past government action sanctioning or acquiescing in the now complained of behavior will sometimes estop government action.<sup>23</sup> Pending state action may support federal judicial abstention or a stay of federal proceedings.<sup>24</sup> Indeed, pending state action may cause the Department of Justice to decline federal prosecution.<sup>25</sup> A final adjudication in state court may be afforded full faith and credit,<sup>26</sup> or may result in collateral estoppel<sup>27</sup> which suggests there may be an advantage to being sued in a relatively friendly forum or perhaps by a relatively friendly governmental plaintiff. Collusive consent decrees, however, will not be afforded great deference.<sup>28</sup>

#### B. *Defenses to Superfund Reimbursement Claims*

##### 1. DEFENDANT NOT AMONG CLASS OF LIABLE PARTIES

Superfund liability for reimbursement extends only to four classes of parties: (1) owners and operators of the facility; (2) owners and operators of the facility at the time the complained of hazardous substance was disposed there; (3) persons who arranged for disposal or transport for disposal of the hazardous substance at the facility; or (4) persons who transported the

<sup>23</sup>United States v. Pennsylvania Engineering Chemical Corp., 411 U.S. 655 (1973), and United States v. Martin, 517 F. Supp. 211 (D.S.C. 1981).

<sup>24</sup>United States v. Cargill, Inc., 508 F. Supp. 734 (D. Del. 1981).

<sup>25</sup>See Dept. of Justice, *Principles of Federal Prosecution*, pp. 11-12 (1980).

<sup>26</sup>Menzel v. County Utilities Corp., 501 F. Supp. 354 (E.D. Va. 1979).

<sup>27</sup>United States v. ITT Rayonier, Inc., 627 F.2d 997 (9th Cir. 1980).

<sup>28</sup>See note 24, *supra*.



hazardous substance and selected the facility for disposal. Only persons falling into one of these categories are liable under section 107 of the act, although generators of hazardous waste could fall within any of these categories.

## 2. JOINT AND SEVERAL LIABILITY AND THE RIGHT OF CONTRIBUTION<sup>29</sup>

The potentially liable owners, operators, and transporters at a typical uncontrolled hazardous waste site are often thinly capitalized or insolvent. Records may identify many generators but not all of them. Some will be insolvent or no longer exist. Of the existing solvent generators, a few will have together generated more than half the wastes by volume but most will have generated insignificant amounts by volume. The degree of hazard of the wastes will vary greatly and have no relation to the volume generated. Remedial actions at larger sites can cost several million dollars and they can escalate quickly if groundwater contamination must be halted.

The liability dilemma is apparent in the typical situation. Common-law liability generally attaches for damages or expenditures linked directly to the defendant. Thus, following the general common-law rule, a generator would be liable only for remedial costs proven to be associated with its wastes. If joint and several liability applies, any generator could be liable for the entire remedial costs, regardless of the size of its contribution to the problem. If a right to contribution exists, the jointly and severally liable generator can recover portions of the costs from other generators. Both liability models have problems, and Superfund does not clearly embrace either of them. The different consequences flowing from them suggest different defense strategies for generators.

Most generators would prefer traditional common-law liability, under which they are liable for costs of remedial actions directed only at their wastes, greatly minimizing their liability. But the traditional liability model makes any recovery so difficult, it appears inconsistent with the remedial nature of Superfund. To establish the liability of a generator in the typical multigenerator situation, the government must isolate that generator's waste and prove that its wastes were released. Where several generators disposed of the same type of waste, this may be impossible. Even where that can be done, apportioning the cleanup costs spent for removal of that particular waste may be impossible if the same action would have been taken in any event to remove other types of wastes.

If the joint and several liability model is used, other unacceptable results occur. A generator could be liable for the costs of all remedial work,

---

<sup>29</sup>This section of the paper is digested, with the kind permission of the publishers, from a fuller discussion of the subject by the author, entitled, "Superfund, Who Pays? The Elusive Issues of Joint and Several Liability and the Right to Contribution," *Environmental Analyst*, September, 1982, pp. 3-5.



despite the fact that other generators of greater volumes of similar or more noxious wastes were equally responsible for releases resulting in Superfund action. Indeed, under a literal reading of Superfund, a generator might be liable even if its hazardous waste or the type of waste generated by it is not being released from a site, as long as some type of hazardous waste is being released. This cause may be the proverbial red herring, however, since it presents the most compelling facts for a court to decide against joint and several liability and, as such, is an extremely unlikely case for the government to pursue.

If a right to contribution against other generators exists, the severity of joint and several liability is much diluted. But contribution has difficulties. How are costs apportioned among generators? By volume? If so, who pays for the volume from unknown or insolvent generators? Should generators pay as much for a barrel of dioxin as for a barrel of relatively innocuous waste? Should contribution be *pro rata* despite differences between the generators?

Contribution can never make a jointly liable defendant whole. It must incur legal and other expenses defending an action by EPA and prosecuting actions against other generators, none of which will normally be reimbursable. Moreover, it will bear the burden of proof in prosecuting the contribution actions. Most of the evidence needed will be in possession of the government or its witnesses and once EPA has recovered from the generator, EPA's further interest in the matter will cool dramatically, even if it promises to cooperate.

Superfund does not explicitly adopt either traditional common-law or joint and several liability. But the statute's structure suggests joint and several liability. Section 107 establishes that "any" person in the classes listed is liable and joins the classes with the conjunctive "and." It establishes no principle of apportioning liability for cleanup costs, which would be necessary to implement common-law liability. At the same time as part of a last minute compromise to secure enactment, Congress did remove from the Superfund bill a clause specifically adopting joint and several liability.<sup>30</sup> The significance of this is debatable, since the House bill had contained an apportionment principle that was also rejected.<sup>31</sup> In place of a joint and several liability language, Congress substituted in section 101(32)<sup>32</sup> a definition of "liability" construing the term as the standard of liability under section 311 of the Clean Water Act, the oil spill cleanup provision on which Superfund is modeled. In so doing Congress had in front of its letters from the Justice Department and the Coast Guard (which administers the oil spill program), assuring it that section

---

<sup>30</sup>See 126 CONG. REC. S14946 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph); H11787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio).

<sup>31</sup>H.R. REP. NO. 96-1016, 96th Cong., 2nd Sess. reprinted in 1980 U.S. CODE CODE & AD. NEWS 6119, 6136.

<sup>32</sup>Pub. L. No. 96-510, 94 Stat. 2767, to be codified at 42 U.S.C. § 9601(32).



311 provided joint and several liability.<sup>33</sup> It seems what Congress took away with one hand, it gave back with the other.<sup>34</sup>

The standard of liability under section 311 of the Clean Water Act has been held to provide a right to contribution,<sup>35</sup> which makes sense only in the context of joint and several liability. If section 311 does not provide sufficient guidance on the standard of liability under Superfund, the legislative history suggests looking to the common law.<sup>36</sup> According to the *Restatement (Second) of Torts*, common law departs from its apportionment of liability and imposes joint and several liability where tortious conduct by two or more persons cause a single or indivisible harm. At the same time, it suggests that many environmental injuries are not single or indivisible.<sup>37</sup> Although the issue is open to debate, Superfund will probably be construed to provide joint and several liability.

A similar case can be made for the right to contribution. Since Superfund does not explicitly adopt joint and several liability, it is, not surprisingly, silent on the right to contribution. It does preserve for liable parties any cause of action they may have by way of subrogation or otherwise.<sup>38</sup> In the letter from the Department of Justice that was before Congress when it enacted Superfund, the department construed this savings clause as providing a right to contribution. A similar savings clause in section 311 of the Clean Water Act has been held to provide a right to contribution.<sup>39</sup> If section 311 did not provide sufficient guidance on the issue and common law is looked to, the answer becomes murkier. The *Restatement (Second) of Torts* supports contribution among joint tortfeasors.<sup>40</sup> But the Supreme Court has held in two recent cases that where a common law claim to contribution is sought under a federal statute and Congress has not provided for contribution or indicated that courts are free to develop substantive law, the old common law rule of no contribution will apply.<sup>41</sup> The statutory references and congressional history discussed above, however, should be sufficient indication that Congress either intended to provide contribution or to allow

<sup>33</sup>26 CONG. REC. H11788 (daily ed. Dec. 3, 1980).

<sup>34</sup>This statutory history is similar to RCRA's about which Judge Pollack wrote, "With respect to this statute it is particularly hazardous to couch analysis in terms of what language Congress 'chose,' in view of the fact that the statute as finally enacted was a compromise version which went through both chambers with little chance for debate." *O'Leary v. Moyers Landfill, Inc.*, 11 ELR 21005 at 21008, n. 6.

<sup>35</sup>*U.S. v. Bear Marine Services*, 509 F. Supp. 710 (E.D. La. 1980).

<sup>36</sup>See legislative history cited in note 30, *supra*.

<sup>37</sup>RESTATEMENT (SECOND) OF TORTS, §§ 875 and 881, illustrations 1 and 2.

<sup>38</sup>Pub. L. No. 96-510, 107(e)(1), 94 Stat. 2767, 2782 to be codified at 42 U.S.C. § 9607(e)(1).

<sup>39</sup>*U.S. v. Bear Marine Services*, 509 F. Supp. 710 (E.D. La. 1980).

<sup>40</sup>RESTATEMENT (SECOND) OF TORTS, § 886A.

<sup>41</sup>*Northwest Airline, Inc. v. Transport Workers Union of America, AFL/CIO*, 451 U.S. 77 (1981); *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981).



courts to develop it by way of substantive law, as they have in other specialized contexts.<sup>42</sup>

### 3. THE RELEASE WAS CAUSED SOLELY BY ACT OF GOD, WAR OR THIRD PARTY

These statutory defenses in section 107 of Superfund are the only defenses provided in what is otherwise aptly characterized as a "strict liability" statute.<sup>43</sup> They are very like the defenses provided under section 311 of the Clean Water Act, except that negligence of the United States is not a defense under Superfund and the third-party defense under Superfund excludes employees, agents, and independent contractors and requires the defendant to show that it took precautions against acts and omissions of third parties. The third-party defense has been narrowly construed under section 311, making the failure of a defendant to take preventive action a contributing cause to the act of a third party, thus defeating the sole cause component of the defense.<sup>44</sup>

## C. *Defenses to Abatement Actions*

### 1. NO IRREPARABLE HARM, ADEQUATE REMEDY AT LAW

Almost all of the actions for which the government seeks injunctive remedies at hazardous waste sites could be accomplished by others (including EPA, using Superfund appropriations), who could in turn sue the defendant for damages or reimbursement. Since this may be characterized as providing an adequate remedy at law, an argument can be made that equitable remedies should not be available. In *United States v. Price*<sup>45</sup> the government sought a preliminary injunction under section 7003 of RCRA to (1) fund a study to determine appropriate remedial action for preventing the contamination of the Atlantic City water supply, and (2) provide alternative water supplies for persons whose wells were already contaminated. The court denied the preliminary injunction on the basis that an adequate remedy was available at law by way of damages. Its opinion came close to relying on the distinction between prohibitory and mandatory injunctions. The court expressed the belief that injunctive relief is appropriate only for action of which the defendant is uniquely capable. The argument has been

<sup>42</sup>Kohn v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. den.* 421 U.S. 978 (1975) (midair collision); Marrero v. Abraham, 473 F. Supp. 1271 (E.D. La. 1979) (damages caused by violation of federal securities laws); Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) (personal injury in admiralty).

<sup>43</sup>Burgess v. M/V Tamano, 564 F.2d 964 (1st Cir. 1977); United States v. LeBoeuf Bros. Towing Co., 621 F.2d 787 (5th Cir. 1980).

<sup>44</sup>Proctor Wholesale Co. v. United States, 11 E.R.C. 1383 (Ct. Cl. 1978); Shell Pipe Line Corp. v. United States, 11 E.R.C. 1385 (Ct. Cl. 1978) (act of God).

<sup>45</sup>11 ELR 21047 (D.N.J. 1981).



explicitly or impliedly rejected in similar cases.<sup>46</sup> Pressed to its extreme, the argument could eviscerate the injunctive provisions of Superfund and the imminent and substantial endangerment provisions of the other environmental statutes. But judges have a considerable amount of discretion in this area, as reiterated recently by the Supreme Court in *Weinberger v. Romero-Barcelo*.<sup>47</sup> And there are good arguments that the injunctive provisions in Superfund were intended for just these purposes. In any event, section 3013 of RCRA<sup>48</sup> authorizes administrative orders for extensive monitoring to ascertain the extent and nature of contamination, which is the bulk of the study for which the injunction was unsuccessfully sought in *Price*. And the judge in the case acknowledged that irreparable harm need not be shown to enjoin further violation of one of the environmental statutes. Curiously, he found that hazardous waste was currently being disposed of in violation of RCRA, an action that could be enjoined, but failed to address the connection or lack of connection between the enjoined violation and the relief requested. In sum, the decision is too conservative and restrictive to be relied on in other cases.

## 2. EMERGENCY PROVISIONS ARE NOT RETROSPECTIVE

This argument is closely related to the one discussed above. The emergency provisions provide injunctive relief against present releases to the environment, not for cleanup from releases that occurred before their enactment. Thus section 7003 of RCRA can be used to enjoin present disposal, but not to require cleanup from disposal prior to RCRA's enactment.<sup>49</sup> The argument is undercut, however, if past disposal results in present releases, as in *United States v. Price*.<sup>50</sup>

## II. THE GOVERNMENT'S INTENTIONS

The sources of information regarding the government's intentions are announced policies and known actions. The recent paucity of both and the disparity between public pronouncements and known actions make it difficult to discern the government's real intentions or its ability to accomplish its articulated intentions.

### A. Policies

EPA's announced policy continues to be that all efforts, including enforce-

<sup>46</sup>*United States v. Solvents Recovery Service of New England*, 496 F. Supp. 1127 (D. Conn. 1980); *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980); and *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138 (N.D. Ind. 1980).

<sup>47</sup>102 S. Ct. 1798 (1982).

<sup>48</sup>42 U.S.C. § 6933 (Supp. III 1979).

<sup>49</sup>*See United States v. Price*, *supra*. *Contra*, *United States v. Solvents Recovery Service of New England*, *supra*.

<sup>50</sup>11 ELR 21047 (D.N.J. 1981).



ment, should be made to induce responsible parties to perform remedial action at hazardous waste sites prior to using government funds. But it consistently expresses a preference to use less confrontational approaches to dispute resolution and its enforcement policies emphasize enforcement tools other than litigation. Administrative orders under section 7003 of RCRA are used in place of judicial action where there is a high degree of likelihood of compliance, but short time deadlines are allowed in negotiations leading up to them.<sup>51</sup> In addition to embodying negotiated agreements in consent decrees or consent orders, EPA uses nonenforceable agreements with particularly cooperative parties.<sup>52</sup> The extent of releases given by the government in return for remedial action performed will be tailored to the extent of remedial action done and knowledge about present and future hazards at the site. EPA also uses administrative orders under section 3013 of RCRA to compel responsible parties to determine the nature and extent of contamination at hazardous waste sites, doing so in a manner calculated to induce communication with the parties and to create a favorable record in the case of subsequent noncompliance.<sup>53</sup>

EPA takes a very broad and liberal position with regard to what constitutes an "imminent and substantial endangerment" for the purpose of seeking relief under the emergency provisions of the federal statutes.<sup>54</sup>

### B. *Known Actions*

Superfund cleanup actions are proceeding slowly. As of mid-1982, EPA had (1) obligated \$62 million of \$225 million available to it under Superfund; (2) entered into implementing agreements with 20 states; and (3) initiated remedial investigation/feasibility studies at 29 out of 115 priority sites and completed 8.<sup>55</sup> It had referred 79 cases under RCRA and Superfund to the Department of Justice for civil prosecution, 22 of them since the beginning of 1981, and 13 cases for criminal prosecution. At the same time, states had commenced 55 civil and 15 criminal actions for hazardous waste problems in 1981 and 1982. Although emphasizing "nonconfrontational" dispute resolution, EPA had not used administrative remedies to the same extent as litigation, issuing only 11 administrative orders under section 106

<sup>51</sup>"Issuance of Administrative Orders Under § 7003 of the Resource Conservation and Recovery Act," from Douglas MacMillan, Acting Director, Office of Waste Programs Enforcement, to Regional Enforcement Division Directors, Sept. 11, 1981.

<sup>52</sup>See "Guidance on Hazardous Waste Site Settlement Negotiations," from William A. Sullivan, Jr., Enforcement Counsel, to Regional Counsels, Enforcement Division Directors and Superfund Coordinators, Dec. 18, 1981.

<sup>53</sup>"Issuance of Administrative Orders Under Section 3013 of the Resource Conservation and Recovery Act," from Douglas MacMillan, Acting Director, Office of Waste Programs Enforcement, to regional enforcement directors, Sept. 11, 1981.

<sup>54</sup>"Standards of Proof for Hazardous Waste Enforcement. . .," from Douglas Macmillan, Acting Director, Hazardous Waste Enforcement Task Force, to various regional enforcement officials, Jan. 25, 1980.

<sup>55</sup>From testimony of Chris Hall before the Senate Environmental Pollution Subcommittee, as reported in *Hazardous Waste News*, August 9, 1982, p. 251.



of Superfund and sections 3013 and 7003 of RCRA. It had sent nearly 1500 letters to owners, operators, and generators at 100 sites, notifying them of potential liabilities and encouraging them to reach prompt negotiated settlements.<sup>56</sup>

In several sites where it has sent notice letters, its attention has been focused primarily on the relatively small number of generators responsible for the greatest part of the waste at the site (first-tier companies). Its demands have led the first-tier companies to form steering committees to negotiate with EPA and with the other generators (second-tier companies) to reach an overall settlement. In cases where these negotiations have reached or approached fruition, the settlements have the following characteristics:

1. A money payment is made by each settling company for accrued expenses and damages and perhaps for ascertainable future expenses and damages. The amounts paid are not graduated according to fault, toxicity, etc., except to arbitrarily reflect gross disparities, e.g., first-tier companies pay ten times the amount of second-tier companies. The amounts are set to total close to the full amount of expenses and damages if all first- and second-tier companies participate. It is as yet unclear how many of the potentially liable parties must participate and what percent of the costs their offer must cover for the government to accept the settlement.
2. EPA gives the settling parties a release covering remedial or removal work for which expenses and damages are paid, but not covering other remedial or removal work.
3. If EPA sues nonsettling generators and they successfully assert a right of contribution against the settling companies, EPA in essence indemnifies them against such payments.
4. Some working relationship is established between EPA and the settling parties for cooperation in future remedial work or in determining whether future remedial work is necessary.

This type of settlement is highly advantageous for settling companies, especially first-tier companies. It limits their liability at a low and affordable level, often below the cost of litigation. It puts them in the best posture possible publicly under the circumstances. There are problems with the approach, however, that may prevent it from becoming an enduring pattern. To remain attractive to the government, a large enough percentage of the generators must participate in the settlement to result in a significant recoupment of the government's expenditures. But there will be a natural disinclination on the part of many generators to settle at an early date, particularly among second-tier companies. Some believe their contribution to

---

<sup>56</sup>From information supplied by EPA in response to a joint request by the Chairmen of the Subcommittee on Oversight and Investigation and the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, dated June 15, 1982.



the problem is too small to warrant being sued if a significant settlement is reached with others. Some may feel they have good enough defenses to avoid being sued or to prevail if they are sued. To keep participation high, the government must quickly and aggressively enforce against nonparticipants. Indeed, it has made initial efforts to do so.<sup>57</sup> But this will prove difficult to continue if large numbers of potential defendants do not participate at various sites. EPA's actions to date do not evidence the speed or resolve necessary to assure the long-term viability of this approach. EPA's internal ability to develop and prosecute cases has been severely disrupted by the abolition of its Office of Enforcement and the fragmentation of its components between various program offices and the new Office of Legal and Enforcement Counsel. The number of attorneys in that office is being reduced substantially and resources requested for 1983 hazardous waste enforcement will not permit significant new activity.<sup>58</sup>

### III. FORCES AT WORK ON THE GOVERNMENT

Both external political pressures and internal organizational pressures are relevant to EPA's hazardous waste enforcement effort.

#### A. Political Pressures

Democratic House Committees continually hold oversight hearings criticizing EPA's slow action in combating hazardous waste problems. Environmental organizations, with quickly growing memberships, are focusing on EPA management as a cause celebre. The media is focusing on EPA's slow pace. GOP vote counters are concerned over public opinion polls suggesting that the party may lose support if it is widely thought of as "soft" in environmental protection. The White House is rumored to have recently told the administrator that it wants EPA to maintain a higher enforcement profile.

On the other hand, conservative senators and congressmen expect favors from EPA for their constituents, including the favorable exercise of enforcement discretion. States, the preferred partner in the new federalism, hold federal enforcement against their regulated public as anathema.

#### B. Internal Pressure

It is unclear to EPA staff whether its management desires a strong enforcement program, a weak one, or none at all. Signals, both by word and deed, are mixed. EPA's former administrator had clearly stated that she wanted a

---

<sup>57</sup>See *Hazardous Waste News*, Aug. 16, 1982, p. 261, reporting that the Department of Justice sued five generators that had not participated in a \$1.6 million settlement at the Bluff Road site near Columbia, South Carolina.

<sup>58</sup>1983 resources for hazardous waste enforcement will permit handling of 15 ongoing judicial actions, initiating 10 new cases, issuing 15 administrative orders and negotiating 14 voluntary agreements. *Hazardous Waste News*, *id.*



meaningful enforcement program.<sup>59</sup> and EPA's regional offices have reportedly been given quotas for producing cases. At the same time, the Office of Enforcement has been dismembered, with its constituent parts distributed to other offices, requiring increased internal cooperation and coordination to produce cases. Enforcement resources are shrinking, adding to the difficulty of producing new cases. Uncertainty of management direction often results in bureaucratic paralysis. The very slow pace of filing new cases suggests this result has occurred with EPA enforcement.

#### **IV. FACTORS CONSIDERED IN ADOPTING A STRATEGY**

In choosing a strategy, a potential defendant should consider the full range of strategies and tactics available, the possible legal defenses, and how each relates to the government's posture and concerns. The most important factors, however, relate to the merits of the case at hand and its potential impact on the defendant. How likely is the government to prevail? How big is the remedial price tag? Are there other potentially liable parties that may be sued or may be subject to contribution? Are there private parties with damage claims that could be aided by government investigation and discovery?<sup>60</sup> Can costs be reduced with cooperation by devising and carrying out the remedial work yourself? How substantial is the potential liability in relation to your assets, cash flow, and opportunity costs? How can you best prevent an undue drain on management attention? How important is adverse publicity? How important are good relations with EPA, the Department of Justice, and counterpart state agencies? How important is the case to the government, and how well prepared is it?

#### **V. DEVISING THE STRATEGY**

The four basic strategies available in most cases are:

1. Eliminating the problem before governmental involvement.
2. Cooperating with the government in eliminating the problem.
3. Resisting demands of the government.
4. Steering a middle course.

Eliminating the problem before significant government involvement is usually the least costly, least aggravating strategy. It is particularly attractive if solution of a small part of the problem eliminates the endangerment. This reduces greatly the risk that the government will later seek resolution

---

<sup>59</sup>See report of the administrator's admonition to her regional administrators, *Inside EPA*, May 7, 1982, p. 5.

<sup>60</sup>In *United States v. Hooker Chemicals and Plastics Corp.*, 90 F.R.D. 491 (W.D.N.Y. 1981) a protective order was denied for materials produced during the government's discovery in the Love Canal cases on the grounds that use by private parties in damage cases was legitimate.



of the remaining nonendangering portion of the problem. This strategy may be impractical if the problem is offsite and there are too many other contributors to agree on a solution or if government becomes involved before a solution can be accomplished.

Cooperation with the government is normally the next best strategy. It is particularly appropriate now, when EPA is anxious to settle disputes, show cleanup progress, and differentiate itself from what it views as overly litigious past administrations. Costs may be less if a contributor can perform remedial work rather than ultimately reimbursing the government for its contractor's charges.<sup>61</sup> The public record from investigation by the government and discovery available to private plaintiffs in potential private damage actions may be less. Cooperation does not forestall hard negotiation to minimize obligations. Cooperation is often frustrated by the government's inability to respond quickly or consistently, because of internal turf battles, organizational disruption, and changing policy.

Resisting the government may avoid liability altogether. In today's climate it runs the risk of an irrational reaction by an EPA hard pressed to show a firm enforcement backbone. If the government makes a substantial commitment of will and resources to a case, it can be a formidable, but by no means unbeatable, litigator. Sometimes the delay secured by litigating may be worthwhile even if ultimately the litigation is lost.

Steering a middle course is recommended only as an interim measure until a more definite strategy can be developed.

## VI. TACTICS

Once a strategy has been chosen, it can be implemented by a variety of tactics. Many, especially legal defenses, have been previously discussed, others are suggested below. Although they may be most obvious for use when resisting government demands, a number of them are very useful in other contexts. The tactics which depend on intervention of others (*e.g.*, Office of Management and Budget (OMB), congressmen) may be difficult to effectuate for highly publicized cases, because of possible adverse political repercussions of appearing "soft" on hazardous waste.

### *A. Exploiting Internal Agency Tension*

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. Direct approaches to appointed agency officials have not often succeeded during past

---

<sup>61</sup>This is not always the case, however. See *Redwing Carriers, Inc. v. U.S.*, 11 ERC 1981 (Ct. Cls. 1978). In that case the government unsuccessfully argued against the size of an oil spill cleanup reimbursement award against it under § 311(1)(1) of the Clean Water Act because the contractor which performed the work for the party seeking reimbursement charged the party more than the contractor normally charged the government for comparable work.



administrations, but there are indications that they may succeed more often during the present administration. If meetings are held with such officials in the absence of the government's case attorneys, there are often communication breakdowns within the agency that confuse or disrupt the government's defenses. Another office within the agency also may be convinced that the government's proposed enforcement action is adverse to its interest. In such a case it may argue the potential defendant's interest within the agency or take an action that can be used defensively.

For either of these approaches to be successful, the defendant must have legitimately arguable points and accurate information on the internal dynamics in the agency. It must know who to approach, when to approach, and how to approach. Whether or not successful, such an approach will alienate, intimidate, or possibly embolden the subordinate bureaucrats who are bypassed. These potential impacts should be assessed before the tactic is pursued.

#### *B. Exploiting Internal Administration Tensions*

The interest of other parts of the administration in a potential case may be great or nonexistent, depending on the facts of the case. Identifying such interest is limited only by imagination and the willingness to search. White House or OMB staff may be interested in policy issues or tales of woe, and a telephone call by them to the agency may have great impact. Another department of government will be interested only in issues that directly affect its interests or operations. It will have less impact on the agency than the White House or OMB, but can raise such issues to them. This approach can alienate or intimidate appointed agency officials, as well as subordinate bureaucrats and those outside the agency who are contacted or used. To be successful, there must be something legitimately arguable about the case to catch the interest of another part of government and the defendant must have accurate information on who is likely to be interested by the case, how much influence they are likely to have, and how to approach them.

#### *C. Taking Advantage of Congress*

Someone in Congress will listen to and support almost any issue or any person. Most congressional inquiries, however, are halfhearted, designed only to show a constituent the congressman is trying to protect its interest. Such approaches create more ill will in the agency than benefit. Finding a sympathetic congressman with appropriate leverage over the agency and sufficient persistence, is a difficult and sophisticated task. Leverage varies with timing. A congressman with no normal leverage over the agency may have tremendous leverage if his vote is needed on a closely contested bill desperately sought by the administration. Informal contact and inquiry, staff investigation, hearing, request for a General Accounting Office audit, investigation or report, legislative or appropriation action, legislative



history and other avenues are open to a persistent and well-situated congressman. The Department of Justice has continuously and rather unsuccessfully discouraged congressional contact with the agency once litigation is commenced.

#### *D. Exploiting Intergovernmental Tensions*

The administration of most environmental laws is highly federalized. The state/federal relationship is fraught with tensions. In many cases it may be possible to convince one level of government to fight the battle for an individual against another level. This may help in pursuing the other tactics suggested. Intergovernmental friction may give a good excuse for a bureaucrat along the chain of command who is not otherwise enthusiastic for a particular case or for conflict in general, to scuttle or settle a case. The risks in the tactic are alienation of the target agency and losing the significance of and control over the original issue in an escalating intergovernmental battle.

#### *E. Resisting Access and Information Requests*

The inspection and information-gathering provisions of the various environmental statutes enforce against refusal to provide requested information only through subsequent court action and do not authorize unconsented searches without warrants.<sup>62</sup> There may be legitimate reasons to quash a warrant: the warrant is too vague or too broad; it was granted without probable cause and not as part of a neutral inspection scheme; or the search is not within the scope of the authorizing legislation. Information requests may be subject to a variety of defenses: the request is beyond the scope of the authorizing legislation; it has not been cleared or exempted by OMB pursuant to the Paperwork Reduction Act of 1980;<sup>63</sup> or compiling it is so burdensome that the government should agree in advance to compensate for time spent and expenses incurred.<sup>64</sup> If delay is advantageous, such legitimate defenses can provide delay if not ultimate satisfaction.

#### *F. Preemptive Litigation*

Early attempts at declaratory judgment or injunctive relief to secure pre-enforcement review of agency orders or halt enforcement did not fare well when attempted under federal environmental laws. However, the reasons for denying pre-enforcement review are specific to each case and reported

---

<sup>62</sup>*Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *United States v. Tivian Laboratories, Inc.*, 589 F.2d 49 (1st Cir. 1978); Note, Rationalizing Administrative Searches, 77 MICH. L. REV. 1291 (1979).

<sup>63</sup>44 U.S.C. § 3501 *et seq.*

<sup>64</sup>*See United States v. Tivian Laboratories, Inc.*, 589 F.2d 49 (1st Cir. 1978), in which the First Circuit denied a request for such relief but did not rule out the possibility of it in another case.



cases centered only on the Clean Air Act.<sup>65</sup> Where these factors are absent and the facts of a particular case are compelling, attempts to secure pre-enforcement review may be successful. Indeed, later cases have shown an inclination to consider it.<sup>66</sup> Because of the threat of treble damages for failure to comply with section 106 Superfund administrative orders, courts should be particularly willing to review them. Where litigation is inevitable, preemptive actions allow the plaintiff to commence the action at a forum and at a time of its choosing, giving it some control over the litigation.

### *G. Diverting Litigation*

Some prospective defendants have initiated litigation on related matters, *e.g.*, a broad challenge to the propriety of gathering evidence by aerial photography.<sup>67</sup> This type of litigation could be used either to divert the government's resources from its original goal of suing the potential defendant or to demonstrate that trifling with the potential defendant can be very costly to the government, *e.g.*, running the risk of being enjoined from aerial photography. As a diversion tactic, such litigation alone is a waste of resources and it will seldom consume sufficient resources of the government to divert it from its contemplated enforcement action. Combined with other tactics reviewed here, however, it may be valuable. As a scare tactic, it is not recommended. The government does not react well to implied threats.

### *H. Making Information Requests*

Use the Freedom of Information Act (FOIA) to gather as much information as possible about the government's case, its evidence, its related policies and procedures, and the scientific and technical justification for its conclusions and demands. Gather the same information through others that are willing to cooperate, *e.g.*, states, congressmen, *etc.* Such information may reveal weaknesses or vulnerability in the government's case, and gathering it does temporarily divert government resources. Refusal to furnish information requested under the FOIA may present a good opportunity for diverting litigation.

### *I. Aggressive Discovery*

The government is not accustomed to aggressive discovery in environmental cases. Its employees are not all well-disciplined, and some may reveal information damaging to the government's case on deposition. The government's records are sometimes poorly kept, and it may have difficulty in

<sup>65</sup>*Getty Oil Company v. Ruckelshaus*, 467 F.2d 349 (3rd Cir. 1975) (declaratory judgment request really sought review of underlying rulemaking); *West Penn Power Company v. Train*, 522 F.2d 302 (3rd Cir. 1975) (notice of violation not final agency action); *Lloyd A. Frye Roofing Co. v. U.S. E.P.A.*, 554 F. Supp. 885 (N.D. Ind. 1973).

<sup>66</sup>*Hooker Chemical Co. v. E.P.A.*, 642 F.2d 48 (3rd Cir. 1981); *Conoco, Inc. v. Gardening*, 503 F. Supp. 49 (N.D. Ill. 1980).

<sup>67</sup>*Dow Chemical Co. v. U.S.*, 50 U.S.L.W. 2651 (E.D. Mich. 1982).



complying with exhaustive requests for documents, leaving possibly grounds for motions to compel complete discovery under Rule 37 of the Federal Rules of Civil Procedure and giving the judge a poor impression of the government's case and professionalism.

Enforcement action by the government to remedy damage or prevent potential damage from hazardous wastes will continue to increase over the next several years. The defendants that deal most successfully with it will be those that anticipate it and, site by site, develop defensive strategies before the government takes action against them. Framed in response to a broad array of considerations and drawing on an equally broad array of tactics, good defensive strategies will minimize and in some cases avoid liability.