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SUPERFUND EXTENSION : HOW MUCH IS ENOUGH ?

INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act, commonly called the "Superfund," was enacted by Congress in 1980. The Superfund legislation provided federal money for the cleanup of hazardous waste disposal sites that posed an imminent threat to the public, and where the responsible party either could not be identified or was insolvent. Congress authorized the expenditure of \$1.6 billion over a five-year period, expiring September 30, 1985. With this date drawing near, a number of legislative proposals to continue or expand the Superfund program have been introduced.

All of the proposals to reauthorize the Superfund program call for increased funding. The Reagan Administration has asked for \$5.3 billion over the next five years, while a version supported by a coalition of environmental groups would spend \$13.5 billion on an expanded program. On March 1, the Senate Environment and Public Works Committee approved S.51, a Superfund reauthorization that would earmark an additional \$7.5 billion for the program.

The central practical question is not whether the program will be continued--clearly it will--or even whether it will receive new funding. Rather, the debate concerns the scope and size of the new Superfund. Environmentalists and their allies in Congress seek a greatly expanded Superfund, which, they admit, ultimately could cost as much as \$40 billion. This new program would go far beyond the original Superfund concept of cleaning up abandoned hazardous waste disposal sites that pose an imminent threat to the public's health or safety. The expanded Superfund would provide funds for a catch-all of environmental concerns. It would impose stringent, unrealistic deadlines for site clean-ups, and burden an already beleaguered U.S. chemical industry with onerous new taxes, and duplicative new reporting requirements,

raising the specter of a direct loss of 30,000 chemical industry jobs, and threatening up to 1 million more in chemical-related activities.¹ Worse, several of the proposals to expand Superfund call for the creation of a vast new entitlements program under the guise of "victim compensation," and would establish a new right to sue in federal courts for individuals claiming injuries resulting from hazardous waste disposal sites.

While the basic notion of cleaning up abandoned hazardous waste dumps has broad support within the Congress, the public, and the Reagan Administration, the enormous expansion of the program advocated by some has aroused widespread concern. It would be enormously expensive, and the victim's compensation provisions alone could add hundreds of billions of dollars to federal outlays. Moreover, by moving away from the original, clearly defined goal, an expanded Superfund would inhibit the ability of the Environmental Protection Agency (EPA) to focus on the primary objective of the existing law.

In short, if the Superfund program is to succeed in fulfilling its original mandate, it must remain focused, realistic, and free of unnecessarily burdensome bureaucratic requirements. Otherwise, not only may it fail to achieve its intended goal, but it also could result in a number of negative consequences. In the worst case, an ill-conceived law could threaten the continued existence of the U.S. chemical industry, jeopardizing hundreds of thousands of jobs. To ensure that this does not happen, it is important to understand just what the possible consequences of some of the proposed Superfund changes really are.

VICTIM'S COMPENSATION PROVISIONS

The Senate Environment and Public Works Committee version of the Superfund reauthorization bill, S.51, includes a pilot program to provide victim's compensation for individuals alleging injuries resulting from hazardous waste disposal sites. Some \$30 million would be allocated for a test which will be limited to five states or expanded to encompass one state in each of the ten federal regions. While seemingly restricted in scope, such a "test" could provide the legal precedent establishing a right to compensation similar to other costly federal entitlements programs.

The proposed victim's compensation pilot program bears close similarities to the Black Lung program which awards federal benefits to coal miners afflicted by the respiratory disease. When Congress created the first Black Lung statute in 1969, it called only for a relatively modest program, expected to cost a

¹ Statement on Behalf of the Chemical Manufacturers Association before the Committee on Environment and Public Works, United States Senate, on Superfund Authorization, February 27, 1985.

total of between \$200 million and \$300 million. However, once a federal right to compensation was established, it became impossible to resist the expansionary pressures from individuals who believed that they, too, were entitled to receive benefits. As a result, the program expanded to the point where in excess of \$17 billion has been expended, and annual costs run at \$2 billion. In other words, the Black Lung program now costs nearly seven times as much each year as Congress expected to spend on the program during its entire lifetime.

There is every reason to expect a similar result should even a limited form of victim's compensation be introduced into law in the Superfund reauthorization. In short order a modest pilot scheme would likely expand to encompass a far wider range of claimants than initially anticipated. And in some of the victim's compensation schemes, not only are health-related claims eligible for compensation, but even claims for such hard-to-define injuries as diminution of property value. So the victim's compensation provisions could create what would amount to an open-ended entitlement for claimants, with little or no control over the ultimate cost.

FEDERAL CAUSE OF ACTION

The extension of "federal cause of action" rights to claimants, contemplated in some versions of the victim's compensation provisions, would complicate this potentially costly entitlement. Federal cause of action means the granting of the right to sue in federal courts--rather than state courts--for an alleged injury. In the case of Superfund, however, this implies far more than the right to take one's case to a federal court. The full ramifications of the right can be appreciated by considering the provision extending this right contained in the 1984 version of the Superfund reauthorization bill, introduced in the House of Representatives, and reported out by the Energy and Commerce Committee.

Title II of that bill, according to an analysis by Michael J. Horowitz, Counsel to the Director of the Office of Management and Budget:

...would allow anyone alleging exposure to a hazardous substance to sue the generator of the hazardous substance, or the transporter who brought the hazardous substance to the site, or the owner or operator of the site for damages caused by such exposure. Such damages would include medical expenses, rehabilitation costs, lost income or profit, pain and suffering, and any economic loss or property damage--including diminution in property value.²

² Remarks of Michael J. Horowitz, Counsel to the Director of the Office of Management and Budget, at the U.S. Chamber of Commerce, Washington, D.C., July 19, 1984, p. 3 (emphasis in original).

In short, any person owning a home located near a hazardous waste disposal site would have a claim on the federal government to make good any decline in the market value of his or her property, even if no physical injury had been sustained--and even if no hazard actually existed.

In an operational sense, notes the OMB analysis, this would mean that "...a trucker that carries one drum of hazardous waste to a site containing thousands of such drums may be held liable for all the damages recoverable...unless it can affirmatively prove that its waste did not cause the damage."³ Since the mere presence of the waste disposal site could be responsible for a diminution in property value, it would therefore be impossible for the trucker to provide such proof, and the owners therefore could be held strictly liable for maintaining the value of all homes in the area simply because the company brought one drum of waste into the dump.

Further complicating the matter is the nature of certain injuries that could be claimed under most of the federal cause of action proposals. The diminution of a property's value, or the extent of pain and suffering, are at best matters of subjective judgment. Also, courts would be able to assess attorney's fees, creating an incentive for attorneys to inflate their charges.⁴ Most important and disturbing is that most of the proposals would require that the defendant prove that he did not cause the injury.⁵ This is in direct contradiction to the traditions of tort law and to the fundamental principle that innocence is presumed until guilt is proven.

IMPOSITION OF DEADLINES

Environmental groups claim that site cleanups have not moved forward rapidly enough under the Superfund program. Consequently, they argue, Congress should impose strict deadlines for action on hazardous waste sites. The evidence suggests, however, that these complaints are based more on rhetoric than reality, and should not induce legislators to place unrealistic time constraints in the reauthorization legislation.

While it is true that the program took some time to gain momentum, such delays are unexceptional with any new undertaking. The pace of activity, however, has steadily increased. According to OMB, Superfund activity was underway at 753 sites by the end of 1984, with engineering studies in progress at 387 sites and actual construction⁶ initiated at 134 sites. By September of

³ Ibid., p. 4.

⁴ Ibid.

⁵ Ibid., p. 6.

⁶ The nature of the construction varies according to the site. Some methods are dredging or erecting a shield over the site.

1985, when the current authorization ends, it is anticipated that Superfund activity will have begun at 1073 sites, engineering studies at 494 sites, and construction at 163 sites.

The process of cleaning up hazardous waste disposal sites requires a great deal of preliminary work. The sites must be identified, public hearings must be held, engineering studies completed, and the appropriate remedies identified before cleanup can begin. It is not surprising, therefore, that often a great deal of time must pass before visible signs of work are evident.

The Administrator of the Environmental Protection Agency (EPA), Lee Thomas, anticipates that by FY 1990 engineering studies will have been initiated at more than 1,400 Superfund sites, and that actual construction will be underway or completed at 900. In addition, he expects that the agency will have undertaken emergency cleanup measures at more than 1,700 sites to address immediate threats to human health or to the environment.

USING SUPERFUND FOR OTHER ENVIRONMENTAL PROBLEMS

One of the most disturbing aspects of the current Superfund debate is the pressure from some environmental groups to expand the Superfund umbrella to tackle a number of environmental problems that clearly are outside the law's original intent. Supporters of this change cite such activities as cleaning up abandoned mining sites, rehabilitating large aquifers that may have been polluted by pesticides, and treating dumps not classified as hazardous by the EPA.

While some of these environmental concerns certainly warrant attention, they do not fall within the purview of the original Superfund concept. If the program were expanded to include them, it could reduce Superfund's focus on the more immediate, pressing need to deal with those abandoned hazardous waste disposal sites that pose an imminent threat to the public's health. It was this need to concentrate on the program's principal objective that led to the creation of a National Priorities List of Superfund sites. Indeed, Congress went so far as to exempt certain pollutants, such as pesticides, from inclusion in the Superfund program in recognition of the need to concentrate on its primary goal.

In addition to diffusing the program's focus, the addition of new goals easily could cause the cost of Superfund to skyrocket. Proponents of expansion do not deny this. A letter sent to Congress by a coalition of environmental groups placed the long-term cost of widening Superfund's jurisdiction at \$40 billion. But even that figure probably understates the cost. For example, just one new area suggested last year--the treatment of leaking underground storage tanks at gasoline filling stations--was given a potential price tag in excess of \$10 billion. And much of this expenditure would be unnecessary, since most oil companies are already replacing old, leaking tanks. When other suggested areas of expansion are included, such as the rehabilitation of local

waste water treatment facilities, it becomes evident that the total cost of Superfund could easily and quickly rise to enormous levels.

NEW REPORTING REQUIREMENTS

Under S.51, new reporting requirements would be imposed on the chemical industry. Companies would have to file reports with the state, federal, and local governments concerning the use, storage, and spills of any substances that contain more than 1 percent hazardous materials. The only firms exempt from the requirements would be companies employing fewer than 10 people and those with less than 6000 kilograms of hazardous substances in storage. A key point about this requirement is that it covers hazardous substances, not just hazardous wastes. So the scope of the rule would be far wider than hazardous waste disposal sites.

Chemical companies already have extensive reporting responsibilities at the state, local, and federal level. The addition of these new and onerous reporting requirements would add further to the costly paperwork burden, with little or no corresponding benefit to the public. The requirements would be particularly burdensome for small and medium-sized firms--they could have to account for thousands of substances in minute detail.

NEW TAXES TO FINANCE SUPERFUND

All proposals for the reauthorization of Superfund activities call for increased spending and for new taxes to finance it. The Reagan Administration's proposal contains a revenue formula whereby one-third of the funds would be generated by a tax on petrochemical feedstocks, with the balance coming primarily from a tax on wastes. Some additional funding would be raised through fines and from interest on Superfund payments.

New taxes on petrochemical firms at this time could cause enormous financial damage to the industry. Over the past several years, increased foreign competition has steadily reduced the U.S. petrochemical industry's share of the world market. New taxes would cut this share further. Moreover, between 1979 and 1983, the U.S. demand for chemicals decreased by an average of 2.7 percent per year. As a consequence, chemical companies are unable to pass through to their customers the costs of increased taxes for Superfund as originally anticipated.

New taxes on chemicals and petrochemical feedstocks would also make it easier for foreign competitors, who would not be subject to the tax, to capture the U.S. domestic market. For example, polyethylene resins are a staple of the chemical industry, accounting for approximately 13 percent of all petrochemicals manufactured in 1983. The proportion of the domestic market for these chemicals served by U.S. firms, however, has been steadily

decreasing since 1980. Between 1980 and 1983, the value of imports of polyethylene resins to the U.S. grew from \$247.4 million to \$468.7 million. In 1984, imports rose to \$677.5 million. A new tax would give foreign producers a further competitive edge.

Inroads by foreign chemical manufacturers are not limited to polyethylene resins. While the U.S. chemical industry still maintains an overall positive balance of trade, this trade surplus has been disappearing steadily in recent years. The positive balance declined from \$15 billion to \$10.6 billion between 1980 and 1983, and the rate of decline appears to be accelerating.

Compounding the problem is an anticipated surge in the establishment of large, new petrochemical facilities overseas--especially in nations with large oil and gas resources, such as Canada and Saudi Arabia. Very likely these nations will subsidize their petrochemical feedstocks in order to gain a foothold in the market. While this price advantage would be offset in part by higher transportation costs to reach the U.S. market, the imposition of new taxes on U.S. producers could help to provide a substantial cost advantage for foreign firms.

The Narrow Tax Base for Superfund

A major flaw in the tax provisions intended to finance Superfund is that they are narrowly based. Although more than three dozen substances involved in the petrochemical industry are subject to Superfund, only eight primary petrochemical feedstocks and five organic chemicals would bear most of the burden of the new tax. According to a survey by the Chemical Manufacturers Association, this would mean that a dozen U.S. firms would end up paying about 70 percent of the tax on petrochemical feedstocks and only four firms would pay the bulk of the taxes assessed on waste.

The proposed tax bite, moreover, would exceed the profit margin prevailing in the chemical industry today. According to industry estimates, the new feedstock tax would translate into a 4 or 5 percent levy on the value of sales. Yet the pretax profit in the chemical industry currently averages less than 4 percent of sales. So the tax would cause the industry to operate at a loss unless prices were raised--eroding firms' competitive position further.

The Tax on Wastewater Treatment

The tax on feedstocks is not the only element of the various Superfund financing schemes that could adversely affect the chemical industry. Taxes on wastewater treatment also could produce undesirable consequences, by imposing an inequitable burden on a few companies. For example, according to a survey by the Chemical Manufacturers Association, just one DuPont Chemical Corporation plant would be assessed \$47 million in wastewater

taxes. Moreover, the tax is likely to collect far more revenues than its authors actually intended, placing unnecessary burdens on the industry. One estimate places collections at \$1.8 billion annually, or 80 percent more than the \$1 billion it was designed to collect. And by taxing the treatment of hazardous wastes, the tax would act as a disincentive to treat them, encouraging firms to store them instead--exactly the outcome the law is intended to avoid.

A more logical approach would be to tax the storage or disposal of hazardous wastes. Unlike the current proposal, such an approach would encourage treatment and discourage storage. It would also create a more equitable basis for assessing the costs of operating the Superfund program by tying the tax more directly to the generation of hazardous wastes.

HOW MUCH IS ENOUGH?

Perhaps the most critical question in the whole Superfund debate is how much money is enough. To a great extent, of course, the answer to that question is a function of the proper goal of the program. To determine that goal, it is important to differentiate between the general goal of cleaning up hazardous waste disposal sites, and the more narrow purpose of cleaning up abandoned or inactive hazardous waste sites where no responsible party can be identified. It is even more important for lawmakers to distinguish between the problems associated with hazardous wastes and the far broader issue of pollutants within the environment. And it is also necessary to remember that while Superfund activities are addressing problems associated with abandoned hazardous waste sites, private sector sources already intend to spend large sums of money cleaning up hazardous waste disposal sites. In fact, while the Superfund program is expected to spend some \$11.7 billion in site cleanups during the next five years, private industry is likely to spend an additional \$10 billion on its own programs during the same period.

If many new activities and purposes are added to those already included under Superfund, the amount of money needed to finance the program could be astronomical. The inclusion of such activities, as already noted, would not further the program's basic goal--and could actually detract from it. Moreover, recent evidence suggests that increasing funding beyond an adequate level will not accelerate the pace of cleanups.

According to a recently released study by the Office of Technology Assessment, increased spending may have little if any effect on the disposal of hazardous waste.⁷ The study lists a number of reasons for this, ranging from bottlenecks in the

⁷ Office of Technology Assessment, Superfund Strategy, March 10, 1985.

supply of sufficiently trained technical personnel to a lack of rational standards for cleanups. In many cases, all that would result from spending more money is wasted tax dollars.

Clearly the manner in which money is spent is at least as important as the level of spending. It would be very unwise to use Superfund to tackle problems for which it was not designed. Immediate efforts should be concentrated on hazards that pose an imminent threat to the public's health or safety. Meanwhile a long-term solution to the problem of hazardous waste disposal should be developed. And steps should be taken to develop clear and rational federal standards for waste disposal sites that are flexible enough to respond to changes in both technology and economics.

CONCLUSION

While Superfund seems certain to be extended, it is unclear what the nature of the program will be after September 30, 1985. It is important, therefore, that Congress should not simply add on new elements to the program, but instead should identify exactly what it wants to do, given what can be accomplished with the present state of knowledge. Merely throwing money at the problem, as the OTA study indicates, will do little to resolve the nation's hazardous waste disposal problem. Superfund should continue to be used to tackle immediate threats. Meanwhile, Congress should devise a long-term strategy.

The temptation to expand the program into new areas, such as victim's compensation, and non-hazardous pollutants, should be avoided. Victim's compensation, for instance, could easily become a new budget-busting entitlements program costing hundreds of billions of dollars per year.

It is also important that Congress recognize the need to base its funding on an equitable and realistic formula of fees so no one segment of U.S. industry is unjustly penalized, nor any segment of the U.S. economy unreasonably jeopardized. Congress must realize that ill-considered action in this area could result in the direct loss of as many as 30,000 jobs in the U.S. chemical industry, and could effect another million jobs in industries involved in chemical-related activities.

Above all else, Congress should debate Superfund in a rational manner. To date, discussion has been characterized by reliance more on rhetoric than on facts. The potential cost of the hazardous waste problem and the need for Congress to secure a healthy environment for future generations requires sober and balanced deliberations.

Milton R. Copulos
Senior Policy Analyst