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Authors

Vernon, James
Dennis, Patrick W.

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Hazardous-Substance Generator, Transporter And Disposer Liability Under The Federal And California Superfunds

*James F. Vernon***
Patrick W. Dennis †*

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** Associate, McCutchen, Black, Verleger & Shea, Los Angeles, California.

* Student Law Clerk, McCutchen, Black, Verleger & Shea, Los Angeles, California.

† The opinions and views expressed in this article are those of the authors, and do not necessarily represent the opinions of the firm of McCutchen, Black, Verleger & Shea or its clients.

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PART I:

LEGISLATIVE HISTORY AND DESCRIPTION OF FEDERAL SUPERFUND AND CALIFORNIA STATE SUPERFUND

A. *Introduction*

The nation's social institutions only recently have begun to recognize the full impact of the problems and costs attendant to the storage, transportation, treatment and disposal of hazardous substances.¹ The federal and state legislatures' relatively slow response may be explained in part by the lack of information and data regarding the effects of hazardous substances on both the physical environment and human physiology as well as the com-

1. Throughout this paper, the term "hazardous substances" is defined according to the Comprehensive Environmental Responses, Compensation and Liability Act of 1980, § 101(14), 42 U.S.C.A. § 9601(14) (West 1980 Laws Spec. Pamph. 1981) [hereinafter cited as CERCLA]. *This definition is broader than that of hazardous wastes. It includes*

(A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act,

(B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of [the Comprehensive Environmental Responses, Compensation and Liability Act of 1980],

(C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any

plexity of the problem itself.² As a result of such situations as Love Canal,³ Kentucky's Valley of Drums⁴ and the Chemical Control site in New Jersey,⁵ the nation's governmental institutions have been forced to address the many complex social, economic and legal issues raised by such problems. In broad terms, the responses (and issues) fall into two categories: (1) regulating the management of hazardous substances—i.e., their present and future generation, storage, transportation, treatment and disposal; and (2) providing a remedy for the effects of improper management of hazardous substances.

This paper discusses two recent pieces of legislation aimed at the second hazardous-substance category: the federal Comprehensive Environmental Responses, Compensation and Liability Act of 1980⁶ (Superfund, CERCLA, the Act) and the California Carpenter-Presley-Tanner Hazardous Substance Account Act of 1981⁷ (California Superfund). Both are designed to provide a fund to be used for the cleanup of hazardous substances; both acts use taxes assessed against generators of hazardous substances to create and replenish the fund;⁸ and both establish the circumstances in which generators, transporters and disposers will be lia-

waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress),

(D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act,

(E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and

(F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act.

Id. In addition, petroleum, crude oil or any fraction thereof which is not listed in (A) through (F) of this paragraph is excluded from the definition of hazardous substances along with natural gas, natural gas liquids, liquified natural gas, or synthetic gas. *Id.*

2. See, e.g., S. Rep. No. 698, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 4491, 4493-94.

3. For a treatment of the difficulties of applying the common law to Love Canal, see Note, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 ENVTL. L. 133 (1980-81).

4. See, e.g., H.R. Rep. No. 1016, 96th Cong., 2d Sess. 18-22, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6119, 6120-25.

5. *Id.*

6. 42 U.S.C.A. §§ 9601-9615 (West 1980 Laws Spec. Pamph. 1981).

7. Carpenter-Presley-Tanner Hazardous Substance Account Act of 1981, ch. 756, 1981 Cal. Legis. Serv. 2609 (West) (to be codified at CAL. HEALTH & SAFETY CODE §§ 25186, 25300-25395 and in scattered sections of CAL. REV. & TAX. CODE) [hereinafter cited as Cal. Superfund].

8. See CERCLA § 211, I.R.C. §§ 4611, 4612, 4661, 4662 (1981) for the federal tax provisions and Cal. Superfund, § 3, 1981 Cal. Legis. Serv. 2609, 2621-34 (West) (to be codified at CAL. REV. & TAX CODE §§ 43001-43067).

ble to the fund for the costs of cleaning up hazardous substances.⁹

However, the two acts leave many issues unresolved, particularly in the area of liability to the respective funds for cleanup costs. The provision of both bills is unclear as to the standard of liability (whether strict or fault-based and whether joint and several) and the scope of liability (what cleanup costs and how much). This paper first briefly describes the development of the hazardous-substance statutes enacted before the two superfund acts. It then examines the liability provisions of the two superfunds along with their legislative histories and analogous judicial interpretations and attempts to draw conclusions concerning the likely application of the liability provisions of both acts.

B. *Brief History of the Statutory Framework Prior to Superfunds*

1. *The Federal Framework*

In 1976, Congress addressed two facets of the hazardous-substance problem with the passage of the Toxic Substances Control Act (TSCA)¹⁰ and the Resource Conservation and Recovery Act (RCRA).¹¹

TSCA was enacted to provide a screening procedure for hazardous substances. It authorizes the EPA Administrator to "require the testing of any chemical substance that 'may present' an 'unreasonable risk' to health or the environment."¹² In this way data would be developed on the effects of chemical substances upon health and environment.¹³ If the tests reveal an unreasonable risk, the administrator is required to act to reduce that risk. An extreme preventative action could include prohibiting the manufacture of the harmful chemical itself.¹⁴ Thus TSCA helps to generate information on new chemicals and to provide safety measures for their distribution and use.

RCRA addresses a different concern—that of monitoring the

9. Liability provisions for the federal and state laws discussed in depth in the text, *infra*, are found in CERCLA § 107, 42 U.S.C.A. § 9607 (West 1980 Laws Spec. Pamph. 1981) and Cal. Superfund, § 2, 1981, Cal. Legis. Serv. 2608, 2618-19 (West) (to be codified at CAL. HEALTH & SAFETY CODE §§ 25360-25366).

10. Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601-2629 (1976).

11. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1976 & Supp. III 1979).

12. Gaynor, *The Toxic Substances Control Act: A Regulatory Morass*, 30 VAND. L. REV. 1149, 1151 (1977). The screening section is in 15 U.S.C.A. § 2604 (West Supp. 1980) and the testing section is in 15 U.S.C.A. § 2603 (West Supp. 1980).

13. *Id.*

14. Toxic Substances Control Act of 1976, § 6(a), 15 U.S.C. § 2605(a) (1976).

generation, storage, transportation and, ultimately, disposal of hazardous substances. The act is structured literally to cover a hazardous waste from cradle to grave.¹⁵ It does so by following a hazardous waste through its 'life' using a manifest upon which the various handlers of the substance record their actions in either generating, storing, treating, transporting or disposing of the substance.¹⁶ Hence RCRA not only tracks hazardous substances but provides an inventory of such substances.

RCRA also gives the EPA Administrator authority to seek equitable relief whenever "the handling, storage, treatment, transportation, or disposal of any . . . hazardous waste is presenting an imminent and substantial endangerment to health or the environment."¹⁷ This provision is a forerunner to the enforcement scheme under Superfund.

Numerous other federal acts impact peripherally on the release of hazardous substances into the environment. Examples include the Clean Water Act,¹⁸ the Occupational Safety and Health Act,¹⁹ the Federal Environmental Pesticide Control Act,²⁰ the Safe Drinking Water Act,²¹ the Consumer Product Safety Act,²² and the Federal Hazardous Substances Act.²³

2. *The State Framework*

California was the first state to enact a comprehensive scheme to control the storage, transportation and disposal of hazardous wastes. That legislation, the Hazardous Waste Control Act of 1972,²⁴ authorized the state Department of Public Health²⁵ to

15. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6242-43. RCRA, as opposed to Superfund, applies only to hazardous "wastes" which may be viewed as a subset of hazardous "substances". The distinction is crucial for an application of RCRA but is not required for an understanding of the present discussion.

16. See, e.g., Resource Conservation and Recovery Act of 1976, § 2, 42 U.S.C. §§ 6922(5), 6923(3), 6924(2) (1976 & Supp. III 1979).

17. Resource Conservation and Recovery Act of 1976, § 2, 42 U.S.C. § 6973 (1976 & Supp. III 1979).

18. 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979).

19. 29 U.S.C. §§ 651-678 (1976 & Supp. III 1979).

20. 7 U.S.C. §§ 135-136 (1976 & Supp. III 1979).

21. 42 U.S.C. §§ 300f-300j (1976 & Supp. III 1979).

22. 15 U.S.C. §§ 2051-2082 (1976 & Supp. III 1979).

23. 15 U.S.C. §§ 1261-1275 (1976).

24. Hazardous Waste Control Act of 1972, ch. 1236, 1972 Cal. Stat. 2387 (codified as amended at CAL. HEALTH & SAFETY CODE §§ 25100-25240 (Deering 1975 & Supp. 1981)).

25. Now the Department of Health Services (DHS).

adopt lists of hazardous and extremely hazardous wastes and minimum standards for the handling, storage and disposal of such wastes.²⁶ The act provided for the first manifest system for the transportation and disposal of such waste.²⁷ To enforce the act, the Department of Public Health had to request the Attorney General or the appropriate district attorney to bring a civil action to enjoin acts or practices which did or would constitute a violation of the act or the corresponding regulations.²⁸

In 1977, the State Legislature enacted substantial amendments to the Hazardous Waste Control Act.²⁹ The renamed Department of Health Services (DHS) was now required to adopt standards for the operation of facilities handling, processing, storing and disposing of hazardous wastes³⁰ and to establish a permit system for these facilities.³¹ Civil penalties were included for violations of either the Act's provisions or regulations promulgated thereunder.³²

Further amendments to the hazardous-waste provisions were added in 1980.³³ Under these amendments, enforcement by the DHS is strengthened by increasing the dollar amount of civil penalties imposed³⁴ and by adding criminal sanctions.³⁵ In addition, the state adopted hazardous waste disposal land use codes provisions applicable to property on which hazardous wastes have been disposed.³⁶

26. Hazardous Waste Control Act of 1972, ch. 1236, 1972 Cal. Stat. 2387, 2389-90 (current version in CAL. HEALTH & SAFETY CODE §§ 25140, 25150-25152 (Deering 1975 & Supp. 1981)).

27. *Id.*, 1972 Cal. Stat. at 2390-91 (current version in CAL. HEALTH & SAFETY CODE §§ 25153, 25160-25162 (Deering 1975 & Supp. 1981)).

28. *Id.*, 1972 Cal. Stat. at 2392 (current version in CAL. HEALTH & SAFETY CODE § 25181 (Deering Supp. 1981)).

29. Act of Sept. 22, 1977, ch. 1039, 1977 Cal. Stat. 3140.

30. *Id.*, 1977 Cal. Stat. at 3145 (current version at CAL. HEALTH & SAFETY CODE § 25150 (Deering Supp. 1981)).

31. *Id.*, 1977 Cal. Stat. at 3150-51 (current version at CAL. HEALTH & SAFETY CODE §§ 25200, 25201, 25202, 25203 (Deering Supp. 1981)).

32. *Id.*, 1977 Cal. Stat. at 3149-50 (current version at CAL. HEALTH & SAFETY CODE §§ 25188-25191 (Deering Supp. 1981)).

33. Act of Sept. 10, 1980, ch. 878, 1980 Cal. Stat. 2756; Act of Sept. 27, 1980, ch. 1161, 1980 Cal. Stat. 3899.

34. Act of Sept. 27, 1980, ch. 1161, § 6, 1980 Cal. Stat. 3899, 3901 (codified at CAL. HEALTH & SAFETY CODE § 25196 (Deering Supp. 1981)).

35. Act of Sept. 10, 1980, ch. 878, § 11, 1980 Cal. Stat. 2756, 2759 (codified at CAL. HEALTH & SAFETY CODE § 25195 (Deering Supp. 1981)).

36. Act of Sept. 27, 1980, ch. 1161, 1980 Cal. Stat. 3899, 3901-09 (codified at CAL. HEALTH & SAFETY CODE §§ 25220-25240 (Deering Supp. 1981)).

C. *Legislative Histories and Main Provisions*

1. *Federal*

a. *History*

If RCRA can be thought of as managing a hazardous substance from its cradle to its grave, Superfund is the fail-safe device should the substance rise from the dead. Superfund addresses the problem of improper hazardous-substance disposal in the past as well as the situation in which hazardous substances pose a substantial danger to the public. The Act provides both a mechanism and a fund for cleanup and emergency response to actual or threatened releases of hazardous substances into the environment. In addition, the Act establishes liability and compensation for the costs of remedying such releases. Finally, the Act closes loopholes left open under RCRA.

The Carter Administration first sent draft legislation to establish a superfund to various federal agencies for comment in May 1979.³⁷ At that time the proposed act was to cover both hazardous-substance releases and oil spills with a fund ceiling of \$6 billion. Liability to the fund was to be joint, several and strict for owners, operators and lessees of inactive or abandoned hazardous-waste disposal sites.³⁸ By June the Administration already was retreating from its initial position by proposing to split the fund so that current chemical manufacturers would not be paying the cleanup costs of already-abandoned hazardous-waste sites.³⁹

On June 13, 1979, the Carter Administration sent its proposed legislation to Congress. The Administration offered a \$1.6 billion ceiling on the fund to be financed eighty percent by fees on industries involving oil and hazardous substances and twenty percent by federal appropriations. Both oil and hazardous-substance spills along with abandoned and inactive hazardous-waste disposal sites were to be covered. The fund was to be used for the costs of government emergency response actions for cleanup of sites posing an imminent and substantial danger to public health or welfare.⁴⁰ Third-party damages not including personal injury were to be paid from the fund.⁴¹ Liability to the fund for owners,

37. [10 Current Developments] ENV'T REP. (BNA) 4 (1979).

38. *Id.* at 6.

39. The administration's rapid shift was revealed in testimony before the House Commerce Subcommittee on Oversight and Investigations by EPA Administrator Douglas M. Costle. *Id.* at 193 (testimony given on June 4, 1979).

40. *Id.* at 223.

41. *Id.* at 223-24.

operators and lessees of hazardous-waste facilities was to be strict, joint and several for any cleanup costs.⁴²

Criticisms of key provisions of the Administration's superfund bill resulted in the introduction of numerous competing proposals. In all, the Ninety-sixth Congress considered twenty bills dealing with liability and compensation for toxic substances pollution and other contamination.⁴³ Two of the bills deserve mention because they contributed significantly to the final form of the Act.

The first of these, S. 1480, was introduced on July 11, 1979, by Senator John C. Culver. The bill proposed a superfund financed entirely with fees paid by importers, manufacturers, and generators of hazardous chemical products. The fund was to be applied retroactively and was to cover longer-term cleanup costs than those covered by the Administration's proposal. The fund was not

42. *Id.* at 224. The proposed legislation drew responses from both environmentalists and chemical manufacturers. The Environmental Defense Fund, Environmental Action, the Sierra Club and the Center for Law and Social Policy issued a joint statement generally supporting the superfund concept but expressing concern over funding and reimbursement of medical expenses. *Id.* at 224-25.

The Chemical Manufacturers' Association criticized the proposed legislation and suggested instead that RCRA simply be amended to include a superfund which would be 100% financed by state and local government. In addition the association further recommended that such a fund apply only to abandoned dump sites (instead of including spills, or inactive sites), cover only emergency cleanup and containment costs, be reimbursed by wrongful dumpers (instead of on a strict liability basis) and allow a defense of comparative responsibility. *Id.* at 724-25 (press conference on July 12, 1979).

Members of both houses of Congress also expressed criticisms of the new superfund bill. Senator John C. Culver (D-Iowa) at a joint subcommittee hearing of the Senate Environment and Public Works Committee viewed enactment of hazardous-substance cleanup legislation as the top environmental priority for Congress. He was concerned, however, that the Administration's proposal did not provide funds for personal injury or medical costs. Other senators noted that the proposed fee system did not provide any incentive to industry by recognizing good-faith efforts. In the House, Rep. James J. Florio (D-N.J.) urged all committees to work quickly on the legislation, claiming that "the consequences of congressional inaction on this matter would be disastrous." *Id.* at 279 (statements given at Senate joint subcommittee hearings on June 20, 1979).

The House Interstate and Foreign Commerce Subcommittee on Transportation and Commerce also raised concerns over the proposal regarding the heavy reliance on statutory authority of the Clean Water Act, the multiple definitions of hazardous substances, the ambiguous definition of "least-cost approach" to containing pollutants at a hazardous-waste site, the lack of economic incentives for recycling and other problems. Many of these perceived defects in the initial proposed legislation were never eliminated. *Id.* at 279-81 (from June 19, 1979 House Subcommittee hearing).

43. 11 ENVTL. L. REP. (ENVTL. L. INST.) 10,102 (1981). *See, e.g.*, H.R. 29, 85, 1048, 1049, 3441, 3797, 3798, 4548, 4566, 4571, 5074, 5290, 5291, 6931, 7020; S. 684, 953, 1046, 1325, 1341, 1480, 96th Cong., 2d Sess. (1980).

to cover oil-spill cleanup.⁴⁴ Major environmental groups⁴⁵ endorsed the Culver bill but called for tougher provisions including strict liability, compensation for medical expenses, provisions for citizen petitions, attorney's fees awards, and higher enforcement penalties.⁴⁶

The second bill, Congressman James J. Florio's H.R. 5790, presented in October 1979, would have set up a superfund financed seventy-five percent by industry and twenty-five percent by federal government appropriations.⁴⁷ The bill also included a contribution scheme whereby the state would have paid ten percent of the excess costs once response costs exceeded \$300 thousand at an individual site. Florio's bill covered only abandoned hazardous-waste sites—not oil spills or hazardous-substance spills.⁴⁸ Both industry and environmentalists had concerns over the bill. Industry criticized its joint, several and strict liability provisions while an environmental spokesperson⁴⁹ noted that the bill did not include third-party damages or a shift in causation requirements.⁵⁰

By April of 1980, the critical portions of the superfund legislation were being hotly debated in Senate subcommittee hearings.⁵¹ The Department of Justice was pressing for joint, several and strict liability by asserting that reimbursement would be sought only from those generators who contributed significantly to a site

44. [10 Current Developments] ENV'T REP. (BNA) 730 (1979). The bill was co-sponsored by Sens. Edmund Muskie (D-Maine), Robert T. Stafford (R-Vt.), John H. Chafee (R-R.I.), Jennings Randolph (D-W. Va.), and Daniel P. Moynihan (D-N.Y.).

45. Center for Law and Social Policy, Sierra Club, Environmental Act, the Natural Resources Defense Council, the Wilderness Society, Friends of the Earth, the National Audubon Society, the National Parks and Conservation Association, the Fund for Animals, Defenders of Wildlife, the Oceanic Society, and the Conservation Law Foundation of New England.

46. [10 Current Developments] ENV'T REP. (BNA) 766-68 (in testimony before Senate Subcommittees on June 19-20, 1979).

47. *Id.* at 1477 (introduced on Oct. 31, 1979).

48. This exclusion resulted in giving the Commerce Committee's Transportation and Commerce Subcommittee, chaired by Rep. Florio, sole jurisdiction over H.R. 5790. [10 Current Developments] ENV'T REP. (BNA) 1478 (1979).

49. Marchant Wentworth of Environmental Action. *Id.*

50. Application of common-law burden of proof requirements in the pollution area has received criticism because of the difficulty for private plaintiffs in proving causation. The private plaintiff often simply does not have the resources, expertise or information to prove causation. Suggestions have been made to reduce this burden or completely shift it to the defendant. *See, e.g.,* Krier, *Environmental Litigation and the Burden of Proof*, LAW AND THE ENVIRONMENT 105, 107 (M. Baldwin & J. Page eds. 1970).

51. [10 Current Developments] ENV'T REP. (BNA) 2263 (1980).

targeted for cleanup.⁵² In addition, the Department urged the subcommittees to amend the superfund bill to declare that the handling, storage, and disposal of hazardous wastes is an ultrahazardous activity. This, the Department claimed, automatically would have subjected those entities involved in such activities to joint, several and strict liability.⁵³ On the other hand, industry spokespersons were particularly critical of the joint, several and strict liability provisions of the bill and an industry-sponsored survey downplaying the necessity of superfund legislation was circulated.⁵⁴ Similar activities surrounded the House hearings on its superfund bills.

On April 30, a House panel (the Transportation and Commerce Subcommittee of the House Interstate and Foreign Commerce Committee) approved a second bill introduced by Representative Florio, H.R. 7020.⁵⁵ The bill split financing of funds equally between the federal government and private industry. It provided

52. *Id.* (testimony before Senate subcommittees on April 15, 1980).

53. *See, e.g.*, comments of Anthony Roisman, Chief of the Department of Justice's Hazardous Waste section. *Id.*

54. An interesting statistical war was going on behind the scenes between the EPA, Congress and private industry. The conflict centered around estimates of the number of potentially dangerous hazardous-waste sites in the nation. A study prepared for the EPA by Fred C. Hart Associates estimated the number of hazardous-waste sites to be between 32,254 and 50,664. Between 1,204 and 2,023 of these were designated as "significant problem sites." [9 Current Developments] ENV'T REP. (BNA) 2085 (1979). The House relied on these figures to emphasize the need for H.R. 7020. H.R. Rep. No. 1016, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6120.

However, a dissenting view of the reliability and significance of the EPA figures was filed by Reps. David Stockman and Thomas Loeffler. Citing Rep. Eckhardt's Subcommittee on Oversight and Investigation report which estimated only 851 potentially hazardous-waste sites, the representatives asserted that the EPA had misused the Hart report data. *Id.* at 70-71, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 6145-46.

The Chemical Manufacturers Association then conducted a survey in early 1980 which found 4,196 disposal sites and classified only 431 of those as potentially hazardous. The study was criticized by the EPA. [10 Current Developments] ENV'T REP. (BNA) 2151, 2263 (1980).

The true figures may be somewhere in between. Michael B. Cook, director of EPA's office of emergency and remedial response, reported to a subcommittee of the Senate Environment and Public Works Committee on July 8, 1981 that 9,300 hazardous-waste sites had been identified, with emergency actions undertaken at 52 sites. Cook noted that about 8,300 site notifications under superfund had been received but added, "we're seeing very few surprises. Most of the significant sites we already knew about." [12 Current Developments] ENV'T REP. (BNA) 349 (1981).

55. [11 Current Developments] ENV'T REP. (BNA) 4 (1980). This bill, introduced by Rep. Florio, was a substantial modification of his other superfund proposal, H.R. 5790.

for strict, joint and several liability to the fund of any person who caused or contributed to the release of any hazardous substance into the environment. Fund expenditures would be available for emergency actions, containment, cleanup, restoration of natural resources and other actions carried out by the Administrator. Personal and property damages could also be collected from the liable party. The states would pay ten percent of all costs incurred above \$500 thousand.⁵⁶

Approximately two weeks later⁵⁷ the House Interstate and Foreign Commerce Committee approved a slightly modified H.R. 7020. Liability for third-party damages resulting from releases at hazardous-waste sites was deleted and a defense to the strict, joint and several liability of the bill was added. A party could avoid paying full cleanup costs if it could show that only a portion of the total cleanup costs was attributable to it.⁵⁸ The bill received a mixed response from environmentalists and industry.⁵⁹

Meanwhile, Senate subcommittees approved S. 1480 on May 22.⁶⁰ The Senate version covered abandoned, inactive, and active hazardous-substance disposal and storage sites as well as other releases into the environment. Financing of the fund was to be 82.5% industry and 12.5% federal appropriations. Liability was to be based on the strict, joint and several provisions of section 311 of the Clean Water Act. A contribution defense similar to that in H.R. 7020 was also added.⁶¹

S. 1480 was approved by the Senate Environment and Public Works Committee on June 27 by a ten-to-one vote.⁶² The bill would have allowed recovery of out-of-pocket medical expenses and other compensation to victims of hazardous-waste spills. Amendments to the subcommittee version included a statute of

56. [11 Current Developments] ENV'T REP. (BNA) 4-5 (1980).

57. On May 13, 1980. *Id.* at 59.

58. *Id.* at 59-60. Interestingly, a similar provision was included in the Cal. Superfund but ultimately rejected for CERCLA.

59. Environmental Action lobbyist Marchant Wentworth was particularly concerned with the elimination of third-party damages and the reliance of the bill's success on appropriations and the Office of Management and Budget. (The approved bill tied the amount of fees assessed against industry to finance the fund to the amount of federal government appropriations approved for the fund.) *Id.* at 60.

The Chemical Manufacturers' Association generally supported the bill but was looking for further changes. *Id.*

60. The delay was caused in part by the appointment of Sen. Edmund Muskie as Secretary of State. *Id.* at 60.

61. [11 Current Developments] ENV'T REP. (BNA) 141-42 (1980).

62. *Id.* at 327.

limitations for medical expense recoveries and stricter requirements to prove causation for personal injuries. The bill was also amended to limit the liability of insignificant contributors to a particular hazardous-waste release.⁶³

By this time other events had stirred the nation and focused attention on the hazardous-waste problem. The Hooker Chemical Company's inactive toxic-chemical dumpsite in the Love Canal area of Niagara Falls, New York became the first hazardous-waste site in the United States to be declared a national emergency. President Carter declared the state of emergency on May 21, 1980, and also ordered the temporary relocation of the families in the area.⁶⁴ The impact of the Love Canal incident on the proposed superfund legislation is not clear, but it obviously was on the minds of legislators as the bill neared passage.⁶⁵

The presidential election in November 1980 provided the final impetus for the passage of a federal superfund bill. With the election of a conservative administration and with the radical change in the make-up of Congress, particularly the Senate, the outgoing administration, environmental groups and some Congressional leaders felt that if *some* superfund bill was not enacted by the end of the year, one might not be adopted for years. As a result, compromises were made quickly and the Senate passed a significantly modified version of S. 1480.⁶⁶ The House passed the same bill three weeks later.⁶⁷ The last-minute scrambling of a lame-duck Congress⁶⁸ and a public-interest group study which sought to link opposition to the bill with chemical industry political contributions aroused criticism of the bill as it passed.⁶⁹ President Carter

63. *Id.*

64. *Id.* at 139.

65. *See, e.g.*, the remarks of Sen. Randolph in 126 CONG. REC. S14,963, S14,969 (daily ed. Nov. 24, 1980).

66. On Nov. 11, 1980, by a vote of 78 to 9. [10 Current Developments] ENV'T REP. (BNA) 1097 (1980).

67. On December 3, 1980, by a vote of 274 to 94. *Id.* at 1177. The Senate had made numerous amendments to S. 1480, incorporating many of the provisions in H.R. 7020. The bill was then adopted by a voice vote as a substitute for H.R. 7020 which would enable the House to adopt the Senate measure on the floor and eliminate the need for a conference. *Id.* at 1097.

68. This was duly noted by the press. Sen. Humphrey had two critical newspaper editorials read into the Congressional Record; one from the Washington Star and one from the Wall Street Journal. 126 CONG. REC. S14,978 (daily ed. Nov. 24, 1980).

69. Public Citizen's Congress Watch, a public interest group founded by Ralph Nader, released a study on August 25, 1980, which attempted to link the size of political contributions to individual senators and House members with their votes on superfund bills. Exceptions to such a correlation were noted, however, and impli-

signed the bill into law on December 11, 1980, calling the legislation a "landmark in its scope and in its impact on preserving the environmental quality of our country."⁷⁰

b. Main Provisions

The Act, based primarily on H.R. 7020, was clearly a compromise, but it received reserved approvals from both environmentalists and industry.⁷¹ The major provisions of the Act will be noted here with particular emphasis on the liability portions.

(1) The Fund

The fund will receive \$44 million each year from general revenues for its first five years of operation.⁷² An estimated \$1.38 billion⁷³ will be added to the fund by taxes on petroleum,⁷⁴ taxes on certain chemicals,⁷⁵ amounts recovered on behalf of the fund under the Act,⁷⁶ moneys recovered or collected under section 311(b)(6)(B) of the Clean Water Act,⁷⁷ penalties under Title I of the Act⁷⁸ and punitive damages under section 107(c) of the Act.⁷⁹

cated legislators issued statements refuting the accusations. [11 Current Developments] ENV'T REP. (BNA) 668-69 (1980).

70. *Id.* at 1261.

71. *Id.* at 1231.

72. CERCLA § 221(b)(2), 42 U.S.C.A. § 9631(b)(2) (West 1980 Laws Spec. Pamph. 1981).

73. 11 ENVTL. L. REP. (ENVTL. L. INST.) 10,104 (1981).

74. CERCLA § 221(b)(1)(A), 42 U.S.C.A. § 9631(b)(1)(A) (West 1980 Laws Spec. Pamph. 1981). Note that the actual revenue-raising provisions are in I.R.C. §§ 4611-4612 (1981). The taxes fall on (1) crude oil received at a United States refinery and (2) petroleum products coming into the United States for consumption use or warehousing.

75. CERCLA § 221(b)(1)(A), 42 U.S.C.A. § 9631(b)(1)(A) (West 1980 Laws Spec. Pamph. 1981). The revenue raising provisions are found in I.R.C. §§ 4661-4662 (1981). This tax falls on generators of the 42 chemicals listed in CERCLA § 211(a), I.R.C. § 4661(b) so long as the chemical is produced in the United States. If it is imported, the tax falls on the importer.

76. CERCLA § 221(b)(1)(B), 42 U.S.C.A. § 9631(b)(1)(B) (West 1980 Laws Spec. Pamph. 1981).

77. CERCLA § 221(b)(1)(C), 42 U.S.C.A. § 9631(b)(1)(C) (West 1980 Laws Spec. Pamph. 1981). The money received under this section is from penalties assessed against owners, operators, or persons in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of certain Clean Water Act regulations. See 33 U.S.C.A. § 1321(b)(6)(B) (West Supp. 1980).

78. CERCLA § 221(b)(1)(D), 42 U.S.C.A. § 9631(b)(1)(D) (West 1980 Laws Spec. Pamph. 1981). These are penalties collected under § 103(b)(3) and (c) for failure to comply with the notification requirements of the Act.

79. CERCLA § 221(b)(1)(E), 42 U.S.C.A. § 9631(b)(1)(E) (West 1980 Laws Spec. Pamph. 1981). As of this writing, the original act as reported in 1980 U.S. CODE CONG. & AD. NEWS 2767 and 42 U.S.C.A. § 9631(b)(1)(E) (West 1980 Laws Spec.

The total amount raised by taxes and general revenues is estimated to be \$1.6 billion over five years.⁸⁰

(2) Notification Requirements

Section 103 of the Act sets forth a general requirement of notification by persons in charge of a vessel or an offshore or onshore facility who have knowledge of any release of a hazardous substance from such vessel or facility.⁸¹ Similarly, any person in charge of a vessel or facility from which a hazardous substance is released who fails to notify the United States government of that release faces a fine of not more than \$10 thousand or imprisonment for not more than one year or both.⁸² Further notification requirements are imposed upon owners and operators of hazardous-substance facilities and transporters of hazardous substances for past handling or disposal of such substances if done without permits.⁸³ Persons subject to notification provision must also comply with recordkeeping requirements.⁸⁴

(3) Response Authorities and the National Contingency Plan

The main thrust behind the Act is section 104 which authorizes government action "whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the

Pamph. 1981) contained a clerical error. CERCLA § 221(b)(1)(E) refers to punitive damages under § 107(c)(8). In fact there is no § 107(c)(8) and the punitive-damages provision of § 107 is in (c)(3).

Assuming that § 107(c)(3) is the proper cross-reference for the statute, it refers to moneys collected from persons found liable to the fund under § 107(a) who fail to comply with an order of the President pursuant to §§ 104 or 106 of the Act to provide removal or remedial action for a hazardous-substance release.

80. 11 ENVTL. L. REP. (ENVTL. L. INST.) 10,104 (1981).

The act also sets up a Post-closure Liability Trust Fund of \$200 million to assume liability for hazardous-waste sites that have been issued permits under RCRA and that have been closed in compliance with such permits. This fund is financed by a tax on the receipt of hazardous wastes at such permitted facilities. CERCLA § 232, 42 U.S.C.A. § 9641 (West 1980 Laws Spec. Pamph. 1981). This fee assessment and the tax are both criticized as providing encouragement for improper disposal of hazardous wastes in Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584, 598 n.63 (1981).

81. CERCLA § 103(a), 42 U.S.C.A. § 9603(a) (West 1980 Laws Spec. Pamph. 1981). This requirement is waived if it is a federally permitted release as defined in the Act or a minimal release (see CERCLA § 102, 42 U.S.C.A. § 9602 (West 1980 Laws Spec. Pamph. 1981)).

82. *Id.* § 103(b), 42 U.S.C.A. § 9603(b) (West 1980 Laws Spec. Pamph. 1981). The de-minimis requirements of § 102 still apply as do exclusions for federally permitted releases (see *supra* note 81).

83. *Id.* § 103(c), 42 U.S.C.A. § 9603(c) (West 1980 Laws Spec. Pamph. 1981).

84. *Id.* § 103(d), 42 U.S.C.A. § 9603(d) (West 1980 Laws Spec. Pamph. 1981).

environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.”⁸⁵ Government action must be consistent with the National Contingency Plan⁸⁶ and may involve both removal and remedial action.⁸⁷ Section 104 also gives the EPA authority to conduct investigations, monitoring, surveys, testing or other information gathering in order to determine if government action is required.⁸⁸

There is a \$1 million or six-month time limit on responses under section 104 unless certain findings are made.⁸⁹ In addition, the Act requires that the President select remedial actions in a cost-effective manner.⁹⁰ The President is also authorized to enter

85. *Id.* § 104(a)(1), 42 U.S.C.A. § 9604(a)(1) (West 1980 Laws Spec. Pamph. 1981).

86. *See infra* note 95.

87. These are terms of art defined in § 101(23) and (24) (42 U.S.C.A. § 9601(23), (24) (West 1980 Laws Spec. Pamph. 1981)) of the Act respectively. Removal generally involves the cleanup of released hazardous substances from the environment, preventative measures to stop releases of hazardous substances, actions of monitoring, assessing and evaluating releases or threats of releases and other steps necessary to prevent, minimize or mitigate damage to public health or welfare or to the environment. Removal may be thought of as including short-term measures.

Remedial action means those actions consistent with a permanent remedy which may be used instead of or in addition to removal actions. Examples of remedial actions given in the Act include storage, confinement, use of dikes or trenches, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff and provision of alternative water supplies. It may also include, for example, costs of permanent relocation of residents, businesses and community facilities.

88. CERCLA § 104(b), 42 U.S.C.A. § 9604(b) (West 1980 Laws Spec. Pamph. 1981).

89. Presumably, findings are required after six months of response action or after \$1 million is incurred in response costs, whichever comes first. The findings are, “(i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis.” CERCLA § 104(c)(1), 42 U.S.C.A. § 9604(c)(1) (West 1980 Laws Spec. Pamph. 1981). The President may also exceed the limits if he finds that the state in which the release occurs has reached an agreement with the President providing certain assurances. *Id.* § 104(c)(1)-(3).

Clarification of this section of the Act was forthcoming on July 28, 1981, in an EPA memorandum from Michael B. Cook, director of EPA’s office of emergency and remedial response. Guidelines for determination of the findings necessary to exceed the limits plus interpretations of the wording of the Act were included. [12 Current Developments] ENV’T REP. (BNA) 430 (1981).

90. CERCLA § 104(c)(4), 42 U.S.C.A. § 9604(c)(4) (West 1980 Laws Spec. Pamph. 1981). The Act defines “cost-effective” as a balance between the need for protection of public health, welfare and the environment, and the availability of amounts from the fund to respond to other sites. This section only requires this cost-effective scrutiny for remedial actions and not for removal actions.

into a contract with a state or political subdivision thereof to carry out response actions and reimburse the state out of the Fund.⁹¹ Finally, various provisions allowing data collection,⁹² stipulating contract terms,⁹³ and establishing information files⁹⁴ are included to facilitate response actions.

Section 105 directs the President to revise the National Contingency Plan⁹⁵ to include a section to be known as the National Hazardous Substance Response Plan.⁹⁶ Guidelines for the revision are included.⁹⁷

(4) Liability

Section 107 makes the following individuals liable for certain government-response costs and other damages with respect to the release or threatened release of a hazardous substance from a vessel or facility: (1) the owner and operator of the vessel or facility; (2) any person who at the time of disposal of any hazardous substance owned or operated the facility at which such substances were disposed of; (3) any person who by contract arranged for disposal, transportation or treatment of the hazardous substances owned or possessed by such person; and (4) any person who accepted hazardous substances for transport to the facility.⁹⁸ The

91. CERCLA § 104(d), 42 U.S.C.A. § 9604(d) (West 1980 Laws Spec. Pamph. 1981).

92. *Id.* § 104(e), 42 U.S.C.A. § 9604(e) (West 1980 Laws Spec. Pamph. 1981).

93. *Id.* § 104(f)-(g), 42 U.S.C.A. § 9604(f)-(g) (West 1980 Laws Spec. Pamph. 1981).

94. *Id.* § 104(i), 42 U.S.C.A. § 9604(ii) (West 1980 Laws Spec. Pamph. 1981).

95. *See* Federal Water Pollution Control Act, 33 U.S.C.A. § 1321 (West 1978).

96. CERCLA § 105, 42 U.S.C.A. § 9605 (West 1980 Laws Spec. Pamph. 1981).

97. *Id.* Although the Act requires the revision within 180 days after enactment (which would have been June 9, 1981) the EPA has fallen far behind that deadline. On July 29, 1981, the EPA Administrator, Anne M. Gorsuch, told a hearing of the House Energy and Commerce Subcommittee on Commerce, Transportation and Tourism that the plan would probably be issued in final form by the fall of 1982. [12 Current Developments] ENV'T REP. (BNA) 427 (1981).

The Environmental Defense Fund brought suit against the EPA in the fall of 1981, to order the required revision of the National Contingency Plan. The State of New Jersey brought a similar action shortly thereafter. These two cases were consolidated and the court issued an order giving the EPA 30 days from Feb. 12, 1982 to publish its revision of the National Contingency Plan. *EDF v. Gorsuch*, [1981] HAZARDOUS WASTE LITIGATION REP. (ANDREWS) 2108 (D.D.C. 1982).

98. Section 107 of the Act reads in part:

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance

costs include not only expenditures from the fund for response actions, but also necessary costs of response incurred by persons acting consistently with the National Contingency Plan.⁹⁹ Damages are imposed for injury to natural resources.¹⁰⁰

The only defenses available to an otherwise liable party are: (1) "Acts of God", (2) acts of war, or (3) acts or omissions of a third party, other than an employee or one whose acts occur in connection with a contractual relationship with the party.¹⁰¹ This third defense is qualified further by requiring an otherwise liable party to prove that it exercised due care with respect to the hazardous substance concerned and that it took precautions against foreseeable acts of third parties.¹⁰²

The Act fixes certain limits on liability for defendants as long as

owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

99. *Id.* One of the focal points of superfund legislation as it was in bill form was the issue of allowing recovery from the fund for medical expenses out of the fund and similarly establishing statutory liability for such expenses. The liability section of the Act does not explicitly provide for recovery of such expenses but earlier versions of the Act called for reimbursement of out-of-pocket medical expenses. *See, e.g.*, the Stafford-Randolph compromise-bill summary in [11 Current Developments] ENV'T REP. (BNA) 1041 (1980). Concern over the omission was also expressed in the senate debate before voting on the final act. *See* remarks of Sen. Mitchell, 126 CONG. REC. S14,973 (daily ed. Nov. 24, 1980). However, it has been suggested that some medical expenses could be covered by the clause allowing recovery for persons acting consistently with the National Contingency Plan. CERCLA § 107(a)(4)(B), 42 U.S.C.A. § 9607(a)(4)(B) (West 1980 Laws Spec. Pamph. 1981). *See, e.g.*, 11 ENVTL. L. REP. (ENVTL. L. INST.) 10,104 (1981).

100. The damages go to the United States Government and any state for natural resources in that state. CERCLA § 107(f), § 42 U.S.C.A. 9607(f) (West 1980 Laws Spec. Pamph. 1981).

101. CERCLA § 107(b), 42 U.S.C.A. § 9607(b) (West 1980 Laws Spec. Pamph. 1981).

102. *Id.*

the release or threatened release was not the result of (1) willful misconduct or willful negligence or (2) a violation of applicable regulations.¹⁰³ Liability limits also are waived if the defendant fails to cooperate or assist in a reasonable manner with requests by a responsible public official in connection with response activities.¹⁰⁴ Finally, punitive damages are available from defendants who fail without sufficient cause to comply with an administrative order¹⁰⁵ to provide removal or remedial action.

Section 107 also (1) restricts the use of indemnification agreements for transferring liability¹⁰⁶ and (2) prevents liability under CERCLA for federally-permitted releases of hazard substances.¹⁰⁷

2. *State Superfund*¹⁰⁸

a. *History*

In the summer of 1981, the California legislature was considering two superfund bills, S.B. 618 and A.B. 69.¹⁰⁹ The two bills differed mainly in their liability provisions. The Senate bill pro-

103. CERCLA § 107(c), 42 U.S.C.A. § 9607(c) (West 1980 Laws Spec. Pamph. 1981).

104. *Id.*

105. As provided for in §§ 104 and 106 of the Act. Under § 106, the President is given authority to require the Attorney General to secure such relief as may be necessary whenever the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance. The President may also issue orders under this section to protect public health and welfare.

This section has raised concern within industry because it allows the President to order cleanup by a suspected responsible party which may be in excess of the cleanup which would be undertaken by the fund. The EPA informally has said it would interpret the Act in that way [11 Current Developments] ENV'T REP. (BNA) 2190 (in an interview on Apr. 6, 1981). Industry pressures and administrative motions to amend the act to restrict the scope of the cleanup order were strongly criticized by one of the act's cosponsors, Sen. Stafford. *See, e.g.*, [12 Current Developments] ENV'T REP. (BNA) 412-13 (1981).

106. CERCLA § 107(e)(1), 42 U.S.C.A. § 9607(e)(1) (West 1980 Laws Spec. Pamph. 1981).

107. *Id.* § 107(j), 42 U.S.C.A. § 9607(j) (West 1980 Laws Spec. Pamph. 1981). Other provisions of the liability section include: § 107(d) (shielding persons acting consistently with National Contingency Plan from liability); § 107(f) (providing that natural-resource damages are to be paid to the federal or state government with jurisdiction over such resources); § 107(g) (subjecting federal government entities to the liability provisions); § 107(i) (relating to pesticide products); § 107(j) (preserving other causes of action); and § 107(k) (transferring liability when applicable to the post-closure liability fund).

108. New Jersey and Florida also have superfund statutes. *See, generally*, FLA. STAT. ANN. §§ 376.011-376.21 (West 1974 & Supp. 1982); N.J. STAT. ANN. §§ 58:10-23.11 (West Supp. 1981) (pertaining to water pollution).

109. *See* S.B. 618, 1980-81 Sess. (as amended Apr. 27, 1981) (introduced by Sena-

vided that "any costs incurred and payable from the state account shall be recovered by the department from the liable person or persons,"¹¹⁰ but failed to define either "liable" or "liable person". The bill did, however, refer to provisions in the federal Superfund which defined "liable" and "liability" as the standard of liability under section 311 of the Federal Water Pollution Control Act.¹¹¹ This standard is generally regarded as strict liability.¹¹²

The Assembly bill used a different approach for its standard of liability, by allowing costs of cleanup to be recovered "from the person or persons whose actions necessitated such expenditures."¹¹³ Obviously, "necessitated" could simply require proof of causation, but it could also imply some culpability.¹¹⁴ The Assembly bill also allowed third parties to recover loss of income and uninsured medical expenses from the fund if the responsible party had rejected a demand for such damages.¹¹⁵

The Senate bill had required that the responsible person's identity be unknown before recovery of such losses from the fund would be allowed.¹¹⁶ The Senate bill, as amended, eventually was enacted in the fall of 1981.¹¹⁷ This new state superfund's three objectives are to:

- (a) Establish a program to provide for response authority for releases of hazardous substances, including spills and hazardous-waste disposal sites that pose a threat to the public health or the environment;
- (b) Compensate persons, under certain circumstances, for out-of-pocket medical expenses and lost wages or business income re-

tors Carpenter and Presley); A.B. 69, 1980-81 (introduced by Assemblywoman Tanner).

110. S.B. 618, sec. 2, § 25360, 1980-81 Sess. (as amended Apr. 27, 1981).

111. *Id.* § 25310; CERCLA § 101(32), 42 U.S.C.A. § 9601(32) (West 1980 Laws Spec. Pamph. 1981).

112. *See, e.g.*, United States v. Tex-Tow, 589 F.2d 1310 (7th Cir. 1978).

113. A.B. 69, sec. 2, § 25074, 1980-81 Sess. (as amended Apr. 27, 1981) (introduced by Assemblywoman Tanner).

114. "Necessitated" was not defined in the bill. *See* the definitions, *id.* at sec. 2, §§ 25055-25064.

115. *Id.* at sec. 2, § 25081(c). This provision was criticized because in effect it would have allowed a person to use the state's resources to pursue a civil claim. The injured person could recover from the state fund first and then the state would have to seek indemnification from the responsible party.

116. S.B. 618, sec. 2, § 25372(a), 1980-81 Sess. (as amended Apr. 27, 1980).

117. Cal. Superfund, ch. 756, 1981 Cal. Legis. Serv. 2609 (West) (to be codified at CAL. HEALTH & SAFETY CODE §§ 25186, 25300-25395 and in scattered sections of CAL. REV. & TAX CODE).

sulting from injuries proximately caused by exposure to releases of hazardous substances;

(c) Make available adequate funds in order to permit the State of California to assure payment of its ten-percent share of the costs mandated pursuant to section 104(c)(3) of the federal act (42 U.S.C. 9604(c)(3)).¹¹⁸

b. Main Provisions of California Superfund

The state act establishes a Hazardous Substance Account to be administered by the director of the State Department of Health Services (DHS).¹¹⁹ The fund is financed by means similar to the federal fund, including taxes, penalties and fines collected under the state act and general state revenues.¹²⁰ Explicitly authorized uses of the account include: (1) costs of responses taken pursuant to the federal act;¹²¹ (2) costs of administration of the state superfund;¹²² (3) costs of assessing and rehabilitating damages to natural resources as a result of hazardous-substance release.¹²³

The state act authorizes DHS to initiate recovery actions against liable persons for the cost of response to a release or threatened release of hazardous substances.¹²⁴ However, any defendant to such an action may make a motion to the court to join any other person who may be liable for costs or expenditures under the state

118. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2609 (West) (to be codified at CAL. HEALTH & SAFETY CODE § 25301).

119. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2613 (to be codified at CAL. HEALTH & SAFETY CODE § 25330).

120. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2613 (to be codified at CAL. HEALTH & SAFETY CODE §§ 25330-25333, 25380). The state, however, provides a much more intricate method of taxing. First, instead of taxing the generators (or importers) of hazardous substances it instead fixes the tax on those who dispose of hazardous substances or submit such substances for disposal. *Id.* § 25342. Second, the base tax rate is computed by a formula based on the amount of money left in the fund from the preceding year, *Id.* § 25345, and the total amounts of disposed hazardous wastes, *Id.* § 25345.

121. Cal. Superfund ch. 756, § 2, 1981 Cal. Legis. Serv. 2609, 2616 (West) (to be codified at CAL. HEALTH & SAFETY CODE § 25350).

122. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2616 (to be codified at CAL. HEALTH & SAFETY CODE § 25351).

123. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2617 (to be codified at CAL. HEALTH & SAFETY CODE § 25352).

124. *Id.* § 2, 1981 Cal. Legis. Serv. at 2616-18 (to be codified at CAL. HEALTH & SAFETY CODE §§ 25350-25358). This includes administrative costs which are computed as 10% of the reasonable costs actually incurred or \$500, whichever is greater. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2618 (to be codified at CAL. HEALTH & SAFETY CODE § 25360).

act.¹²⁵ If a party can show by a preponderance of the evidence that it is only responsible for a portion of the costs of response, the court must duly apportion the damages.¹²⁶ In addition, the state superfund does *not* create any new liability for acts that occurred on or before January 1, 1982.¹²⁷

The California Superfund also departs from its federal counterpart in the area of claims for medical expenses by third parties. A special Hazardous Substance Compensation Account is established within the Hazardous Substance Account.¹²⁸ A person may recover all uninsured, out-of-pocket medical expenses and eighty percent of uninsured lost wages for up to three years from the onset of treatment for losses caused by the release of a hazardous substance.¹²⁹ A claimant must show either that the identity of the party liable¹³⁰ is unknown or cannot be determined with reasonable diligence, or there is no liable party, or that the liable party could not satisfy the judgment.¹³¹ For persons injured in hazardous-substance spills this creates a form of relief that is unavailable under the federal act.¹³²

125. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2618 (to be codified at CAL. HEALTH & SAFETY CODE § 25362).

126. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2618-19 (to be codified at CAL. HEALTH & SAFETY CODE § 25363). This is in contrast to CERCLA which has no such explicit provision. See *infra* discussion of contribution under CERCLA accompanying notes 191-192.

127. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2619 (to be codified at CAL. HEALTH & SAFETY CODE § 25366). The wording of this section is unclear regarding acts after Jan. 1, 1982. It could be interpreted to mean that after that date a new form of liability will apply. Thus, for example, it could be that although negligence or nuisance is the principle used to establish liability to the state fund for acts prior to Jan. 1, 1982, strict liability will apply after that date. See *infra* discussion in text accompanying notes 219-256.

128. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2619 (to be codified at CAL. HEALTH & SAFETY CODE § 25371). A ceiling of \$2 million per year is set with authority to appropriate funds from the general hazardous-substance account given to the state legislature.

129. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2620 (to be codified at CAL. HEALTH & SAFETY CODE § 25375). Actual lost wage recoveries are limited to \$15,000 per year for three years. There is also no recovery for claims which are the result of long-term exposure to ambient concentrations of air pollutants.

130. Presumably this is the standard of liability that will apply throughout the act.

131. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2619 (to be codified at CAL. HEALTH & SAFETY CODE § 25372).

132. See *supra* note 99 which comments on the exclusion of recovery for medical expenses from the federal act. See also *supra* note 128 for statutory ceiling on size of compensation fund. The \$2 million annual ceiling may greatly limit the significance of this provision.

PART II:
APPLICATION OF THE FEDERAL AND CALIFORNIA
SUPERFUND LIABILITY SECTIONS TO
GENERATORS, TRANSPORTERS AND
DISPOSERS OF HAZARDOUS WASTES

A. *Liability Under the Federal Superfund*

1. *The Strict-Liability Standard*

Although CERCLA does not expressly provide for strict liability to the fund for generators, transporters and disposers of hazardous substances which are cleaned up by the fund, its wording practically ensures such a result. There is no defense for non-negligent acts unless the release is caused by a third person not in an agency or contractual relationship with the defendant, and the defendant can establish by a preponderance of the evidence that it exercised due care with respect to the hazardous substance and that it took precautions against foreseeable acts by third persons.¹³³

In addition, the Act lists the parties who will be liable in the event of a spill¹³⁴ and defines "liable" as "the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act."¹³⁵ This standard has been regarded in other contexts as strict liability in case law,¹³⁶ and some members of Congress hoped that it would carry over under Superfund.¹³⁷

Yet, because the strict liability wording was dropped from the final form of the Act and left up to the courts to determine, a brief discussion of the rationale for strict liability in this area is appropriate.

A number of theories for the use of strict liability in the hazardous-waste area have been proffered. Three are particularly promi-

133. CERCLA § 107(b), 42 U.S.C.A. § 9607(b) (West 1980 Laws Spec. Pamph. 1981). Somewhat similar language is in the Federal Water Pollution Control Act, 33 U.S.C.A. § 1321(f) (West 1978 & Supp. 1981).

134. See *supra* note 98.

135. CERCLA § 101(32), 42 U.S.C.A. § 9601(32) (West 1980 Laws Spec. Pamph. 1981). See 33 U.S.C.A. § 1321(f)(1) (West 1978 & Supp. 1981) for the relevant Federal Water Pollution Control Act section.

136. See, e.g., *Stewart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979); Note, *Liability Without Fault Under the Federal Water Pollution Control Act*, 19 NAT. RESOURCES J. 687 (1979).

137. See, e.g., 126 CONG. REC. S14,964, (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph); 126 CONG. REC. H11,788 (daily ed. Dec. 3, 1980) (remarks of Rep. Florio). Note, too, that the Department of Justice has indicated its intent to apply a strict liability standard. See, e.g., letter from Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs, Department of Justice. 126 CONG. REC. H11,788 (daily ed. Dec. 3, 1980).

ment. The first argument is that the handling, storage and disposal of hazardous substances is an abnormally dangerous activity and as such has historically been subject to strict liability.¹³⁸ Courts have split on this issue because of exceptions to the ultrahazardous-activity doctrine.¹³⁹ Activity which may be considered ultrahazardous in one location (for example a hazardous-substance disposal site in an urban residential area) may not be in another (such as a disposal site far removed from an urban center and protected from leakage into the groundwater).¹⁴⁰ Thus, Congress rejected the Department of Justice's request to state in the Act that the handling, storage and disposal of hazardous wastes was an ultrahazardous activity.¹⁴¹ Legislators may have recognized the inaccuracy of such a generalization.

A second justification for the imposition of strict liability is that it reduces the burden of proof by eliminating the need to prove negligence and thus increases judicial efficiency.¹⁴² Such a justifi-

138. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 505-16 (4th ed. 1971). A stumbling block to the straight application of abnormally dangerous activity to, say, the disposal of hazardous substances, is that the definition of abnormally dangerous activity often depends upon the place and manner of the activity. Thus storage of hazardous substances in a remote area may not constitute abnormally dangerous activity. *Id.* at 512. To make the connection between the handling of hazardous substances and ultrahazardous activity, the Department of Justice urged legislators to declare in the Act that the handling, storage and disposal of hazardous wastes is an ultrahazardous activity. [10 Current Developments] ENV'T REP. (BNA) 2263 (at an Apr. 15, 1979 Senate subcommittee hearing). This was not done.

"Abnormally dangerous" activity is not quite the same as "ultrahazardous" activity. The first term is derived from its original use in *Rylands v. Fletcher*, [1868] L.R., 3 H.L. 330. The latter term comes from the RESTATEMENT OF TORTS §§ 519, 520. The RESTATEMENT term is more narrowly defined. It is limited to activities the risk of which "cannot be eliminated by the exercise of the utmost care." *Id.* The RESTATEMENT (SECOND) OF TORTS §§ 519, 520 reverts back to the "abnormally dangerous" activity term.

139. In *Ewell v. Petro Processors of La., Inc.*, 364 So. 2d 604 (La. Ct. App. 1978) the court rejected the ultrahazardous-activity label for the disposal of hazardous wastes. *Id.* at 607. The opposite result was reached in *United States v. Waste Indus., Inc.*, No. 80-4-Civ-7 (E.D.N.C., decided April 7, 1981). See also 1 CHEMICAL & RADIATION WASTE LITIGATION REP. (CHEMICAL & RADIATION WASTE LITIGATION REP., INC.) 1015-16 (1981).

140. See *supra* note 138. Conditioning application of the ultrahazardous-activity doctrine on such factors may involve the same type of risk assessment as determining a standard of care under a negligence theory.

141. See *supra* note 138.

142. A good textual treatment of this argument for environmental cases in general can be found in R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 226-31 (2d ed. 1978).

The Department of Justice also lobbied strongly on these grounds for the imposition of strict liability. See, e.g., [10 Current Developments] ENV'T REP. (BNA) 2039, 2263 (1980).

cation ignores several problems. First, the price of promoting judicial efficiency may be substantial and may fall on parties who committed no negligent act. Second, the justification suffers in the case of potentially large damage recoveries under Superfund because of the damage limitations for non-willful conduct.¹⁴³ A court will still have to try the issue of willful negligence whenever a defendant is seeking to invoke damage limitations. As a practical matter, this could occur in a relatively high percentage of the cases actually brought under section 107 because: (1) budget constraints will probably force EPA response and recovery action only in the largest spill or release cases, with necessarily large damage recoveries near the limitations of section 107(c); and (2) most defendants will probably want to try the issue of negligence, not just to limit damages, but also to help establish defenses to other actions.

A third justification which has been proffered for strict liability is one often heard in products liability cases—that imposition of liability on generators, transporters and disposers is the most efficient manner to assess and spread the risks associated with the parties' activities. While such a justification may be valid with respect to future activities by those parties, it is significantly less persuasive with respect to actions taken in the past.¹⁴⁴

2. *Joint and Several Liability*

The issue of whether or not joint and several liability will be applied under Superfund and, if so, how it will be applied is likely to occupy the federal courts for some time.¹⁴⁵ It has significant implications for industry since a uniform application of joint and several liability could leave one generator liable for all the cleanup costs of a release even though it contributed only a fractional amount of the hazardous substance at a site.¹⁴⁶ Similarly,

143. CERCLA § 107(c), 42 U.S.C.A. § 9607(c) (West 1980 Laws Spec. Pamph. 1981).

144. See, e.g., Note, *Inactive or Abandoned Hazardous Waste Disposal Sites: Coping With a Costly Past*, 53 S. CAL. L. REV. 1709, 1739 n.226 (1980).

145. James W. Moorman, Assistant Attorney General of the Justice Department's land and natural resources division, told a Senate Subcommittee that by *not* explicitly making the handling, storage, and disposal of hazardous substances an ultrahazardous activity, it would take "another five years of case law to establish the principle." [10 Current Developments] ENV'T REP. (BNA) 2263 (at an Apr. 15, 1980 Senate subcommittee hearing). The joint-and-several-liability issue will probably evolve with the ultra-hazardous activity issue.

146. Joint and several liability means that defendants may be sued individually for the total amount of harm done. W. PROSSER, *supra* note 138, at 315-316.

one participant in the chain of events in the life of a hazardous substance—for example, the transporter—could be liable for the complete cleanup costs of a release.

This potential liability exposure led chemical-industry lobbyists to apply pressure in Congress to prevent the imposition of joint and several liability in the Act.¹⁴⁷ By contrast (as noted above), the Department of Justice urged the legislators to adopt joint and several liability, asserting that such a provision would (1) induce voluntary cleanup and (2) encourage those involved to implicate others who might be more responsible for a particular release.¹⁴⁸ Congress eventually chose a middle-of-the-road course, and as a last-minute compromise dropped joint and several liability wording and decided to let the courts develop the common law in this area.¹⁴⁹

The threshold question here is, which common law controls: federal or state? Since the landmark case of *Erie R.R. v. Tom-*

147. *See, e.g.*, [10 Current Developments] ENV'T REP. (BNA) 1976 (1980).

148. *Id.* at 2038 (letter submitted to Senate subcommittees on Feb. 19, 1980). The Department also sought to allay industry fears that a single contributor of a small amount of hazardous substance at a release site would be liable for the full amount of cleanup costs. At an April 15, 1980, senate markup session James W. Moorman, assistant attorney general of the Justice Department's land and natural resources division, said: "The Department of Justice would simply not press a case against one whose contribution was an insignificant factor in a release." *Id.* at 2263.

149. "We have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act, but we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable." 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph). *See also* 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1980) (remarks of Rep. Florio).

There is some indication that Congressional intent may have been to prevent the application of joint and several liability by eliminating the wording from the act. *See* 126 CONG. REC. S15,004 (daily ed. Nov. 24, 1980) (remarks of Sen. Helms). However, deference to the remarks of any one legislator in interpreting an act has been criticized by the Supreme Court in *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 49 U.S.L.W. 4537, 4541 n.17 (1981). The citation to the remarks of Sen. Randolph and Rep. Florio, of course, falls prey to the same criticism except (1) they are the sponsors of the successful bill (Florio) and particular amendment (Randolph) that passed and (2) the conclusion that the exclusion of joint-and-several-liability wording in the Act was meant to eliminate it from judicial consideration seems more dangerous than the assumption that courts are free to fashion their own definition of liability. Congressional representatives, during debate, included two interpretations of the wording of the Act which called for joint and several liability. The first, a letter from the Department of Justice, claimed that a clause in the Act allowed contribution among defendants and that such contribution would be meaningless without joint and several liability. The second, a Coast Guard Memorandum, interpreted section 311 of the Clean Water Act as applying joint and several liability and by implication that standard should be extended to the Superfund. 126 CONG. REC. H11,788 (daily ed. Dec. 3, 1980).

*kinds*¹⁵⁰ federal courts have been reluctant to create or recognize federal common law. However, two categories of cases give rise to the formulation of federal common law: "Those in which a federal rule of decision is 'necessary to protect uniquely federal interest,' . . . and those in which Congress has given the courts power to develop substantive law."¹⁵¹ Superfund liability seems to encompass both categories.

In the first category, federal common law is recognized when the "right and obligations of the United States" are at stake.¹⁵² Since the federal government is the legal entity suing to recover expenses under Superfund it is clear that peculiarly federal rights and obligations are involved. In *Clearfield Trust Co. v. United States*¹⁵³ the Court noted that "when the United States disburses its funds . . . it is exercising a constitutional function." The Court reasoned that in such instances the rights acquired by the United States spring from federal sources and in the absence of an applicable act of Congress it is left to the federal courts to develop the appropriate governing law.¹⁵⁴ Under Superfund, the federal government is disbursing funds for hazardous-substance cleanup and then suing for reimbursement. The situation seems analogous to that in *Clearfield Trust*.

Also in the first category are interstate disputes¹⁵⁵ which often involve environmental issues. The leading case establishing a federal common law for federal statutory environmental policies is *Illinois v. City of Milwaukee*.¹⁵⁶ In that case, involving a suit between the State of Illinois and various local governmental jurisdictions of the State of Wisconsin for pollution of Lake Michigan, the Supreme Court recognized the need for a federal common law in the water-pollution area.¹⁵⁷ The Court relied on the extensive history of federal water-pollution legislation and also the need for a uniform law to apply to interstate disputes.¹⁵⁸ The hazardous-waste area also has been largely covered by federal legislation and in the superfund context the need for uniform application of lia-

150. 304 U.S. 64 (1938).

151. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 49 U.S.L.W. 4537, 4540 (1981).

152. *Id.*

153. 318 U.S. 363 (1949).

154. *Id.* at 366-67.

155. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 49 U.S.L.W. 4537, 4540 (1981).

156. 406 U.S. 91 (1972).

157. *Id.* at 101-107.

158. *Id.*

bility seems self-evident.¹⁵⁹

In the second category, the legislative history of Superfund suggests that it was Congress' intent to have the courts develop the common law in this area.¹⁶⁰ Indeed, the determination of the joint-and-several-liability question is really simply an interpretation of the wording in the liability section of the Act and not the creation of a new right or remedy.¹⁶¹ Assuming, therefore, that joint and several liability will be a matter for federal courts to determine according to federal common law,¹⁶² how should the determination be made?

The common law has traditionally applied joint and several liability in cases where two or more causes combine to produce a single indivisible result.¹⁶³ However, application of this rule under Superfund leads to mixed results. Consider two potential cases of cleanup of hazardous substances from more than one source: (1) hazardous substances are stored in an unsafe manner in separate identifiable drums on property;¹⁶⁴ and (2) hazardous substances have been dumped into the ground in an unsafe manner.¹⁶⁵

In the first case it may be possible to apportion damages among the various contributors of the drums, especially if the drums are identified as to source and content. To apply joint and several

159. It would be hard to rationalize the application of a local-liability standard to govern repayment to a fund which is financed by a nationally uniform tax scheme. Neither environmentalists nor industry should favor such a proposal. Environmentalists would find a less stringent liability in some jurisdictions, causing relatively more hazardous-waste cleanup efforts in those areas whereas industry in states with tougher liability standards would find themselves paying a disproportionate share of the national cleanup bill.

160. See *supra* note 149.

161. In *Texas Industries*, 49 U.S.L.W. 4537, the Supreme Court indicated that a determination of joint and several liability from a statute's liability section may follow from general federal court authority to identify the scope of a remedy Congress has provided. 49 U.S.L.W. at 4542.

162. In *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980) the court, after an *Illinois v. Milwaukee* analysis, concluded that the federal common law of nuisance applied to an action brought by the United States government under § 7003 of RCRA. *Id.* at 1129. It further concluded that interstate effects of pollution need not be pleaded where groundwater is the medium. *Id.* at 1129. This decision may pave the way for the application of federal common law to hazardous-waste cases under federal statutes.

163. W. PROSSER, *supra* note 138, at 313-16. See also RESTATEMENT (SECOND) OF TORTS §§ 875, 879 (1979).

164. *E.g.*, Kentucky's Valley of Drums: see *supra* note 4.

165. This was the case in *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980).

liability in such a situation would violate the spirit of the common law.¹⁶⁶ A more difficult question arises when the owner of the site, the transporter of the drums and the generators of the wastes are all liable under CERCLA. In this case of vertical liability,¹⁶⁷ as opposed to horizontal liability,¹⁶⁸ the need for joint and several liability is more apparent. The vertical-liability situation is much closer to the historical situation which originally gave rise to several liability.¹⁶⁹ Also, it may be impossible, given the wording of section 107(a) of the CERCLA,¹⁷⁰ to apportion the harm caused or threatened by members of the vertical structure.¹⁷¹

166. A careful reading of the RESTATEMENT (SECOND) OF TORTS §§ 875, 879 (1979) shows that under § 875 the harm must be single and indivisible. In this case, however, the harm is the threatened release which authorizes action under CERCLA (§ 104(a)(1)), and each drum and its contents may form a divisible part of such a threatened release. Unless the threatened release is dangerous only because of reactive combinations of the chemicals in the drums once mixed together (as in a spill); there seems little rationale to apply joint and several liability on the basis of a single indivisible harm.

Similarly, § 879 applies joint and several liability only if the harm cannot be apportioned. Clearly, in this case, apportionment is possible and liability should not fall entirely on one source of some of the drums. Apportionment could be made on a simple numerical basis depending on the number of drums supplied by a particular contributor compared to the total number of drums in the site. Other schemes are discussed in the contribution section. See *infra* notes 187-215 and accompanying text.

167. Vertical liability as used in this paper refers to the liability of the various participants in each step of the hazardous waste disposal process. The owner/operator of the disposal site may be thought of as "closest" to the site with the transporter and generator respectively further above (or below) in the process.

168. Horizontal liability as used here refers to the liability of any one 'layer' in the hazardous-waste disposal process—e.g. all the transporters to a particular site or all the generators of wastes at a particular site.

169. The common law imposed several liability on those who committed a "joint tort". Thus "all persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result." W. PROSSER, *supra* note 138, at 291. This includes those who actively take part in the common plan or further it by cooperation or request. *Id.* at 292. A court could easily view the actions of a generator who is operating outside the RCRA manifest system and who sends his wastes via a hauler (also outside the system) to an illegal dumpsite as part of a common plan among generator, hauler and dumpsite owner to dispose of wastes unsafely. The horizontal-liability case, when comparing generators acting independently, does not fit the historical scenario as well.

170. See *supra* note 98.

171. This kind of situation where all three levels of liability under CERCLA § 107(a) apply may not be capable of apportionment because of the 'strict' nature of CERCLA liability. Assuming the non negligence of each member of the vertical structure, the harm or threatened harm triggering EPA action is, by statutory definition, a result to be attributed to all those in the structure. This necessarily places the owner, transporter and generator in a position where the harm *may not* be apportioned, or it would violate section 107(a) of CERCLA. See *supra* note 9 for wording of section 107.

The second case—that of hazardous wastes unsafely buried in the ground—increases the difficulty of dividing the harm caused on a horizontal as well as vertical basis. Unless accurate records of quantities and substances are kept,¹⁷² it may not be possible to ascertain pro-rata amounts of harm.¹⁷³ Some courts have found joint and several liability for polluters in cases where pollutants have entered and become mixed with the environment. In *Michie v. Great Lakes Steel Division*,¹⁷⁴ a federal circuit court applying Michigan state nuisance law found that joint and several liability for damages caused by air pollution was proper. The defendants had discharged pollutants into the air which had mixed “so that their separate effects in creating the individual injuries [were] impossible to analyze.”¹⁷⁵ The court found liability even though the defendants were acting independently;¹⁷⁶ however, it tied the liability to a subsequent right of contribution among the joint of-

172. Such records, if in existence, would be subject to the broad discovery provisions of CERCLA § 104(e), 42 U.S.C.A. § 9604(e) (West 1980 Laws Spec. Pamph. 1981). A case where some drums are identifiable and others are not is currently developing in Santa Fe Springs, California. Both vertical and horizontal liability are involved. A purchaser of salvageable or recyclable hazardous substances leased property to store drums containing the substances. The drums were stored in a residential neighborhood near a flood control channel. After a fire broke out on the property, the EPA initiated cleanup actions and began looking for responsible parties. Vertical liability became an issue because under CERCLA the former and current owners of the property, the purchaser-transporter-lessee (who could not pay cleanup costs), could be liable. The EPA has pressured known generators of the wastes to step forward and support cleanup efforts. (Presumably a suit against the transporter-lessee would be fruitless since he could not cover cleanup costs.) One generator has assumed responsibility for site cleanup while attempting to preserve a right of contribution against other parties potentially liable. This case may provide legal precedent in the area of contribution and the issue of horizontal joint and several liability. *People v. Stankevich*, No. 365979 (Cal. Super. Ct. filed on June 12, 1981).

173. Once chemicals have seeped into the soil and mixed with other deposits it would be an intractable problem to ascertain just which generator deposited which chemicals if no other records were kept. Prosser, in his discussion of the application of joint and several liability alludes to a situation where two defendants each pollute a stream with oil and he asserts that joint and several liability is unwarranted in such a situation because each defendant “has interfered to a separate extent with the plaintiff’s rights in the water.” W. PROSSER, *supra* note 138, at 314. However, the cases cited for the proposition rely on the independent actions of the polluters and the ability to determine their pro-rata contribution to the harm caused. Because the pro-rata contribution cannot be determined in our case, joint and several liability may be warranted.

174. 495 F.2d 213 (6th Cir. 1974).

175. *Id.* at 215.

176. Independent action by defendants was frequently a ground for the refusal to apply joint and several liability in the common law. *See, e.g., id.*

fenders.¹⁷⁷ The court reasoned that the burden of allocating the damages should not fall on the plaintiff when the harm is indivisible and should, instead, be left to the defendants.¹⁷⁸ This reasoning applies equally well to the case of horizontal liability for, say, multiple generators of hazardous wastes which have been disposed into the ground.¹⁷⁹ But the key to applying this liability is in allowing a subsequent right of contribution.¹⁸⁰

The vertical-liability question presents an even stronger case for joint and several liability with a right of contribution when hazardous substances have been released into the environment and the harm is indivisible. In these circumstances the traditional common-law grounds for joint and several liability are directly applicable¹⁸¹ and so is the CERCLA statute.¹⁸² Case law in this area has been sparse.¹⁸³

177. *Id.* at 217. The issue of contribution is necessarily part of the liability discussion. See *infra* notes 187-215 and accompanying text where contribution is discussed.

178. *Michie*, 495 F.2d at 218, citing 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1 at 701-02 (1956).

179. *Michie's* reasoning would seem to apply regardless of whether there were accurate records on the amount of pollutants discharged by various generators. Thus it could be applied to case one of the hypotheticals in the text if the harm were indivisible. As argued there the 'harm' is the threatened release from the various drums and thus it is divisible (each drum is a separate harm). See *supra* note 166.

180. This was made clear in the *Michie* case. See *Michie*, 495 F.2d 213, 218. The case of horizontal liability among owners of hazardous-waste sites also seems to fall under the joint-and-several-liability provisions subject to a right of contribution. In *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980), a court allowed the contribution of a past owner of a hazardous-waste site to the present owner where seeping wastes had spread to the nearby Arkansas River.

In another case, a liability for cleanup costs between a present owner and a past owner of a hazardous-waste disposal site was prorated based on the fraction of the years of ownership to the total years of operation of the site for each owner. The apportionment was reversed on appeal for other reasons. *State v. Ventron*, [1982] HAZARDOUS WASTE LITIGATION REP. (ANDREWS) 1804, 1805 (N.J. Super. Ct. App. Div. 1981).

181. In addition to an indivisible harm, the common law also applied joint and several liability to situations where (1) the actors fail to perform a common duty owed to plaintiff, or (2) there is a special relationship between the parties (e.g., master and servant or joint entrepreneurs) among others. See, e.g., 1 F. HARPER & F. JAMES, *supra* note 178, at 697-98. Both of these could be available in the vertical-liability situation. For example, under the RCRA Manifest System generators, transporters and disposers of hazardous wastes are all required to track the hazardous waste via the manifest system. See *supra* note 16. A violation of such an obligation could be viewed as a violation of a common duty and thus lead to joint and several liability for cleanup under CERCLA.

182. See *supra* note 98 and the discussion *supra* note 171.

183. In *Ewell v. Petco Processors of La., Inc.*, 364 So. 2d 604 (La. Ct. App. 1978) the court found both the owner and operator of an unsafe hazardous-waste disposal site and a generator whose wastes had been dumped on the site liable for damages to

Thus an application of the common law of joint and several liability to two typical Superfund situations does not yield a uniform result. Superfund authorizes such a range of clean-up activities in so many different factual settings that the better rule is to determine on a case by case basis whether joint and several liability should be applied. This would alleviate the chemical industry's concern that one small contributor to a hazardous-waste site could be liable for full cleanup costs, at least in the situation where contributors of substances and amounts are known.¹⁸⁴ It would still induce voluntary cleanup and encourage record-keeping which in turn would facilitate separating out the amount of harm caused by any one contributor in the event of a release.¹⁸⁵ This reasoning may have support from the EPA, the Department of Justice and the Congress.¹⁸⁶

a nearby property owner. *Id.* at 608. The opinion, however, does not expressly consider the question of the joint and several liability of the owner and generator; rather it simply assesses damages against "all defendants". *Id.* at 606. *See also id.* at 608. Interestingly, the court accepted the generator's independent-contractor defense and rejected the application of the inherently or intrinsically dangerous exception. *See supra* note 138. The court found that hazardous wastes could be safely disposed. The generators were found liable on the basis of their knowledge of the unsafe construction of the dump site. *Id.* at 608.

184. *See supra* note 147.

185. These were basically the twin goals of a joint-and-several-liability section according to the Department of Justice (*see supra* note 136 and accompanying text). If generators knew that any one contributor could be liable for full cleanup costs unless records existed indicating how much and what kind of hazardous waste was deposited at a location and by whom, those generators would be encouraged to comply with the RCRA manifest system. A blanket rule of joint and several liability under Superfund seems to encourage clandestine and illegal dumping, especially without records so that the original generator can never be identified. Presumably the Post-closure Liability Fund was set up to provide this encouragement to comply with RCRA. The only problem is that under Superfund, if the transporter or disposal-site operator is not complying with RCRA even though the generator is, the generator of the hazardous wastes is still liable for cleanup costs. By adopting a rule of joint and several liability when it is possible to determine quantities and substances attributed to a particular generator, at least the generator is encouraged to follow the RCRA manifest system because he will only be liable for his proportionate share of cleanup costs.

186. Anne Gorsuch, Administrator of the EPA, in an interview with BNA concerning testimony before a hearing of the House Energy and Commerce Subcommittee on Commerce, Transportation and Tourism on July 29, 1981, stated that "when the harm is 'indivisible' and the government *cannot determine a division of damages among the responsible parties*, common law dictates that joint and several liability will apply." [12 Current Developments] ENV'T REP. (BNA) 428 (1981) (emphasis added). Carol Dinkins, Assistant Attorney General for the Justice Department's land and natural resources division, said that "when the harm is divisible and the government can determine how much harm was caused by each defendant, joint and several liability will *not* be appropriate under common law." *Id.* (emphasis added). A letter read into

3. Contribution

The joint-and-several-liability question cannot be addressed without considering a subsequent right of contribution among defendants.¹⁸⁷ However, courts have generally been reluctant to recognize a right of contribution unless the right is established by statute.¹⁸⁸ This reluctance has received sharp criticism¹⁸⁹ but continues to be the rule today.¹⁹⁰

Some versions of the federal superfund bills did expressly provide for a right of contribution among defendants to cleanup-cost recovery suits,¹⁹¹ but such explicit wording was left out of the final act. Section 107(e)(2) contains a provision which preserves "a cause of action that an owner or operator or any other person subject to liability under this section . . . has against any person." On its face this clause does not seem to create a right of contribution yet it has been so interpreted by the Department of Justice.¹⁹²

In two recent opinions the Supreme Court has cautioned against the applicability of a right of contribution unless expressly provided by a statute. In the first, *Northwest Airlines, Inc. v. Trans-*

the Congressional Record from the Department of Justice noted "an indivisible harm [thus calling for joint and several liability] is frequently the situation at hazardous waste sites where many parties have contributed to the contamination or other endangerment and there are no reliable records indicating who disposed of the hazardous wastes (or in what quantities)." 126 CONG. REC. H11,788 (daily ed. Dec. 3, 1980) (emphasis added). By implication, when there are reliable records indicating who disposed of what quantities of waste the harm may not be indivisible and joint and several liability is not justified. In addition, Sen. Randolph, in commenting on the compromises made in the final bill's liability wording, said: "The changes were made in recognition of the difficulty in prescribing in statutory terms liability standards which will be applicable in individual cases. The changes do not reflect a rejection of the standards in the earlier bill." 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (emphasis added).

187. The common law did not allow contribution among joint tortfeasors initially. W. PROSSER, *supra* note 138, at 305.

The right of contribution discussion in the text should not be confused with indemnification, insurance, or subrogation agreements. These agreements are expressly allowed by CERCLA § 107(d), 42 U.S.C.A. 9507(d) (West 1980 Laws Spec. Pamph. 1981).

188. *Id.*

189. *Id.* at 306-307.

190. See *infra* text accompanying notes 193-96, 207-10.

191. See, e.g., H.R. 7020, 96th Cong., 2d Sess. § 3041(c) (1981).

192. See a letter from the Department of Justice put into the House record by Rep. Florio. 126 CONG. REC. H11,788 (daily ed. Dec. 3, 1980). This letter concluded that since 107(e)(2) implied a right of contribution, the overall liability section must be interpreted to include joint and several liability. Otherwise contribution would be irrelevant. Such reasoning suffers from a "bootstrapping" criticism and may be invalid in light of recent Supreme Court cases concerning implied rights of contribution. See text treatment *infra* accompanying notes 193-96.

port Workers Union of America,¹⁹³ a class action brought against the airline by a female employee and others similarly situated for back pay because of wage differentials in the union contract which violated the Equal Pay Act of 1963¹⁹⁴ and Title VII of the Civil Rights Act of 1964,¹⁹⁵ the Court declined to allow the airline a right of contribution against the union. The Court articulated two ways for a private right of contribution to be created; (1) expressly or impliedly in the statute itself, or (2) through the exercise of judicial power to fashion an appropriate remedy.¹⁹⁶

With respect to the first possibility, expressly providing for such a right, the Department of Justice argued section 107(e)(2) does at least preserve a private right of contribution. However, Congress considered explicit contribution clauses and chose instead not to include these.¹⁹⁷ Like the last-minute elimination of joint-and-several-liability wording, this noninclusion may be less a rejection of the principle than simply a result of political compromise. It is arguable that Congress hoped to encourage the development of federal common law in this area.¹⁹⁸

Assuming that section 107(e)(2) does not expressly allow a private right of action for contribution,¹⁹⁹ one must scrutinize the Act for an implied right, the second possibility after *Northwest Airlines*. The factors relevant to this inquiry are "the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing State remedies."²⁰⁰ Applying this four-pronged test does not clearly establish an implied private right of contribution under Superfund. First, the express language of the statute is, at best, ambiguous.²⁰¹ Second, the legislative history indicates that most of the key liabil-

193. 101 S. Ct. 1571 (1981).

194. 29 U.S.C.A. § 206(d) (West 1978).

195. 42 U.S.C.A. § 2000a-2000h-6 (West 1981).

196. *Northwest Airlines*, 101 S. Ct. at 1580.

197. See *supra* note 191.

198. See *supra* note 149 and accompanying text.

199. There are other sections of CERCLA which could also be construed as recognizing a contribution right. For example, section 107(a)(4)(B) includes the costs of response "incurred by any other person consistent with the natural contingency plan" as part of the liability under the Act. 42 U.S.C.A. 9607(a)(4)(B) (West 1980 Laws Spec. Pamph. 1981). Thus a person is liable for the costs of cleanup borne by others consistent with the natural contingency plan. This could mean that a party bearing a disproportionate share of cleanup costs could sue other liable parties for contribution.

200. *Northwest Airlines, Inc.*, 101 S. Ct. at 1580.

201. Recall that the Department of Justice felt that section 107(e)(2) of CERCLA allowed for a right of contribution. See *supra* note 192.

ity sections that were left out were excluded for political compromise with the hope that the issues would be decided by the courts.²⁰² Third, whether or not the allowance of a right of contribution would aid in the purpose and structure of the Act is a more difficult question that can only really be answered on a case-by-case basis in conjunction with the joint-and-several-liability issue. One response is that if joint and several liability is to apply consistently under the Act then contribution should be allowed. The reasoning is that no further purpose is gained by forcing any single liable party to pay the full amount of cleanup costs.²⁰³

An even more-compelling argument can be made that allowing a right of contribution makes economic sense. For instance, if one generator is held completely liable for the cleanup costs and cannot shift some of the responsibility through contribution, then his original waste-generating product will be overpriced. The cost of producing his product will necessarily reflect the cleanup costs attributed to the wastes of other producers. This neither furthers efficiency nor the purpose of the Act.²⁰⁴

The final criterion for determining an implied cause of action for contribution is whether or not its implication would invade an area of law reserved to the states.²⁰⁵ Because a right of contribution derives its substance from the original cause of action (here,

202. "It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph).

203. Once one liable party has been found and has paid for cleanup, it does not seem that the Act would be furthered by refusing such party the right to attempt to apportion liability among others. It is possible that the deterrent effect on a generator caused by the knowledge that it could be liable for full cleanup at any site where its hazardous wastes ended up would be greater than if it knew it would have the chance to seek contribution from other liable parties. The counter argument is simply that increased clandestine dumping may be the result of disallowing contribution because the potential liability of a party, if it can be identified, is so great. Anthony Roisman, then chief of the hazardous-waste section in the Department of Justice, on May 8-9, 1981, told an American Bar Association Standing Committee that joint and several liability under Superfund would be the biggest driving force to get sites cleaned up and that responsible waste generators will pay for the cleanup of a particular site and "then turn around and sue the others." [12 Current Developments] ENV'T REP. (BNA) 97 (1981).

204. Indeed, in such a scenario, the producers of the other hazardous wastes at the site will have avoided the costs of cleanup associated with their product. The price of their product will be lower than is required in an economic sense and thus lead to overconsumption of their product. The evil of such an outcome is clear if, say, the lone generator "caught" by the EPA was actually the producer of the least-toxic hazardous waste at the site. The result would be an overconsumption of products generating the more highly toxic wastes.

205. See *Cort v. Ash*, 422 U.S. 66, 78 (1975).

for example, a recovery suit under Superfund) it would be anomalous indeed if the law governing contribution were left up to local jurisdictions. Liability standards in subsequent suits for contribution should not, logically, be different from those in the parent action. Surely if a right of contribution is to be recognized under Superfund, it must be done at the federal level with consistent application throughout the country.

This last argument and the preceding discussion on the implied right of contribution do not point clearly in the direction of assuming such a right into the Act. There is still the possibility that the right can be fashioned by the federal judiciary.²⁰⁶

In *Texas Industries, Inc. v. Radcliff Materials, Inc.*,²⁰⁷ a companion case with *Northwest Airlines*, the Supreme Court again declined to find a right of contribution. The case considered whether a defendant against whom civil damages have been assessed under the federal antitrust laws has a right to contribution from other participants in the unlawful conspiracy. The Court found no express or implied language in the antitrust laws to support a right to contribution.²⁰⁸ Despite that, however, it recognized that in some cases the federal courts could fashion a federal remedy of contribution. The court wrote: "In areas where federal common law applies, the creation of a right to contribution may fall within the power of the federal courts."²⁰⁹ The Court noted that the treble-damage action under the antitrust laws was a private suit and therefore contribution in such a case did not involve the "uniquely federal interests" which oblige courts to formulate federal common law.²¹⁰

In light of *Texas Industries*, Superfund could still be the vehicle for finding a federal common-law right to contribution in the hazardous-waste area for a number of reasons. First, as the previous discussion of *Illinois v. City of Milwaukee*²¹¹ indicates, there is a recognized federal common law in certain pollution areas and at least one district court has found federal common law applicable to hazardous-waste cases.²¹² Second, unlike the case in *Texas Industries*, the federal government will be a party in the underlying suit which spawns the contribution action under Superfund. Fed-

206. See *supra* note 196 and accompanying text.

207. 49 U.S.L.W. 4537 (1981).

208. *Id.* at 4540.

209. *Id.* at 4540.

210. *Id.* at 4541 (quotation marks in the original).

211. See *supra* notes 156-158 and accompanying text.

212. See *supra* note 162.

eral interests will certainly be at stake in Superfund recovery suits. Third, Congress indicated its intent for judicial development of the common law for the joint-and-several-liability-questions²¹³ and this should include a determination of a right to contribution.²¹⁴ However, *Texas Industries* indicates that even the judicial creation of joint and several liability under a statute does not "suggest that courts also may order contribution. . . ."²¹⁵ The case could be read to support denial of a right to contribution even if joint and several liability is implied under Superfund.

4. *Apportioning the Damages in Contribution*

If contribution should be allowed under Superfund, the question of how to apportion the cleanup costs will have to be decided. The obvious methods of apportioning costs (e.g., based on weight or volume of hazardous wastes contributed to a site by different generators) may not adequately distribute the actual costs of cleanup. Not only may different substances have different degrees of hazard or different costs of cleanup (and thus potential harm and/or cleanup not be constant on a per-volume basis), but the real danger of a hazardous-waste disposal site may be in the combining of various wastes once in the ground so that the mixture is more dangerous than the sum of the individual wastes.

Courts could devise some scheme to apportion liability but, depending on the circumstances, the "solution" may be complex. For example, a court could weigh the amount of waste contributed by a degree-of-hazard factor.²¹⁶ Or an even more comprehensive apportioning scheme could be devised — one which incorporated a number of variables including volume, degree of hazard, disposal techniques, and local geography.²¹⁷

Unfortunately, the more complex the apportioning scheme, the

213. See *supra* notes 149 and 201.

214. The *Michie* case, discussed *supra* in text accompanying notes 174-78, makes a strong argument for the necessity of allowing a right to contribution in pollution cases. One of the very policies behind allowing joint and several liability is to reduce the burden of proof on the plaintiff and to shift it to the defendants by allowing a right to contribution. *Michie*, 495 F.2d at 217.

215. *Texas Industries*, 49 U.S.L.W. at 4542.

216. Congressman Eckhardt (D-Tex.) drafted a superfund bill in early 1980 which proposed taxing industry based on the degree of hazard of the waste. [10 Current Developments] ENV'T REP. (BNA) 1820 (1980). Such a taxing scheme was supported by the steel industry. [11 Current Developments] ENV'T REP. (BNA) 1231 (1980).

217. One example is the scheme currently being developed by a contractor for the EPA which assesses numerous variables in the hazardous-waste disposal process in order to incorporate a degree-of-hazard approach into the hazardous-waste manage-

better the reason not to assume contribution unless it appears expressly in the statute. The Court in *Texas Industries* was faced with just such a dilemma and chose to deny contribution and thus provoke legislative action in an area fraught with judicial pitfalls.²¹⁸ However, the very complexity of the problem argues for implication of a right of contribution on a case-by-case basis. Thus, whether it is ultimately the Congress' or the Courts' responsibility to apportion cleanup costs, the argument for the right of contribution remains.

B. *Liability Under California Superfund*

Basically the same issues of liability under the federal superfund exist in its California counterpart. The state statute, however, is clearer on some issues and more ambiguous on others.

1. *Strict Liability*

As discussed, the California law allows reimbursement to the state fund "from the liable person or persons."²¹⁹ No further definition or explanation of "liable" is given, with two exceptions. The state act provides that it is not to be construed as imposing any new liability for acts before January 1, 1982, if the acts did not violate state and federal laws or regulations at the time they were taken.²²⁰ Also, liability under the state act is not to affect or modify liability already existing by virtue of state or federal law, including common law, for acts associated with releases of hazardous substances.²²¹ However, these provisions fail to explain how to apply the liability section nor, more specifically, what standard to use.

One interpretation, beginning with section 25310 of the statute,

ment regulations under RCRA. [12 Current Developments] ENV'T REP. (BNA) 936 (1981).

Note also that for horizontal-liability among site owners or operators, contribution or apportionment could be based upon the number of years owned or operated. This was done in *State v. Ventron*, [1982] HAZARDOUS WASTE LITIGATION REP. (ANDREWS) 1805, 1809 (N.J. Super. Ct. App. Div. 1981).

218. *Texas Industries*, 49 U.S.L.W. at 4537, 4539 (1981).

219. Cal. Superfund, ch. 756, § 2 (1981) Cal. Legis. Serv. 2609, 2618 (West) (to be codified at CAL. HEALTH & SAFETY CODE § 25360).

220. *Id.*, at § 2, 1981 Cal. Legis. Serv. at 2619 (to be codified at CAL. HEALTH & SAFETY CODE § 25366(a)). In addition, liability is waived for permitted releases (as under CERCLA). *Id.* at § 2, 1981 Cal. Legis. Serv. at 2619 (to be codified at CAL. HEALTH & SAFETY CODE § 25366(b)).

221. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2619 (to be codified at CAL. HEALTH & SAFETY CODE § 25366(b)).

assumes incorporation of the federal strict-liability provision. Section 25301 reads: "the definitions set forth in this article shall govern the interpretation of this chapter. Unless the context requires otherwise and except as provided in this article, the definitions contained in section 101 of the federal act . . . shall apply to the terms used in this chapter."²²² Since "liable" is not defined in the State superfund, one could assume that the federal superfund standard of liability should apply. Recall, however, that "liable" under the federal act is to be governed by the same standard as that under the Federal Water Pollution Control Act. This standard has been interpreted in other contexts to be strict liability.²²³

However, it can be argued that by inserting the following words: "unless the context requires otherwise" another definition was intended. The state legislators may have wanted California to develop its own standard of liability in this area. Indeed, one argument for such an intent follows from including the medical Hazardous Substance Compensation Account for medical claims in the California Superfund.²²⁴ The legislators, by allowing state recoveries against liable persons for more than remedial and removal actions (as under the federal act), may have intended that liability should be more narrowly defined to, say, negligence or recklessness.

California has adopted the concept of strict liability for ultrahazardous activity,²²⁵ and case law generally applies the *Restatement* guidelines to any particular activity.²²⁶ Previous discussion demonstrated that the common-law case for application of strict liability in the area of hazardous-substance spills or leaks is arguable. Even if the disposal of hazardous substances in a non-permitted site near a residential area were to fit within *Restatement* requirements for strict liability,²²⁷ as the disposal site is moved away from populated areas and operated in a safer manner, the use of strict liability via the abnormally dangerous activity

222. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2611 (to be codified at CAL. HEALTH & SAFETY CODE § 25310).

223. *See* discussion *supra* concerning strict liability under the federal act.

224. *See* discussion *supra* and notes 128-32.

225. *See* RESTATEMENT (SECOND) OF TORTS §§ 519-524A; Note, *Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949, 969-77 (1980).

226. *Id.*

227. *See, e.g.,* *Ewell v. Petro-Processors of La., Inc.*, 364 So.2d 604, 607 (La. Ct. App. 1978). *See also supra* note 149 and its criticism of the ultrahazardous activity doctrine as really implying a negligence standard.

rationale is not so apparent.²²⁸ Specifically, disposing of hazardous substances according to certain precautions and in certain areas may not be abnormally dangerous.²²⁹

In addition to the possible exclusion of hazardous-substances activity from abnormally-dangerous activity based on the potential for safe disposal, generators and transporters of hazardous substances may escape strict liability on other grounds. In the case of a generator, the transporter is an independent contractor (similarly, the disposal-site operator is an independent contractor for the transporter), and in certain circumstances this may shield the generator from liability. However, if the underlying activity is abnormally dangerous, the acts of the independent contractor must be at least deliberate, intentional, and actually harmful in order to shield the employer from liability.²³⁰ A situation in which the transporter (or disposer) represents to the generator that it is complying with state and federal hazardous-waste regulations and later proceeds to dispose of the wastes in an unauthorized manner arguably could shield the generator from liability under California law.

Thus, in applying the state law, the threshold question is the standard of liability, whether strict or not. If the wording "liable person" is meant to be covered by the federal definition, then strict liability may be the rule. If, instead, the relevant wording is "unless the context requires another definition", state common law will dictate its meaning. In that case there are good arguments for an application of strict liability based on the abnormally dangerous activity doctrine with the possible exceptions for cases where (1) the disposal is done in a remote area or otherwise could be done safely, and (2) an independent contractor, like a transporter or disposer, acts in an intentionally harmful manner.

2. *Other Theories of Liability*

Should the state act be interpreted *not* to embrace a standard of strict liability (at least not explicitly), the question remains as to

228. *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948).

For the distinction between "ultrahazardous" activity and "abnormally" dangerous activity, see *supra* note 138.

229. See, e.g., *Ramsey v. Marutamaya Ogatsu Fireworks Co.*, 72 Cal. App. 3d 516, 527 n.2, 140 Cal. Rptr. 247, 253 n.2 (1977).

230. *Slap, Generator Liability for Hazardous Wastes*, 5 ALI-ABA COURSE MATERIALS J. No. 5, at 95 (1981). See also RESTATEMENT (SECOND) TORTS § 522. *Griesel v. Dart Indus., Inc.*, 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979), is a recent California Supreme Court opinion in this area.

what will determine liability. Recent articles have dealt with the topic of common-law remedies for private plaintiffs against generators, transporters and disposers of hazardous wastes.²³¹ This article will review the classic remedies and their potential application under the California Superfund and state law.

a. Negligence

Actionable negligence requires a legal duty to use due care, a breach of that duty, and proximate causation between breach and injury.²³² While it may be easy to prove that a disposer of hazardous substances at a site which is found to require cleanup under California Superfund was negligent and thus liable, the transporters and generators of the substances at the site are more difficult cases. First, in order to find a duty, one must establish foreseeability of risk, and in a vertical liability chain the generators may be too far removed from the actual cleanup site to have foreseen the risk. At least one state has required knowledge of the unsafe dumping procedures followed by the disposers before imposing liability on a generator.²³³ Such a requirement in California would provide a shield against liability for generators and could also promote forced ignorance of the whereabouts of hazardous wastes after they leave the generator's control.²³⁴

Breach of a legal duty can also be proved by the violation of a statute.²³⁵ Presumably, many incidences of state cleanup will concern sites that have complied neither with RCRA nor state re-

231. See, e.g., Baurer, *Love-Canal: Common Law Approaches to a Modern Tragedy*, 11 ENVTL. L. 133 (1980); Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 585 (1981); Note, *Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949 (1980); Slap, *Generator Liability for Hazardous Waste*, 5 ALI-ABA COURSE MATERIALS J. No. 5, 95 (1981).

232. See, e.g., *Budd v. Nixen*, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971).

233. *Ewell v. Petro-Processors of La., Inc.*, 364 So.2d 604 (La. Ct. App. 1978).

234. However if a generator selects a transporter or disposer because its rates are substantially below prevailing rates and inquires no further, it may have performed a negligent inquiry. Cf. 1 CHEMICAL & RADIATION WASTE LITIGATION REP. (CHEMICAL & RADIATION WASTE LITIGATION REP., INC.) 274 (1981).

235. CAL. EVID. CODE § 669 (Deering Supp. 1981) reads:

- (a) The failure of a person to exercise due care is presumed if:
- (1) He violated a statute, ordinance, or regulation of a public entity;
 - (2) The violation proximately caused death or injury to person or property;
 - (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
 - (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

quirements for the disposal of hazardous substances.²³⁶ Since the California Supreme Court recognizes violation of federal statutes in proving negligence for state common law,²³⁷ this method could prove a significant ground for finding liability. Again, however, a problem occurs when vertical liability is considered. Suppose a generator has complied with the RCRA manifest requirements and locates an authorized transporter. If the transporter or subsequent disposer violates RCRA, the generator may be insulated from a negligence cause of action.²³⁸ However, violation by the generator of a hazardous-substance handling statute could be the basis for proving negligence in this area.²³⁹

b. Nuisance

Nuisance as a legal theory to hold generators, transporters and disposers of hazardous substances which are improperly disposed has a basis in California law. The California Civil Code defines nuisance as:

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street or highway.²⁴⁰

236. This is so because the state fund will frequently be called in to supply funds on large cleanup actions under CERCLA (recall that the state is to contribute 10% of cleanup funds expended under CERCLA by virtue of § 104(c)(3)). Also cleanup will only occur at those sites either not covered by RCRA or in violation of RCRA (if covered by RCRA, the Post-closure Liability Fund will be used if the site is inactive).

In addition, the state exempts from its fund, like the federal Act, the cleanup of any permitted releases. Thus non-permitted releases, and/or those violating state or federal statutes, often will be the cleanup targets.

237. See, e.g., *Peterson v. City of Long Beach*, 24 Cal. 3d 238, 245, 594 P.2d 477, 480, 155 Cal. Rptr. 360, 363 (1979).

238. Recall, however, the discussion *supra* in text accompanying note 230, concerning independent contractors and strict liability.

239. Violation of just any section of RCRA or its state counterpart will not meet the test set out in the Evidence Code, see *supra* note 235. But violation of a manifest-system requirement under RCRA such as not reporting the production and disposal of a hazardous substance by a generator would seem to meet the requirements of section 669. Since the RCRA manifest system was designed to follow the hazardous substance to a proper grave, by allowing such a substance to pass out of the system and end up as a public health threat, the generator's violation may result in an injury or threatened injury which the statute was designed to prevent.

Further discussion of this issue can be found in Note, *Strict Liability for Generators, Transporters and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949, 964-67 (1980).

240. CAL. CIV. CODE § 3479 (Deering 1980).

Although under California law a nuisance may be public or private or both,²⁴¹ recovery actions under the state superfund are most likely to arise under the public-nuisance concept.²⁴² In fact, one state appellate court has noted that "Contemporary environmental legislation represents an exercise by government of [the] traditional power to regulate activities in the nature of nuisances."²⁴³

Application of nuisance theory to a recovery under California Superfund generally requires negligence to hold someone other than the landowner or lessee of the property liable. For example, a landlord is generally not responsible for a nuisance existing on premises occupied by his tenant where the nuisance was not in existence at the time of leasing.²⁴⁴ Application of this rule would be a shield to owners of property leased to a disposal site operator, if the owner had no knowledge of the site's operation. (This contrasts with the liability structure of the federal superfund, which would make such owners liable for cleanup costs.²⁴⁵) The same reasoning would apply to a generator of hazardous wastes who had no knowledge of how the wastes were disposed.²⁴⁶

Thus, while nuisance theory—in particular public-nuisance theory—comes close to representing a common-law theory of liability for the cleanup of hazardous-waste sites which could be applied in recovery actions under California Superfund, it leaves gaps²⁴⁷ in

241. *Id.* at §§ 3480-3481.

242. "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." CAL. CIVIL CODE § 3480 (Deering 1980). A private nuisance is defined as any nuisance which is not a public nuisance. For an example of a California court finding facts sufficient to state a cause of action in public nuisance for private plaintiffs in an air pollution case, *see Venuto v. Owens-Corning Fiberglass Corp.*, 22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1971).

243. *CEED v. Cal. Coastal Zone Conservation Comm.*, 43 Cal. App. 3d 306, 318, 118 Cal. Rptr. 315, 323 (1974). Also note that the state act calls for expenditures which are consistent with the natural contingency plan referred to in CERCLA and that federal action, also consistent with the national contingency plan, is mandated when public health or welfare is endangered. The wording of CERCLA § 104 mandating action is somewhat similar to the very definition of a California public nuisance. In addition, one authority claims that "the town dump was and is the epitome of a public nuisance." W. RODGERS, ENVIRONMENTAL LAW § 6.2 at 623 (1977).

244. *Anderson v. Souza*, 38 C.2d 825, 831, 243 P.2d 497, 501 (1952).

245. *See supra* note 98.

246. *See Ewell v. Petro-Processors of La., Inc.*, 364 So. 2d 604 (La. Ct. App. 1978) where such reasoning was applied. Note, too, that such a theory promotes ignorance of the disposal of hazardous wastes after leaving the generator and thereby may encourage clandestine disposals.

247. The "gap" is serious because frequently the responsible party under nuisance

the vertical-liability context.

c. Trespass

Trespass involves protection of a plaintiff's present possessory interest in land.²⁴⁸ It requires a physical invasion of property which may be unintentional provided that harm is done and the harm is accompanied by negligence, recklessness or extrahazardous activity.²⁴⁹ The invasion of property may occur below the ground surface²⁵⁰ and would probably apply to the seepage of hazardous wastes as leachate from a disposal site.²⁵¹ However, using trespass as a basis for finding persons liable to the state superfund would be awkward at best.

First, there is a standing problem since trespass usually requires a plaintiff to be the landowner whose property has been invaded.²⁵² For cases arising under the medical claims portion of the state act this may not prevent the state from assuming the position of the injured property owner²⁵³ and pursuing the claim.²⁵⁴

theory will be the owner or operator of the disposal facility and such a person often cannot afford the complete cleanup costs. The generator may be part of a national industrial corporation which can afford such costs. See, e.g., *Ewell v. Petro-Processors of La., Inc.*, 364 So. 2d 604 (La. Ct. App. 1978). Note also that if the disposal site operator is not operating the site in accord with RCRA, or the wastes are dumped illegally on an innocent party's property, the chances of getting full recovery from anyone but the generator are remote.

248. W. PROSSER, *supra* note 138, at 68.

249. See *Gallin v. Poulou*, 140 Cal. App. 2d 638, 645, 295 P.2d 958, 962 (1956).

250. This is explicit in the case of oil and gas wells. See, e.g., CAL. CIV. PROC. CODE § 349-3/4 (Deering 1972).

251. The question of whether seeping subterranean hazardous chemicals constitute a physical invasion sufficient to support a trespass cause of action may be partially answered by reviewing *Martin v. Reynolds Metal Co.*, 221 Or. 86, 342 P.2d 790 (1959), *cert. denied*, 362 U.S. 918 (1960). There the court held that drifting air pollutants which settled on the property did constitute such an invasion even though the particles were invisible. However, the invasion was found to be not actionable because it was considered "consequential" (as a result of weather variables) and not "direct". Note that this could raise another issue for hazardous wastes whose seepage is caused by weather (e.g., flooding) which could make the invasion not actionable.

For the view that the seepage of chemicals underground does not constitute a "physical invasion" sufficient to establish trespass, see Note, *Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949, 960 n.60 (1980).

252. 3 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 499 (2d ed. 1970).

253. Recall that certain medical expenses can be recovered under the Act (see *supra* notes 128-32).

254. Such a pursuit will not be frequent since, by statute, the state will not be involved in a medical-claims recovery suit unless the original plaintiff shows that the party liable is unknown or cannot be determined with reasonable diligence, or there is no liable party, or the liable party could not satisfy the judgment. See *supra* notes

However, in the majority of cases where the state is seeking recovery it will not be the owner of the property where the invasion occurs.²⁵⁵ Second, the necessity of proving actual physical invasion to find a party liable would eliminate all those cases where the state incurs cleanup costs to address a release which is threatening but has not yet occurred.²⁵⁶ Third, the same problems which arose under the negligence and nuisance theories concerning vertical liability would be present for any unintentional trespasses. That is, since negligence, recklessness or abnormally dangerous activity must be involved in order to find liability for unintentional trespass, the generators and transporters may rely on lack of knowledge and the independent-contractor defenses to prevent liability. For these reasons trespass seems the form of liability least likely to be used by the state.

3. *Joint and Several Liability and Contribution*

California law concerning joint and several liability is similar to that discussed in the federal context.²⁵⁷ Assuming that one of the previously discussed theories based on fault applies,²⁵⁸ when two or more parties contribute to a wrong they are ordinarily jointly and severally liable for the entire damages.²⁵⁹ Apportionment is generally not available except where the independent acts created a nuisance²⁶⁰ and the amount of damage caused by each tortfeasor can be ascertained. Some courts have simply shifted the burden of apportionment to the defendants in such cases, especially when a pro-rata division is difficult.²⁶¹ Should the definition of "liable

128-32 and Cal. Superfund, ch. 756, § 2, 1981 Cal. Legis. Serv. 2609, 2619 (West) (to be codified at CAL. HEALTH & SAFETY CODE § 25372).

255. An exception would be where the disposal site was illegally using state property or where the seepage entered a state owned waterway or leaked onto state owned land.

256. A situation the state is clearly authorized to remedy. Cal. Superfund, ch. 756, § 2, 1981 Cal. Legis. Serv. 2609, 2613, 2616 (West) (to be codified at CAL. HEALTH & SAFETY CODE §§ 25323, 25351(d)).

257. Witkin describes two situations which may result in the imposition of joint and several liability: (1) concurrent tortfeasors and (2) successive tortfeasors. Such a breakdown is useful in considering hazardous-waste liability since, often, concurrent tortfeasors will be those in a horizontal relationship and successive tortfeasors will be those in a vertical relationship. See 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 34 (8th ed. 1973).

258. The situation under a strict-liability interpretation is discussed *infra*.

259. *Shea v. San Bernardino*, 7 Cal. 2d 688, 62 P.2d 365 (1936).

260. This exception is discussed in Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 383 (1950). The leading case is *Griffith v. Kerrigan*, 109 Cal. App. 2d 637, 241 P.2d 296, 298 (1952).

261. *Brown v. Guy*, 144 Cal. App. 2d 659, 666, 301 P.2d 413, 418 (1956).

party" under the California Superfund follow a nuisance theory, apportionment of damages among concurrent or successive wrongdoers could fall upon the state or the defendants in a recovery action and no one defendant would bear the total cleanup costs. Certainly for those involved with hazardous wastes this would be a better rule than allowing joint and several liability in the initial action with a right of contribution afterward.²⁶²

For the other fault-based theories of liability (negligence and, in some cases, trespass), joint and several liability is the general rule. The next question under the common law in these situations would be the right to contribution. Fortunately, the California Superfund, unlike its federal counterpart, makes the right to contribution explicit by requiring apportionment.²⁶³ The code alleviates most of the inadequacies of the state contribution statutes.²⁶⁴ It allows any party to the recovery action to make a motion to the court to join any other party who may be liable.²⁶⁵ It also instructs the court to apportion costs after a defendant's demonstration that the preponderance of the evidence shows that the defendant is only responsible for a portion of the total cost.²⁶⁶ Even when the evidence does not suffice for this allocation the court is to apportion the "costs or expenditures, to the extent practicable, according to equitable principles."²⁶⁷ In addition, the state account is to pay any amount of the judgment in excess of

262. Opting for joint and several liability with a right of contribution would leave some defendants with a disproportionate share of the damages whenever other responsible defendants were unknown or unable to pay the judgment.

263. Cal. Superfund, ch. 756, § 2, 1981 Cal. Legis. Serv. 2609, 2618-19 (West) (to be codified at CAL. HEALTH & SAFETY CODE §§ 25362-25363).

Like CERCLA, Cal. Superfund expressly preserves the right to indemnification and insurance contracts in this area. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2619 (to be codified at CAL. HEALTH & SAFETY CODE § 25364).

264. *See* CAL. CIV. PROC. CODE §§ 875-880 (Deering 1973). The two major problems in this area are that (1) under the contribution codes, the plaintiff in the underlying tort action has the right to select the tortfeasors for the initial action. Contribution is then limited to those tortfeasors who were parties to the original action and received the joint judgment. (2) The codes also prorate the damages by simply dividing the total by the number of joint judgment defendants. However, California does recognize a right of implied indemnity in the area of joint and several liability and practically this judicial rule circumvents many of the problems in the contribution statutes. *See, e.g., Cobb v. Southern Pacific Co.*, 251 Cal. App.2d 929, 59 Cal. Rptr. 916 (1967).

265. Cal. Superfund, ch. 756, § 2, 1981 Cal. Legis. Serv. 2609, 2618 (West) (to be codified at CAL. HEALTH & SAFETY CODE § 25362).

266. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2618-19 (to be codified at CAL. HEALTH & SAFETY CODE § 25363(a)).

267. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2619 (to be codified at CAL. HEALTH & SAFETY CODE § 25363(b)).

the total costs apportioned.²⁶⁸

Inclusion of this explicit apportionment provision could lead to the conclusion that the legislature intended the original liability to be joint and several.²⁶⁹ However, the provision may also be an answer to the California Civil Procedure Code deficiencies in the contribution area²⁷⁰ and a means of encouraging defendants to help locate all potentially liable parties and to keep accurate records of hazardous-waste disposal.²⁷¹

Even with the contribution sections in the state act, if the original assumption for this section is dropped and the standard for liability under the state superfund becomes strict, the question of apportioning damages among defendants who are strictly liable or among some defendants who are strictly liable and some who are negligent is difficult indeed.²⁷² One solution would be to equate strict liability with "negligence per se" for comparison purposes.²⁷³ Another suggestion is to view strict liability as the least culpable form of conduct so that if one party is strictly liable and the other is negligent, the negligent party pays all costs. Unfortunately, there is little case law in this area; until the question of contribution among strictly liable defendants is settled, this will remain a speculative area.

4. *Guidance from Other State Superfunds*

Two other states have superfund laws whose liability sections could provide guidance to the California courts and legislature. New Jersey's superfund allows for recovery by the fund against "any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which" has been removed under the superfund.²⁷⁴ Further, such persons "shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs."²⁷⁵ Explicit language such as this,

268. *Id.* at § 2, 1981 Cal. Legis. Serv. at 2619 (to be codified at CAL. HEALTH & SAFETY CODE § 25363(c)).

269. Recall that it was just such an argument that was made by the Department of Justice for CERCLA. *See supra* note 192.

270. *See supra* note 264.

271. This idea was developed at *supra* note 148.

272. Some of the issues are discussed in Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73 (1976).

273. This is the Wisconsin approach. *See Dippel v. Sciano*, 37 Wis. 2d 443, 461-62, 155 N.W.2d 55, 64-65 (1967).

274. N.J. STAT. ANN. § 58:10-23.11g(c) (West Supp. 1981).

275. *Id.*

though not eliminating all issues, certainly clarifies some of them.

Florida, whose superfund covers oil spills only, directs the department administering the fund in recovery suits to plead and prove causation only.²⁷⁶ "It shall not be necessary for the department in administering the fund to plead or prove negligence in any form or manner."²⁷⁷ The issue of joint and several liability is not settled by the wording of the code. However, the strict nature of liability seems clear.

C. Conclusion

While both the federal and California superfunds are worthy attempts to provide a mechanism for the cleanup of the release or threatened release of hazardous substances into the environment, they do leave some significant questions unresolved. For example, generators, transporters and disposers of hazardous substances do not know whether or not they will be jointly and severally liable for cleanup expenses or whether or not contribution will be available in all cases and how it will work. While some uncertainty in the reach and extent of legislation is inevitable, given the large potential exposure for liable persons, the need for clarity and precision in these statutes is great. The state's contribution sections²⁷⁸ and the federal explicit-defenses section²⁷⁹ are good examples of the kind of wording which is necessary.

However, until the courts and the legislatures add clarification to these acts, potentially liable parties should use every precaution to comply with both state and federal hazardous-waste statutes and maintain thorough and accurate records of the hazardous substances within their control. These steps will aid in preventing liability initially and, should liability be found, will support apportionment of possible damages.²⁸⁰

276. FLA. STAT. ANN. § 376.12(3) (West 1974).

277. *Id.*

278. Cal. Superfund, ch. 756, sec. 2, §§ 25362-25363, 1981 Cal. Legis. Serv. 2618-19 (West) (to be codified at CAL. HEALTH & SAFETY CODE §§ 25362-25363).

279. CERCLA § 107(b), 42 U.S.C.A. § 9607(b) (West 1980 Laws Spec. Pamph. 1981).

280. At a recent two-day Superfund Conference held at the Stouffer's National Center in Arlington, Virginia, on Dec. 14-15, 1981 and sponsored by the New York-based Energy Bureau, Inc., Steven Ramsey of the Department of Justice advised companies to keep records as to what types and quantities of materials they dumped or stored. See [1981] HAZARDOUS WASTE LITIGATION REP. (ANDREWS) 1855.

