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Beth I. Z. Boland
Beth.Boland@chicagounbound.edu

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Consent Decrees Under the Superfund Amendments and Reauthorization Act of 1986: Controlling Discretion With Procedure

In 1986, Congress passed the Superfund Amendments and Reauthorization Act ("SARA")1 in order to restructure the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), commonly known as "Superfund,"2 and to curb what it perceived to be the Environmental Protection Agency's ("EPA") abuse of its discretion in administering the Fund.3 One of the ways in which the bill sought to accomplish these ends was to require the use of consent decrees in waste-site cleanups by the polluter.

This comment will argue (1) that the mandatory use of consent decrees for all private cleanups is unworkable (Part III); and (2) that Congress should have at the very least bifurcated the Superfund settlement process into two stages—one pertaining to

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2 Although the terms "Superfund" and "CERCLA" are often used interchangeably, CERCLA in fact embraces a much broader range of administrative mechanisms than simple federal cleanups financed by the Fund.

3 The EPA misconduct in the early administration of Superfund is documented primarily in Environmental Protection Agency Investigation of Superfund and Agency Abuses—Parts 1-3: Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. (1983) ("Oversight and Investigations Subcommittee Report").

According to William N. Hedeman, Jr., Director of EPA's Office of Emergency and Remedial Response from 1981 to 1985, the EPA attempted to spend as little of the Fund monies as possible to prevent future reauthorization of Superfund when it expired in 1985—even to the point of relaxing its cleanup standards in order to prompt generators of hazardous waste to agree to remove waste through settlements: "[T]here was a hidden agenda if you will, not to set into motion events that would lead to... the extension of the [CERCLA] tax or reenactment of the law beyond the 1985 cutoff." Id., Part 2 at 160. See also Former EPA Officials Said to Curtail Superfund Spending to Retain Current Law, 13 Env't Rep. (BNA) 2307, 2307-08 (1983).

The political controversy surrounding this and other EPA fundings resulted in the resignation or firing of fifteen officials at that time, including EPA Administrator Anne Gorsuch and her assistant administrator, Rita Lavelle.
surface waste removals, and one pertaining to underground remedial actions. Because the former stage may be conducted more efficiently by private parties, and since the latter is much more open to industry manipulation due to the unforeseeability of cleanup costs, Congress should have required only those settlements pertaining to underground decontamination to be entered as consent decrees (Part IV). In reaching these positions, the comment will also discuss the problems which plagued the administration of CERCLA in its early years (Part I) and the relevant sections of SARA designed to curb agency discretion through the mandatory use of consent decrees (Part II).

I. EPA Sweetheart Deals—An Example

CERCLA was enacted in 1980 to give the EPA clear authority and funding to respond to the serious environmental and public health hazards posed by hazardous waste sites prior to adjudicated findings of liability. By 1983, the program was in serious jeopardy. The agency had begun to substitute its own agenda for hazardous waste enforcement for that set by Congress. Its tactics ranged from refusals to use Superfund monies for hazardous waste removal to granting industry-requested delays in conducting cleanups.

The height of the EPA-generated Superfund controversy came in late 1982, when the agency entered into a series of so-called “sweetheart” deals which, critics charged, unduly favored industry

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Despite Congress's original intention that CERCLA be the comprehensive response to the problem of hazardous waste disposal, it was clear by 1980 that the statute simply could not fulfill this promise. Although it did regulate the "cradle-to-grave" handling of hazardous wastes by generator, transporter, and facility site owner, it failed: (1) to address past dumping practices; (2) to provide for removal of present hazardous wastes; (3) to require that hazardous waste generators use the most efficient and effective methods to dispose of waste; (4) to provide funds for emergency waste containment or removal procedures; and (5) to preempt the approaches of nonuniform states to the determination of siting of waste disposal facilities. Note, The Role of Injunctive Relief and Settlements in Superfund Enforcement, 68 Cornell L. Rev. 706, 709-10 (1983) (“Role of Injunctive Relief”).
polluters. For example, in the Seymour Recycling decree, 24 of the 364 polluters (those 24 accounted for half of the total chemicals at the waste site) proposed to conduct their own cleanup of surface waste material at the site at an estimated cost of $7.7 million in exchange for the EPA’s promise not to sue for any further cleanup costs. The EPA offered a “cash-out” proposal to the remaining 340 generators whereby they paid directly to the EPA their pro rata share of the $15 million targeted for underground decontamination.

After the EPA published the terms of the first agreement for public review as required by Department of Justice (“DOJ”) regulations, the 340 “secondary” generators objected to the consent

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5 In particular, the EPA settled with Seymour Recycling Company in Indiana, General Disposal in California, and Chem-Dyne Corporation in Ohio during this time. Critics charged that these settlements were nothing more than “sweetheart” deals made in order to prevent the straining of relations with larger corporate PRPs (“potentially responsible parties”). Largest Voluntary Cleanup Settlement Announced for Seymour Site Under Superfund, 13 Envtl. Rep. (BNA) 877, 877-78 (Oct. 29, 1982).


7 The terms of the covenant not to sue read as follows:

The United States, the State and the local governments do hereby covenant not to sue, execute judgment, or take any civil judicial or administrative action under [any law] . . . against the Companies . . . arising out of or related to the storage, treatment, handling, disposal, transportation or presence or actual or threatened release or discharge of any materials at, to, from or near the Seymour site, including any action with respect to surface cleanup and soil or groundwater cleanup at the Seymour site. This covenant . . . includes all civil, legal and administrative costs incurred by the United States, the State and the local governments . . . Seymour Recycling, 554 F. Supp. at 1346 (from Section XII of consent decree) (emphasis added).

The covenant not to sue also covered all additional costs “relating to injury to, destruction of, or loss of natural resources of the United States . . . .” Id. Compare with 42 U.S.C.A. § 9607(a)(4)(A)-(D) (West Supp. 1987) (explicitly imposing such costs on polluters).

8 The relevant regulations provide that the DOJ may enter into a consent decree “to enjoin discharges of pollutants into the environment” only after DOJ gives public notice of the terms of the decree, with thirty days allowed for the filing of objections with the Department. 28 C.F.R. 50.7(a)-(b) (1986).

Despite the EPA’s compliance with this particular DOJ regulation during the early 1980s, the EPA in fact bypassed many DOJ requirements by entering into informal talks with industry PRPs without involving DOJ attorneys. Theoretically, the DOJ is the legal representative for the EPA in all Superfund negotiations and litigation, once the EPA initi-
decree as an unfair allocation of monetary liability between the two groups: one group, responsible for half the contamination, paid only $7.7 million, while the other group was to pay $15 million. The district court rejected this argument, citing the twenty-four polluters' continued responsibility for any surface cleanup costs above the original $7.7 million.\(^9\)

More important, however, is the fact that the district court upheld the reasonableness of the consent decree without once expressing any reservations over its inclusion of the extremely broad covenant not to sue for any future costs of eliminating underground contamination of the site.\(^9\) This covenant essentially released the polluters from responsibility for any unexpected costs above and beyond the $15 million originally scheduled for the underground cleanup. The agreement was particularly problematic in light of the special environmental and financial problems posed by hazardous wastes which seep below the surface of a site. Not only do they present tremendous threats to the quality of drinking water obtained from underground aquifers, but the amount of funding needed to avert this threat is highly volatile. Some of the costs of conducting subsurface hazardous waste cleanups are often subject to change, others are virtually unenforceable, due to the inability to identify and locate all the responsible parties, and all

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\(^9\) The defendants' contract with the waste disposal firm chosen to carry out the surface cleanup, Chemical Waste Management, provided that the latter was responsible for the completion of the work regardless of its ultimate cost over $7.7 million. Seymour Recycling, 554 F. Supp. at 1336.

\(^9\) The district court instead focused on the need for an immediate cleanup of the site. It was concerned with the "immediate, substantial endangerment to public health" presented by the 60,000 toxic waste barrels located on the surface of the site, id. at 1340, and concluded that the decree was fair and adequate due to its potential for immediately initiating cleanup operations at the site. "In reaching this determination, the Court has particularly considered the need to abate the hazardous conditions at the site as expeditiously as possible and the unavailability of any other prompt plan to undertake the cleanup." Id. at 1341.

The court was prompted by the EPA's inability to effectuate the cleanup itself at that time. 42 U.S.C.A. § 9604(e)(3) (West Supp. 1987) requires the state in which the waste site is located to provide matching funds before the EPA may commit federal Superfund monies for a cleanup. The State of Indiana, however, had not yet established a state Superfund in 1982, and did not expect to be able to provide the matching funds until almost one year later. Seymour Recycling, 554 F. Supp. at 1340. See also note 5.
CONSENT DECREES UNDER SARA

are extremely difficult to estimate a priori. The court's approval of and the EPA's willingness to enter into such a pro-industry release of liability for future underground decontamination costs created an immediate uproar among environmental groups. The covenant not to sue for underground decontamination relieved the industry polluters of all the risks of responsibility for these future unquantifiable costs without incurring any increased present liability. Consequently, environmentalists complained that the EPA had compromised its duty to ensure full cleanup of the Seymour site and subjected itself to excessive responsibility for future cleanup costs as an expensive tradeoff to get industry polluters to conduct part of the cleanup themselves.

II. CONTROLLING SWEETHEART DEALS—THE CERCLA AMENDMENTS

A. The Administrative Framework

Under CERCLA, the EPA may effectuate the removal of hazardous wastes in one of two principal ways: the agency, pursuant to Section 9604, may clean up the site itself (an “agency cleanup”); or, pursuant to Section 9606, it may order potentially responsible parties (“PRPs”) to remove the hazardous waste material (a “pri-
If the EPA performs the cleanup, it initially utilizes Superfund money to do so, but cost-sharing arrangements are also made with the particular state. Subsequent to such a cleanup, the EPA may recoup the cost from PRPs under the rules of liability established by Section 9607 of CERCLA.

CERCLA, as it stood in 1980, contained little statutory guidance governing the administration of the Superfund program. No provisions existed to limit the EPA's discretion to enter into one-sided settlement agreements with PRPs to conduct cleanups. There were also no provisions which consistently allowed third parties to comment on whether a proposed course of action would satisfy concerns of industry, of the EPA, of interested citizens or for the public health in general.

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14 42 U.S.C.A. § 9606 (West Supp. 1987). The most important provision of the section is subpart (a). It outlines the two instances in which a PRP may be enjoined from depositing new toxic wastes at a site, or required to clean up materials which the PRP improperly disposed of in the past. First, the President (in practical terms, the EPA Administrator) may seek a court-ordered injunction when he or she 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 from a facility. Id. at § 9606(a). Second, the President may "take other action under this section including, but not limited to, issuing such orders as may be necessary to protect the public health and welfare and the environment." Id.

The proper construction of the scope of Section 9606 has been the subject of much debate since CERCLA's passage in 1980. Compare Carol L. Dorge, After "Voluntary Liability": The EPA's Implementation of Superfund, 11 B.C. Envtl. Aff. L. Rev. 443 (1984); Note, 68 Cornell L. Rev. 706 (cited in note 4) (arguing for a narrow construction of the provision, and thus a broad construction of Section 9604) with Neil Clark, Section 106 of CERCLA: An Alternative to Superfund Liability, 12 B.C. Envtl. Aff. L. Rev. 381 (1985) (arguing for a broad construction of Section 9606).

16 42 U.S.C.A. § 9607(a) (West Supp. 1987). Section 9607(a) provides that all parties contributing to hazardous waste sites shall be liable for all removal or remedial costs incurred by the United States in a waste removal action, all necessary response costs incurred by other related parties, plus all consequential damages to the natural resources surrounding the waste site. Id. Section 9607(c) also provides for a treble damage remedy against any defendant who, "without sufficient cause," violates an agency administrative order requiring the party either to clean up a site or reimburse the Fund for conducting a cleanup. 42 U.S.C.A. § 9607(c) (West Supp. 1987).


17 Representative James Florio, in his article describing Congress's view of the legislature's role in CERCLA, cited two revealing statements in CERCLA's legislative history concerning the amount of discretion granted the EPA in 1980:
In response to some of these problems, the EPA adopted an enforcement policy which has been relatively successful in the last few years. However, the agency continued primarily to rely on private settlements to enforce CERCLA; by 1985, it had still negotiated more toxic waste removals by private parties than it had performed itself or had compelled by judicial action. Such reliance on settlement was necessary due to the great cost of agency cleanups relative to agency resources, coupled with delays in obtaining compensation for the cleanups themselves. This continued reliance on private remedial actions, unchecked by statutory safeguards, did nothing to assuage Congressional fears that the EPA might once again fall prey to interest group pressures. Consequently, by 1985, a consensus formed demanding that Congress set up a regulatory system restraining much of the agency’s independent powers to formulate and enter into hazardous waste settlements with industry PRPs.

Congressman David Stockman warned of an “undirected regulatory blunderbuss”: The bill prescribes drastic overkill and resource waste in three separate dimensions: inventory requirements, monitoring, and clean-up . . . Clean-up methods and costs are wide open and authority to order and directly fund cleanup is plenary, rather than limited to cases of imminent threat to public health.

Senator Jesse Helms, the most active critic of the Senate version of the legislation, also protested:

[W]e are going far beyond what is needed to address the real problem—that of abandoned waste sites. I am concerned that the addition of this whole “release” concept will unnecessarily open the “Pandora’s box” of new regulations and notice requirements—requirements which will not assist in the cost-effective cleanup of waste sites but that will in addition merely provide jobs for more bureaucrats at the expense of the consumers of America.


In order to begin the hazardous-waste removal process, the EPA must first place the site in question on the National Priorities List (“NPL”). This in turn triggers an assignment of the site to the Fund itself (if it appears that a Section 9604 cleanup is most appropriate) or to the regional enforcement personnel (if a Section 9606 or negotiated cleanup appears most appropriate). The regional branch then sends notice letters to all identified PRPs at the site and simultaneously conducts a Remedial Investigation/Feasibility Study (“RI/FS”) to determine the likely extent of damage and the approximate cost of cleanup. Once notice letters have been sent and the RI/FS has begun, the PRPs generally form a committee to represent the diverse parties implicated in the contamination. The EPA then sends out a second notice letter, informally known as a “drop dead” letter, notifying the PRPs that they have sixty days to reach an acceptable negotiating position; otherwise the EPA either will clean up the site itself or force them to clean it up involuntarily through the use of an administrative order or a lawsuit.


See Florio, 3 Yale J. Reg. at 371-75 (cited in note 17).
B. The Statutory Mechanism

One glance at the breadth and complexity of the Superfund Amendment and Reauthorization Act of 1986 reveals the strength of Congress's resolve to control the EPA's prosecutorial discretion by shifting the locus of Superfund administration away from the agency and by increasing the role of Congress, the courts, and the public at large. Congress sought to resolve the problem of agency discretion by placing literally dozens of procedural and substantive checks on each stage of the CERCLA enforcement process. Congress attempted to control the agency better by allowing the continued use of private cleanups while closely monitoring their use through a variety of mechanisms designed to ensure that these private remedies would be carried out in the public interest.

The amendments increase the availability of private cleanups when a PRP is willing and able to conduct a proper cleanup of a waste site.\(^2\) They also eliminate the requirement that the environmental hazard addressed by the consent decree be both "imminent and substantial."\(^2\) The legislative history of SARA does not shed much light on the rationale for these shifts,\(^2\) but one passage from the 1980 CERCLA proceedings illustrates the rationale underlying

\(^2\) One specific example of Congress's intent to shift the focus of Superfund enforcement may be found in the changes made in Section 9604(a). The early version of the section authorized the EPA to conduct its own Fund cleanups under certain conditions, "unless the President [i.e., the EPA administrator] determines that such removal and remedial action will be done properly" by a responsible party. 42 U.S.C. § 9604(a) (1980) (emphasis added).

In 1985, H.R. 2817 struck the "unless" clause and provided that the EPA "shall require" the responsible party to carry out the removal or remedial action in accordance with Section 9622 (which in turn requires that the settlement be pursued through a consent decree). The accompanying committee report stated, "[t]he intent is to encourage response actions by owners or operators where the Administrator of EPA determines that they can perform the actions properly and promptly." Superfund Amendments of 1985, H.R. Rep. No. 99-253 Part 5, 99th Cong., 1st Sess. 8 (1985).

The final version of the bill retreated from the force of H.R. 2817. H.R. 2005 also struck the "unless" clause, but provided that the EPA "may allow" a responsible party to clean up a site, if the EPA determines that the cleanup would be conducted "properly and promptly." 42 U.S.C.A. § 9604(a)(1) (West Supp. 1987).

\(^2\) 42 U.S.C.A. § 9622(d)(1)(A) (West Supp. 1987). For the language of this section, see text at note 34.


The EPA informally advocated the use of consent decrees during the debate over SARA, but was countered by industry lobbyists who were concerned that their use would require a finding of an "imminent and substantial" threat and subject them to potential toxic tort actions. As a compromise, the "imminent and substantial" requirement was eliminated. Letter from William N. Hedeman, Jr. (cited in note 5).
Congress’ desire to encourage private sector responses to the problem of hazardous waste removal:

The supposition of the Administration’s proposal [favoring private party cleanups] is that society should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefitted from commerce involving these substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created. To relieve industry of responsibility for chemicals whose effects only become visible years later, is to sentence our children’s society to a potentially enormous burden. Relieving industry of responsibility establishes a precedent seriously adverse to the public interest. It tells polluters and others who introduce hazardous substances into our society and environment for profit that the longer it takes for resultant problems to appear—regardless of their severity—the less responsible they are for solving the problem.24

The 99th Congress sought to accomplish the same objectives by promoting the use of private cleanups. But, blessed with hindsight, Congress adopted numerous statutory safeguards preventing the EPA from “cutting deals” with industry representatives. These statutory provisions may be divided into two classes: those that rely on third party/public intervention to encourage proper enforcement of the Act, and those that rely on legislative and judicial overview mechanisms to do so.

1. Third Party/Public Intervention. SARA increases the opportunities for public participation in several ways. First, it requires the EPA to publish notice (with a 30-day comment period) of any proposed remedial plan or settlement, whether or not it is subject to judicial approval.25 Once the EPA decides upon a final

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25 See 42 U.S.C.A. § 9622(d)(2) (West Supp. 1985) (public participation requirements for consent decrees) and 42 U.S.C.A. § 9622(i) (public participation requirements for out-of-court settlements). Section 9622(i) provides as follows:

(1) PUBLICATION IN FEDERAL REGISTER—At least 30 days before any settlement (including any settlement arrived at through arbitration) may become final . . . , the head of the department or agency which has jurisdiction over the proposed settlement shall publish in the Federal Register notice of the proposed
response, it again must publish notice of the terms of the action, along with another period for public comment, before any remedial action is actually taken.\textsuperscript{28}

Second, at every step of these procedures, Congress now requires explicit record keeping. The EPA must now address in writing each of the major objections to the proposed plans of action, along with its reasons for accepting or rejecting any alternative plans.\textsuperscript{27} SARA also allows intervention as of right in any pending settlement. The notice shall identify the facility concerned and the parties to the proposed settlement.

(2) \textbf{COMMENT PERIOD—For a 30-day period beginning on the date of publication of notice under paragraph (1) of a proposed settlement, the head of the department or agency which has jurisdiction over the proposed settlement shall provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement.}

(3) \textbf{CONSIDERATION OF COMMENTS—The head of the department or agency shall consider any comments filed under paragraph (2) in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.}


The requirements of Section 9622(d)(2) essentially mirror these procedures. It is important to note that in Section 9622(d)(2) publicly registered objections are filed with the overseeing court, while in Section 9622(i)(3), objections are filed with the EPA.

\textsuperscript{28} Id. at § 9617. These recordation provisions detail a number of additional publicity and comment procedures:

(a) \textbf{PROPOSED PLAN—Before adoption of any plan for remedial action to be undertaken by the President ... [he] shall take both of the following actions:}

(1) \textbf{Publish a notice and brief analysis of the proposed plan and make such plan available to the public.}

(2) \textbf{Provide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue regarding the proposed plan and regarding any proposed findings under Section 9621(d)(4) of this title (relating to cleanup standards). The President or the State shall keep a transcript of the meeting and make such transcript available to the public. The notice and analysis published under paragraph (1) shall include sufficient information as may be necessary to provide a reasonable explanation of the proposed plan and alternative proposals considered.}

(b) \textbf{FINAL PLAN—Notice of the final remedial action plan adopted shall be published and the plan shall be made available to the public before commencement of any remedial action. Such final plan shall be accompanied by a discussion of any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations under subsection (a).}

Id. at § 9617(a)-(b).

Subsections (c) and (d) then provide for publication in local newspapers of the remedial plan once it has been adopted. Id. at § 9617(c)-(d).

\textsuperscript{27} 42 U.S.C.A. §§ 9617(a)(2) and (c); 9622(d)(2)(A); 9622(i)(3) (West Supp. 1987). This recording requirement serves a dual purpose: not only does it provide the public with information on which it may act to bring future objections or to file a lawsuit against the agency, but it also facilitates judicial review of the EPA's actions once a consent decree is proposed.
lawsuit for any person who has a practical interest in the outcome of the terms of the remedial action. 28 Finally, SARA permits a private right of action against either the EPA (for violations of its nondiscretionary duties) or against private parties (for contributing to the hazardous waste site in question). 29 Most importantly, SARA provides private parties up to $50,000 per site for technical assistance in evaluating the nature of the environmental hazard and the feasibility of a proposed remedial plan. 30

2. Judicial and Legislative Overview. SARA also creates a number of judicial and legislative overview mechanisms that limit the EPA's discretion to negotiate and enter into settlements with industry defendants. These include specific guidelines circumscribing the EPA's ability to formulate de minimis settlements with PRPs, to grant them covenants not to sue, and to enter any Section 9606 agreements requiring the PRPs, rather than the EPA, to clean up the hazardous waste sites. The EPA now has a statutory duty to reject a de minimis settlement with a PRP unless the PRP is deemed responsible for only a "minor portion" of the cleanup costs and detrimental effects on the surrounding environment. 31

or a lawsuit is filed.

28 Id. at § 9613(i). The section provides for intervention as a matter of right for any person who "claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties."

29 Id. at § 9659. Section 9659 provides a private right of action against the EPA for failure to perform any nondiscretionary duties under the Act, and against private parties for failure to comply with CERCLA standards and regulations. In order to counteract the potential dilatory effects of these third-party suits, however, they may not be initiated until after a proposed remedial action is actually commenced. Id. at § 9659(a)(1).

30 Id. at § 9617(e). This grant is especially important in countering the major obstacles to public participation in the CERCLA process—the layman's inability to assess adequately the initial need for remedial action and the technical deficiencies of proposed remedial plans, and the public's lack of incentive to raise the funds to acquire this information when the costs to the public health are not immediately apparent. See David Allan Feller, Private Enforcement of Federal Anti-Pollution Laws through Citizen Suits: A Model, 60 Denver L.J. 533, 564 (1983).

31 Id. at § 9622(g)(1). In addition to the "minor portion" requirement, Congress now also limits the EPA's ability to enter into settlements until either of the following conditions is met:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

or

(B) The potentially responsible party—
and may enter a covenant not to sue a PRP only if the covenant satisfies a lengthy list of requirements which the agency must specifically consider in writing and which generally cannot be met in most underground decontamination actions.\footnote{32}

Most important for purposes of this comment, Congress now requires that all private cleanups be enforced through consent decrees, rather than through administrative orders.\footnote{33} Section 9622(g)(1)(A)-(B).

Section 9622(g) further provides that any de minimis settlement must be embodied in a consent decree or an administrative order, but is not subject to the usual notice and comment procedures. Id. at § 9622(g)(4).

These covenants are now available only if:

(A) The covenant not to sue is in the public interest.
(B) The covenant not to sue would expedite response action . . . (C) The person is in full compliance with a consent decree under [Section 9606] . . . for response to the release or threatened release concerned.
(D) The response action has been approved by the President.

Id. at § 9622(f)(1)(A)-(D). The section then enumerates the factors for determining whether the covenant is in the public interest. The EPA must consider:

(A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.
(B) The nature of the risks remaining at the facility.
(C) The extent to which performance standards are included in the order or decree.
(D) The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.
(E) The extent to which the technology used in the response action is demonstrated to be effective.
(F) Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.
(G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

Id. at § 9622(f)(4)(A)-(G). Section 9622(f)(5) further requires that any covenant not to sue "be subject to the satisfactory performance by such party of its obligations under the agreement concerned." See also § 9622(j)(2) (requiring federal natural resource trustee approval before the EPA may make a covenant not to sue for damages to natural resources). Subsection 9622(f)(4)(D) in particular prevents the widespread use of covenants not to sue in subsurface waste cleanup actions.

\footnote{33} There is some disagreement as to which of these devices is generally favored by the agency. Some commentators suggest that the EPA strongly favors entering environmental enforcement actions as consent decrees. Anderson, 1985 Duke L.J. at 287 (cited in note 19) ("Most settlements to date have been judicially approved as consent decrees."); Robert V. Percival, The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making, 1987 U. Chi. Legal F. 327, 330 ("the vast majority of environmental enforcement actions are resolved by negotiated settlement"); citing Jeffrey G. Miller, Private Enforcement of Federal Pollution Control Laws, Part II, 14 Env't L. Rep. (Env't Law Inst.) 10063, 10080 (1984). At least one EPA administrator maintains, however, that the agency prefers to issue administrative orders. Telephone interview with Norman Niedergang, Chief, EPA Region V CERCLA Enforcement Section (Oct. 2, 1986).
9622(d)(1)(A) of SARA provides that "[w]henever the [EPA] enters into an agreement . . . with any potentially responsible party with respect to remedial action under section 9606 . . . the agreement shall be entered . . . as a consent decree." The legislative history of SARA indicates that Congress intended this provision to promote several objectives: to minimize costly and time-consuming litigation; to utilize the technological and financial resources of the PRPs, rather than the EPA; and, most importantly, to ensure that all EPA settlements be made "in the public interest," so as to avoid a "sweetheart" settlement such as that produced in Seymour. Whether Congress' use of the judiciary to curb the EPA's discretion in formulating hazardous waste settlements was an appropriate response to the perceived inadequacies in the agency's prior negotiation policies is discussed below.

III. THE MANDATORY USE OF CONSENT DECREES IN PRIVATE CLEANUPS

A. The Benefits of Consent Decrees in Curbing Agency Discretion and Promoting Efficiency in Enforcement

As noted above, Congress perceived that several benefits would flow from the mandatory use of consent decrees in private hazardous waste actions. A thorough examination of the benefits provided by consent decrees indicates not only that they may increase the agency's accountability, but also that the benefits may enhance the agency's ability to enforce the settlements into which it enters.

Stated broadly, Congress intended to increase agency account-

42 U.S.C.A. § 9622(d)(1) (West Supp. 1987). Section 9622(d) also provides that the entry of a consent decree shall not be construed as an acknowledgement of liability by any party, id. at 9622(d)(1)(B), and that actions conducted under Section 9604 may be entered either as consent decrees or as administrative orders, id. at 9622(d)(3). The legislative history indicates that the reason for the latter provision, in contrast to the mandatory use of consent decrees for Section 9606 settlements, is that "Section 106 [9606] . . . is the only section where a settlement agreement can be revised or enforced by a court." Superfund Amendments of 1985, House Committee on Energy and Commerce, H.Rep. 99-253 Part 1, 99th Cong., 1st Sess. 101 (1985).

Section 9622 further requires that all settlements be consistent with the National Contingency Plan ("NCP"), codified at 42 U.S.C.A. § 9605 (West Supp. 1987). The NCP, which has always required that the most cost-effective means must be chosen among equally effective plans and that cleanups be conducted at sites where they will be utilized most efficiently, has been amended also to impose more stringent requirements on the order in which sites are chosen for cleanup. Id. at § 9605.

ability by mandating judicial oversight of settlement and by requiring that the agency’s prosecutorial discretion is exercised “in the public interest.” The standard generally used for measuring the sufficiency of a decree’s terms is that they be “fair, reasonable, and adequate.” Admittedly this standard may be so malleable as to be almost meaningless. Yet in principle it demands at least a minimal level of compliance with the substantive provisions of CERCLA, and also creates a mechanism to ensure adequate representation of consenting parties and to equalize their relative bargaining positions.

The degree to which a federal district court will engage in a substantive review of the terms of a decree varies widely from court to court. Some judges refuse to reject a decree as inadequate unless it is patently illegal on its face, while others take a much more active role in scrutinizing its terms. This variance is due in large part to the position into which these courts have been thrust by the very nature of decrees as quasi-adjudicatory mechanisms: the judge must make an intelligent inquiry into the merits of the underlying claim without fully trying the case. SARA, while not specifying a particular level of judicial inquiry into the merits of Superfund decrees, nevertheless facilitates a more concrete and comprehensive review, by providing both a “paper trail” of agency documentation throughout the negotiation process and a detailed, extensive body of substantive requirements (including those governing de minimis settlements and covenants not to sue) which hazardous waste sites must now meet. In this way, Congress at-

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36 Although SARA itself does not codify this public interest standard, the legislative history demonstrates that this was Congress’s intent when it passed the provision. See H.R. 99-253 at 101 (“[t]he Administrator is encouraged to enter into settlements where they are in the public interest”) (cited in note 35).
39 Id. at 90 n.165.
40 See text at note 27.
41 For example, before the CERCLA amendments were passed, it was entirely possible for the EPA to declare a site officially “clean” when it still contained a concentration of contamination high enough to violate the levels prescribed by other federal statutes such as the Safe Drinking Water Act. Compare 40 C.F.R. § 300 (National Oil and Hazardous Substances Pollution Contingency Plan) with 42 U.S.C. § 300(f)-(j) (1982 and Supp. 1985). Under SARA, all hazardous waste cleanups must comply with the substantive standards issued under other federal environmental laws. 42 U.S.C.A. § 9621(d)(2)(A)(i) (1986) (West Supp. 1987). Similarly, covenants not to sue and de minimis settlements, which previously went entirely unregulated by statute, now must conform with specific standards before they may be issued. See notes 31-32.
tended to limit a court's ability to approve one-sided agreements such as those in *Seymour Recycling* and similar cases.\(^4\)

A court's review of the substantive merits of a decree is related to its determination of the adequacy of party representation at the bargaining table. To a certain extent, one can decide whether representation is adequate by an analysis of the merits of the agreement. A decree's substantive compliance with CERCLA is thus particularly important in Superfund negotiations, where responsible parties are frequently represented by self-appointed agents or are absent altogether. On a given issue, the "environmental movement" typically is either only loosely coalesced or entirely nonexistent.\(^4\) Similarly, industry PRPs may have radically conflicting interests, and some may never be located. In each case, the duty of the district court, much like its duty in a formal class action, is to ensure that the consent upon which the decree rests is comprehensive, representative, and, consequently, authoritative with respect to the substantive claims of all potentially interested parties. While SARA does not specify what standards a judge must use to reach this determination, it facilitates the process by encouraging effective methods for third parties to get their claims before the court by formally intervening in the action, by registering objections to EPA proposed settlements, or by filing related citizen suits against the agency or PRPs.\(^4\)

The judiciary performs a similar supervisory function in the consent decree process when the real parties in interest (i.e., the public and the PRPs) have disproportionate resources and bargaining power. Environmental cases generally involve a large industry party opposed by a citizen group whose main hope for countervailing power is through the judiciary.\(^4\) In such cases, the

\(^{42}\) Congress's intent on this score was unmistakeable. The House Committee on Energy and Commerce stated that "the Committee specifically notes its disapproval of the releases granted in the settlements entered into in the *Seymour Recycling* [sic] case . . . and expects and intends that any comparable [sic] releases that might be presented for court approval would be rejected as not in the public interest." Superfund Amendments of 1985, House Committee on Energy and Commerce, H.Rep. 99-253 Part 1, 99th Cong., 1st Sess. 101-03 (1985).

\(^{43}\) See Laura Lake, ed., *Environmental Mediation: The Search for Consensus* 7 (1985) ("Search for Consensus") (the "environmental movement" consists of a variety of interests which "ought not to be viewed as a monolith of shared objectives and solidarity").

\(^{44}\) Compare Owen Fiss, Against Settlement, 93 Yale L.J. 1073, 1078-82 (1984) (courts should perform supervisory function, albeit in the context of litigation) with Frank Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. Legal F. 19, 30 and n.16 (judicial supervision adds little to the authoritativeness of consent).

weaker parties may be forced to agree to a settlement where a
stronger party would not be so inclined. Assuming a relatively
high degree of judicial involvement, the presence of a judicial me-
diator may help rectify this particular imbalance.

Judicial supervision through the use of consent decrees may
also promote administrative consistency and efficiency in the
EPA’s enforcement of the decrees once they are entered. For ex-
ample, the permanence of consent decrees as opposed to settle-
ment agreements may also be useful in Superfund negotiations, es-
pecially as they pertain to underground decontamination actions.
As previously indicated, the removal of subsurface wastes from a
site may span several decades and therefore several administra-
tions. Although there is much disagreement among legal scholars
regarding the validity of the consent given by one administrator to
bind his or her successors through the use of long-term consent
decrees, one point remains clear: if long-term subsurface settle-
ments are to provide any continuity and certainty in the hazard-
ous-waste removal process, consent decrees create a more stable
mechanism than mere private agreements for ensuring the stability
of the legal principles embodied in the agreements.


Fiss outlines three ways in which a disparity in resources may influence a settlement: 1) the poorer party may be less able to amass and analyze as much information on the issue as its wealthier counterpart; 2) the poorer party may need the damages money immediately, thus settling for less now rather than more later; and 3) the poorer party might be forced to settle due to lack of resources to finance a potentially lengthy trial. Fiss, 93 Yale L.J. at 1076 (cited in note 44). Consent decrees (as opposed to litigation) help alleviate at least the second and third of these concerns because of the judicial involvement that is present.

The balance of power between the EPA and the PRPs is not as well-defined. Presumably, the EPA possesses much greater influence with respect to the PRPs than do private citizen groups, but its ability to fulfill its statutory duties may be circumscribed by its ability to receive sufficient funding from Congress.

Casey Bukro, Overburdened Superfund Needs To Clean Up Its Act, Chicago Tribu-

Compare Michael W. McConnell, Why Hold Elections? Using Consent Decrees to
Insulate Policies from Political Change, 1987 U. Chi. Legal F. 295, with Peter M. Shane,
Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion,

The Department of Justice has issued guidelines preventing federal agency officials
from entering into consent decrees which limit the discretion of successors on the negotiated
topic. Specific exceptions to the policy must be approved by high-ranking members of the
Department. Memorandum from the Attorney General, Department Policy Concerning Con-
sent Decrees and Settlement Agreements (March 13, 1986) (on file with the University of
Chicago Legal Forum) reprinted in part in 54 U.S.L.W. 2492 (April 1, 1988) (“Department
of Justice Guidelines”).

This factor is especially important where the intent of the signatories may be in-
creasingly subject to “selective recall” over time, whereas presumably the legal values un-
derlying the agreement will remain relatively constant. This argument to some extent also
Furthermore, a consent decree provides incentives for increased industry compliance by virtue of the symbolic value of its judicial stamp of approval: "[f]ailing to perform under a consent decree is a violation of the 'law,' whereas failing to perform as required by contract—even though a transgression of the law of contracts—is somehow less obviously a breach of the law."  

Consent decrees also facilitate the monitoring of compliance after the decree is entered. For example, in cases where the parties anticipate an extended period of compliance (such as in those agreements involving subsurface decontamination), the use of consent decrees enables the signatories not only to avoid the delays inherent in litigation, but also to obtain appearances before the same judge who approved the decree.  

The entry of a consent decree aids enforcement in other ways as well. For example, as a result of a consent decree, the EPA may become a judgment creditor and take priority over creditors pursuant to settlements should the PRP file for bankruptcy. These judicial orders, unlike settlements, are then given full faith and credit across state lines.  

Finally, judicial involvement may be required to enable the parties in an environmental dispute to reach any agreement at all. Typically, such negotiations may involve unpredictable long-term trends as well as numerous parties or factions with disparate interests and rigid ideological positions—all of which decrease the likelihood of successful negotiations. The presence of an objective authority may greatly increase the chances that the differences may be resolved without resorting to litigation.  

B. The Hidden Drawbacks of Using Consent Decrees in Superfund Negotiations

Requiring the use of consent decrees in all private hazardous
waste negotiations is not without its costs. In fact, Congress's insistence on the use of consent decrees in hazardous waste enforcement under CERCLA's particular administrative framework is highly problematic. There is a severe tension between the legislative desire in CERCLA to encourage private parties to conduct toxic waste cleanups voluntarily and the desire in SARA to provide sufficient oversight of those private efforts.

Using consent decrees to resolve hazardous waste disputes presupposes a substantial level of judicial involvement in the evaluation of proposed consent decrees under Section 9606. A trial court cannot effectively counteract the undue influence of private interests upon the administrative process without conducting a fairly extensive investigation into the adequacy of the agreement. Assuming a high level of scrutiny by the judiciary, one must then ask whether the mandatory use of consent decrees for all private cleanups (as opposed to the use of settlements, administrative orders, or litigation) best furthers the objectives of CERCLA. For a number of reasons, the answer is no. Although SARA’s primary goal is to curb agency discretion, its negative secondary effects may actually heighten the possibility of industry manipulation of the waste cleanup agreements and inhibit the development of a consistent national policy of hazardous waste enforcement.

1. The Dilatory Effects of Consent Decrees Within the CERCLA Framework. In order to analyze the potential delays caused by the SARA consent decree provisions, it is helpful first to determine how frequently these decrees may in fact be used. In the last several years, the EPA has begun initial Remedial Investigation/Feasibility Studies (“RI/FS”) at approximately 400 sites on the National Priorities List (“NPL”)—up from approximately thirty which had been initiated from 1980 to 1982—many of which are just now reaching the settlement and negotiation stage. In addition, SARA now requires the EPA to initiate 375 new long-term cleanups by 1992. Meanwhile, the number of contemporaneous

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67 In fact, the courts may have little choice in the matter. After Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986), courts supervising the entry of consent decrees for Section 9606 cleanups arguably must be sufficiently involved with the settlement so as to ascertain properly whether (1) a decree is within the general scope of the pleadings; (2) the decree furthers the “objectives” of the law under which the case was filed; and (3) the decree requires no action in violation of the statute. Local Number 93, 106 S. Ct. at 3077.

58 See note 18 for a description of the RI/FS and NPL process.

59 By 1982 the EPA had initiated RI/FS at only 29 of 114 sites on the NPL. Florio, 3 Yale J. Reg. at 364 n.66 (cited at note 17). By 1985, this number had reached 450. EPA, Superfund Factbook 3 (2d Ed. 1985).

short-term hazardous waste removals could reach into the thousands.\textsuperscript{61} These numbers, taken in conjunction with SARA's elimination of some of the barriers to privately-conducted cleanups,\textsuperscript{62} indicate that there will be a substantial increase in the number reaching the courts in the form of consent decrees.

Yet the courts simply are not logistically well-equipped to oversee the vast numbers of Superfund cases scheduled to be initiated in the next few years.\textsuperscript{63} Although it is no answer to posit blindly that courts simply cannot and should not conduct the necessary fact-finding to process the volatile and technically complex cases presented by nonadversarial Superfund cleanups, these disputes are particularly difficult for the judiciary to understand thoroughly.\textsuperscript{64}

Even if the judiciary were able to carry out sufficient fact-finding procedures to prevent "sweetheart" deals from occurring, some of the most pressing dangers created by the mandatory consent de-

\textsuperscript{61} By 1984 the EPA estimated that 1,400-2,200 of the roughly 20,000 sites scheduled for RIF/FS presented environmental hazards of sufficient scope and immediacy that they should be included on the National Priority List. Supplemental Appropriation for Superfund Being Considered for Fiscal 1984, EPA Says, 14 Env't. Rep. (BNA) 1245 (Nov. 4, 1983).

\textsuperscript{62} See text at note 21. Even under the more restrictive version of CERCLA, between 1980 and 1984 the EPA entered roughly eight times as many settlements as it had funded cleanups.

\textsuperscript{63} EPA Counsel Says Courts Ill-Equipped to Handle Influx of Hazardous Waste Suits, 15 Env't. Rep. (BNA) 1252-53 (Nov. 16, 1984). In fact, the United States Supreme Court has registered substantial doubt as to the judiciary's ability to oversee effectively the increasing complexity of environmental regulations. In Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), the Court appeared to adopt a significantly more deferential attitude toward judicial review of EPA decision making than had been set forth previously, stating:

When a court reviews an agency's construction of the statute it administers, it ... does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.


\textsuperscript{64} See Michael J. Hickok and Joyce A. Padleschat, Strategic Considerations in Defending and Settling a Superfund Case, 19 Loyola of L.A. L. Rev. 1213, 1220 (1986) (advocating bifurcation of the issues, since Superfund agreements are inherently lengthy and complex); Lake, Search for Consensus at 6 (cited in note 43) (footnotes omitted):

the traditional bureaucratic response of incrementalism does not always apply to environmental decisionmaking, since the physical damage from a project may be irreversible. Thus, unlike a social or economic policy which can be reformulated and renegotiated over time, the implementation of environmental policy at the local level poses particularly difficult problems for bureaucrats.
Cree provision are those resulting from the delays caused by the fact-finding process inherent in the decrees. Although CERCLA does not mandate that the court make specific findings of fact in evaluating the decree, the legislative history does suggest that it engage in a fairly extensive inquiry into the propriety of the decree's terms.\textsuperscript{6} Due to the complexity of most hazardous waste negotiations, this fact-finding process may span weeks and even months—sometimes lasting as long as if the case were fully litigated.\textsuperscript{6} When combined with the panoply of notice-and-comment procedures which regulate the formulation of decrees before they even reach the courts, one must ask whether the extra procedural safeguards provided by consent decrees are really worth the effort in all cases. In order to make this determination, one must identify the possible negative consequences of the delays caused by the mandatory use of consent decrees in Superfund negotiations.

2. A Shift to Publicly-Administered Hazardous Waste Cleanups? As a preliminary matter, it is important to note that the postponement of agreement is more likely to hurt local public interest organizations than industrial parties in the dispute. The organizational costs of delay are greatest for ad hoc, volunteer groups that run the risk of collapsing long before a final decision is reached.\textsuperscript{6} This result undermines Congress's intent to equalize relative bargaining positions of the parties.

The most pressing danger of the mandatory use of consent decrees in hazardous waste cases, however, is that the excessive use of judicial review and fact-finding may consume so much time and money as to force the EPA to shift from agency reliance on private cleanups to agency cleanups for any and all toxic waste sites requiring expedited remedial action. The incentives for this policy shift become more apparent when one integrates the new consent

\textsuperscript{6} See text at note 39-41.
\textsuperscript{6} See, for example, Maryland v. U.S., 460 U.S. 1001 (1983), in which the Court took six months to formulate the decree.
\textsuperscript{6} It is ironic that the judicial instrument used to eliminate perceived inequities in the bargaining power of these two parties may in some cases also cause just the opposite result. See text at notes 28-30. Some scholars advocate mediation as the mechanism best suited for reaching relatively quick and enduring resolutions to environmental conflicts. See Talbot, Settling Things (cited in note 45). This view has been justly criticized by others who recognize that current environmental statutes simply do not always promote the speedy and final adjudication of issues because they simply "involve too many steps and leave too many hard issues unresolved." Schoenbrod, 58 N.Y.U. L. Rev. at 1453 (cited in note 45). See also Percival, 1987 U. Chi. Legal F. at.333 (cited in note 33) ("[environmental] settlement negotiations may be so protracted that settlement ultimately proves to be more costly than proceeding to trial").
decree provision with the other sections of the revised CERCLA statute.

First of all, it is not at all clear that the congressional schedule requiring the EPA to initiate and supervise 375 site cleanups over the next five years is realistically attainable under the new amendments. Because of the bill's addition of many new procedural requirements and the increased workload created by the EPA's recent initiation of hundreds of new NPL RI/FS studies, some EPA officials estimate that no more than fifty sites—less than one-third of the target number—will be cleaned up by 1990.68 One former Superfund official has further suggested that the notice-and-comment procedures alone will add a minimum of one year onto the negotiation process before the EPA can even begin to arrange a hazardous waste site cleanup.69

Thus, when faced with a hazardous waste site which presents a substantial danger to the public, the EPA will have two options. First, it may clean up the site itself, thereby avoiding the full notice-and-comment procedures, and the delays associated with negotiating, formulating, and obtaining approval of a consent decree, in addition to any other dilatory tactics pursued by industrial parties to whose distinct advantage it is to postpone remedial action as long as possible. Alternatively, the EPA may attempt to force the PRPs to clean up the site by entering into a consent decree, thus suffering the delays described above, or bringing suit against the PRPs.70 Given these alternatives, it is not difficult to predict a

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69 Presentation by William N. Hedeman, Jr., at the University of Chicago, May 14, 1987.

70 A third, rarely utilized alternative would be to invoke the emergency procedures outlined in the Superfund amendments bill, which allows the EPA to abandon CERCLA's strict procedural requirements to facilitate agreement "[w]henever practicable and in the public interest." 42 U.S.C.A. § 9622(a) (West Supp. 1987). Despite the apparent breadth of this language, substantially similar language has been held to require proof of a real emergency. Union of Concerned Scientists v. NRC, 711 F.2d 370, 382 (D.C. Cir. 1983) (construing comparable section of Administrative Procedure Act).

It is informative to note the criticisms registered by legal commentators regarding the excessive inflexibility of the settlement guidelines formulated by the EPA even before codification by Congress. Critics recently have charged that the complexity of the Interim Settlement Guideline process, described in note 18 and accompanying text, has unduly hampered the EPA in its efforts to negotiate settlements with industry polluters. Anderson, 1985
significant shift by the EPA toward the agency cleanup option.\textsuperscript{71}

Although it is not necessarily undesirable to have the government conduct a certain percentage of hazardous waste cleanups, a significant shift to agency cleanups would be at best an ineffective and most likely an unworkable solution. The negative consequences triggered by heavy reliance on EPA-effectuated cleanups (as opposed to PRP-effectuated ones) are manifold. They include: increasing governmental costs to enforce CERCLA, abandoning Congress's policy of effectuating efficient private cleanups, and undermining the public interest in holding waste site contributors liable for their actions.

EPA-effectuated cleanups have been extremely costly and inefficient in the past. Though the long-term cost to the government of using Section 9604 as an enforcement tool was intended to be minimal, the actual administration of the Fund reveals quite a different story.

Congress initially supplied the EPA with $1.6 billion to conduct expedited cleanups where necessary. These funds were to be reimbursed fully by identified responsible parties.\textsuperscript{72} However, a wealth of documentation exists which suggests that EPA expenditures of Fund monies to conduct its own cleanups have been extremely wasteful and inefficient compared to those made by private parties.\textsuperscript{73} A recent internal EPA study indicated that the

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\textsuperscript{71} One EPA official acknowledged the potential for the forced shift from Section 9606 to Section 9604 under the new CERCLA settlement requirements, noting that if the backlog of consent decrees became too heavy, the EPA would have to rely on Section 9604 to conduct quick remedial actions. Telephone interview with Kate Sellars, Superfund Environmental Engineer with Region V, EPA, Washington, D.C. (Oct. 2, 1986).

\textsuperscript{72} It should be noted, however, that Congress never expected some of these costs to be reimbursed. At many hazardous waste sites, barrels of toxic materials may have been abandoned there for decades, thus eliminating almost all chance of locating the responsible parties. The damage caused by these abandoned wastes is called an "orphan share," which the Fund was intended to cover.

\textsuperscript{73} For example, a newsletter published by a company that performs technical site assessments estimates EPA assessment and cleanup costs at roughly thirty to forty percent more than equivalent private cleanups. See Anderson, 1985 Duke L.J. at 302 n.143 (cited in note 19). Similarly, a recent internal EPA audit indicated that contractors who have performed cleanups at Superfund sites have billed the EPA up to 100 times more for equipment, and up to double the labor costs, than the contractors had originally estimated for the job. Superfund Contractors Overcharge Service, Contract Competition Lacking, Auditor Says, 17 Env't Rep. (BNA) 734, 734-35 (Sept. 19, 1986). This is true even though a PRP's refusal to reimburse the EPA when ordered to do so by an administrative order carries with it a penalty of treble damages. Also, in Seymour Recycling itself the PRPs were able to conduct a surface cleanup estimated by the EPA at $15 million for just $7.7 million. Oversight and Investigations Subcommittee Report at 8 (Dec. 15, 1985) (cited in note 3).

The disparity between federal and private cleanup costs is sometimes so great that in
agencies have collected only 1.1 percent of the Superfund monies it has spent under Section 9604 of CERCLA to date. These losses are exacerbated by the retention of increased numbers of agency personnel presumably needed to enforce Superfund under Section 9606; the EPA’s record from 1980-1984 showed expenditures amounting to as much as two and one-half times more on administrative costs than on remedial expenses.

A CERCLA framework which encourages (albeit unintentionally) increased reliance on agency cleanups flies in the face of Congress’ intention to increase the agency’s efficient use of private cleanups. If Congress perceived its mission as one of encouraging the cost-effectiveness of waste site decontamination, the deterrence of inadequate toxic waste disposal, and the payment by responsible parties for such disposal, its preference should also be to en-

Two recent cases industry parties actually sued the EPA, requesting the district courts to order them to perform the necessary cleanup rather than to allow the EPA to do so. Lone Pine Steering Committee v. EPA, 600 F. Supp. 1487 (D.N.J. 1985), aff’d, 777 F.2d 882 (3d Cir. 1985); Midwest Solvent Recovery, No. H-79-556 (N.D. Ind. Dec. 14, 1984).


New York Attorney General Robert Abrams described the EPA’s dismal enforcement record as follows:

Two shocking facts emerge . . . . First, only one-third of the money obligated for cleanups has actually been spent. Second, 2 1/2 times as much money has been spent on administrative costs as on actual cleanups . . . . In fiscal 1983, for example, actual permanent cleanup work was done at only 17 sites; 124 sites were still in the study stage. It is astonishing to me that at the end of the year, with 60 percent of the Superfund time period elapsed, a mere $13.2 million—less than 1 percent of the $1.6 billion fund—had been spent on permanent remedial cleanups at hazardous waste sites.

Implementation of the Superfund Program: Hearings before the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, 99th Cong., 1st and 2d Sess. 472 (1984-85) (statement of Robert Abrams). Mr. Abrams later stated that from 1981 to 1983, $165.4 million was spent on administrative costs but only $67.7 million was spent on remedial responses. Id. at 472.

It is worth noting the different approach taken by Congress when it was faced with a similar problem of underenforcement of a federal program by an executive agency. In the only other major piece of legislation specifically aimed at consent decrees, the Tunney Antitrust Act, 15 U.S.C. § 16(b)-(h) (1982), Congress departed from the CERCLA framework in two significant ways: it did not mandate the use of consent decrees in any given set of circumstances, but it did require that any decree issued be “in the public interest.” Id. at § 16(e). The adoption of the Tunney Act also stemmed from concern that the government had been “giving away the store” in antitrust negotiations—a phrase with a familiar ring in the present context. See Ronald G. Carr, Some Observations on the Tunney Act, 52 Antitrust L.J. 953 (1983); Janet L. McDavid, et al., Antitrust Consent Decrees: Ten Years’ Experience Under the Tunney Act, 52 Antitrust L.J. 883 (1983); Note, The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974, 82 Mich. L. Rev. 153 (1983).

Although there is no indication that the 98th or the 99th Congress expressly considered...
courage increased reliance on privately-conducted cleanups. These objectives may not be met if the EPA is compelled to implement agency cleanups as its principal means of Superfund enforcement.

3. Other Consequences of Mandating Consent Decrees in Superfund Negotiations. One may argue that the new procedural safeguards under SARA need not result in a wholesale shift from private to publicly-administered cleanups. Yet given the number of cleanups the bill now requires the EPA to initiate, combined with a relatively high level of judicial supervision over them, it is difficult to foresee a significantly different result.

There are several imaginable actions the EPA could take in response to the influx of hazardous waste cases. It could increase the size of its office to oversee the vast numbers of private cleanup actions. Even assuming away funding problems, though, this alternative does not address the fact that the time needed to conduct the new CERCLA notice-and-comment procedures and the subsequent judicial factfinding does not decrease if the case is handled by ten EPA officials rather than one.

The EPA could also simply fail to prosecute some of the PRPs if the administrative burden became too great. Implementation of CERCLA would then rest on private suits against either PRPs or against the agency for failure to perform its mandatory duties. Of course, neither of these alternatives would result in the uniform and efficient administration of national hazardous waste policies. In a waste dispute the priorities among the parties that are perceived by a district court judge do not necessarily reflect optimal national priorities; the “public interest” in the context of a judicial consent decree may differ significantly from the “public interest” in the context of administrative policy considerations.

Moreover, a broader role for the courts in environmental cleanup negotiations may result in the abandonment of the courts’ traditional “legal” functions in favor of a comparatively “managerial” role in dispute resolution through consent decrees. SARA

the same methods to curb agency discretion as those embodied in the Tunney Act, one could reasonably assert that Congress was well aware of the provision. As mentioned above, it is the only other statute dealing with consent decrees as a tool of agency administration, and figures prominently in the relevant consent decree literature.

77 See text at notes 31-35.
78 See Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 376 (1982); Fiss, 93 Yale L.J. 1073 (cited in note 44); David Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L.J. 1265, 1303-07 (arguing for a diminished role of the judiciary in supervising institutional reform and public law disputes). This concern, however, is counteracted by the arguable necessity of judicial intervention to get the parties in a complex environmental case to agree to anything. See text at notes 55-56.
itself seems to shy away from increasing the managerial role of the courts in the cleanup of hazardous waste sites. The extensive provisions for public participation (especially those providing for intervention as of right and for citizen suits against the EPA),\textsuperscript{79} as well as for the EPA's expanded factfinding role in the cleanup process, imply that Congress generally regarded the EPA and other interested third parties, not the courts, as the primary overseers of hazardous waste cleanups. The mandatory consent decree provision located in Section 9622 of the bill represents the only significant provision to the contrary.

IV. BIFURCATION OF ISSUES TO MAXIMIZE BENEFITS AND MINIMIZE COSTS OF CONSENT DECREES

When Congress evaluated various proposals for limiting the EPA's discretion in the Superfund enforcement process, it correctly identified many of the public policies favoring the use of consent decrees in the environmental arena. Congress recognized that consent decrees may significantly curb agency discretion in the formulation of hazardous waste agreements, and may promote efficient long-term enforcement of decrees once they are entered. However, Congress failed to adequately anticipate the negative impact which delays, caused by the SARA enforcement scheme, might have on the agency's ability to take swift remedial actions. Not only do the decrees take time to formulate and supervise, but the new notice-and-comment procedures themselves may add months to the process before a cleanup may begin.

If Congress wanted to impose additional constraints on agency discretion (in the form of consent decrees) above and beyond the scope of SARA's other new procedures, it should have taken steps to limit the dilatory effects of these constraints. At the very least Congress should have bifurcated the enforcement process to require the use of consent decrees only for agreements pertaining to underground, as opposed to surface, cleanups. In this way Congress could have taken advantage of some of the benefits provided by consent decrees and eliminated many of their drawbacks in the Superfund context.

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\textsuperscript{79} See text at notes 28-30.
This bifurcation along surface/subsurface lines makes particular sense for hazardous waste treatment. The removal of toxic waste from the surface of a contaminated waste site presents substantially different policy considerations from those associated with the cleanup of underground contamination. The former is much more likely than the latter to require immediate removal of hazardous waste materials from the surface as a stopgap measure to reduce the risk of their eventual seepage into the underground aquifers. Once the surface waste containers are removed, years may pass before significant action is needed to maintain the potability of underground water.⁸⁰

In addition, one can quantify the costs of conducting surface cleanups much more easily than the costs of underground waste removal. It is now apparent that previous estimates of the time and expense required to effectuate the latter have been grossly inadequate.⁸¹ As Seymour Recycling readily demonstrates, the surface cleanup in that case, originally estimated at $7.7 million, was completed on time and for precisely the estimated cost.⁸² By contrast, the EPA now estimates that the subsurface cleanup, originally targeted at $15 million, will take at least $31.9 million and thirty years to clean up.⁸³ Recognition of the difference between surface and subsurface cleanups has led legislative and administrative authorities to suggest bifurcations along surface and subsurface lines.⁸⁴

⁸⁰ The assistant administrator of the EPA's toxic waste program under RCRA noted in 1983 that, on average, two years elapse between the EPA's learning of the hazard and the eventual cleanup. Thomas Seeks Review of Groundwater Rules to Shorten Time Between Detection, Cleanup, 14 Env't Rep. (BNA) 1436, 1436 (1983).

⁸¹ SARA itself contemplates an increased emphasis on the subsurface aspects of waste site cleanups. Section 9604(e) now allows the expenditure of $2 million over a one-year period for short-term "removal" type actions, which can be waived if there is a finding that the removal is consistent with a long-term remedial action. 42 U.S.C.A. § 9604(e)(1)-(2) (West Supp. 1987). A former EPA administrator has suggested that unlike prior agency policy, these provisions may allow the EPA to proceed immediately to undertake surface cleanups without having to make the prerequisite RI/FS, thus shifting the focus of RI/FS to the more difficult issue of subsurface and groundwater contamination. Letter from William N. Hedeman, Jr., (cited in note 5).

⁸² See note 11.

⁸³ In 1984 the twenty-four defendants announced the completion of their work at exactly the $7.7 million figure originally estimated. Statement of Mary Walker, Deputy Assistant Attorney General, Department of Justice, before the House Committee on Public Works and Transportation (Dec. 15, 1983), cited in Anderson, 1985 Duke L.J. at 302 n. 143 (cited in note 19).

⁸⁴ Bukro, Chicago Tribune Sect. 5 at 1 col. 1 (cited in note 48).

⁸⁵ The EPA has also ostensibly followed a policy of negotiating bifurcated agreements whereby the EPA may settle only with respect to particular phases of the cleanup opera-
Given the relative benefits and costs of consent decrees, the differences between surface and subsurface cleanups suggest that the most expeditious use of mandatory consent decrees would be to utilize them where the need for immediate action is at its lowest and the costs of the EPA's "giving away the store" are the highest—that is, in subsurface decontamination actions. In this way the EPA could best take advantage of the slower yet "safer" qualities of judicial overview through the decrees. By contrast, more streamlined enforcement mechanisms may be better suited for surface cleanups, which generally require swifter agency action and involve a reduced risk of running into extremely costly and time-consuming remedial responses.

There are distinct practical advantages to making the judiciary the titular head of enforcement throughout the lengthy process of underground waste cleanup. This does not mean, however, that the judiciary must be the principal managerial overseer of the remedial process on a week-to-week or a month-to-month or even a year-to-year basis. It also does not mean that the judiciary will necessarily abdicate its legal function for an excessively managerial one in enforcing decrees. The primary public-interest features a court brings to a settlement—those of ensuring the substantive fairness of an agreement, the authoritativeness of consent, and the equalization of bargaining power—are performed in large part either at the decree formulation stage or at long-term intervals thereafter, rather than on a regular basis.

There are two substantial objections to the position that the use of consent decrees should be mandatory only for subsurface remedial action. First, the use of consent decrees may inordinately delay underground cleanups which may pose a risk of contamination just as immediate as the risk posed by toxic wastes located on
the surface of a site. This objection may be answered by recognizing that in such cases, an emergency agency cleanup may be used to respond to the immediate threat until the parties agree to a private cleanup consent decree. This utilization of agency cleanups not only avoids the concerns associated with excessive reliance on government-effectuated cleanups, but also furthers the original purpose of CERCLA—to provide a flexible system of hazardous waste removal when the public health is threatened and the responsible parties cannot develop a rational response in the time allotted.

A second argument against the nonmandatory use of decrees for surface cleanups is that the EPA has at its disposal a number of remedial responses that are unchecked by the judiciary and therefore are unbridled by judicial mechanisms which ensure that the agency makes its responses in the public interest. Several factors indicate that this argument is misplaced here. First, it is a mistake to say that the only significant way to control agency discretion is to require judicial supervision of its actions. Many nonjudicial avenues, such as administrative lobbying and interest group information campaigns for and against elected and appointed officials, as well as formalized EPA settlement policies subject to subsequent judicial review, may perform a similar supervisory function without the immediate intervention of the courts.

Specifically, CERCLA’s notice-and-comment administrative procedures provide a comprehensive opportunity for curbing the EPA’s prosecutorial discretion. As noted above, CERCLA now requires the EPA to spend several months creating a paper trail for its decisions either to pursue or release PRPs, and to address publicly the objections to any proposed settlements with industry representatives. The EPA’s failure to meet these objections in a satisfactory manner, or fully to prosecute PRPs under CERCLA’s new substantive requirements, may subject the agency to a citizen suit filed in federal district court. Although this process does not guarantee that the agency will always hold PRPs fully responsible for all surface cleanup costs, it does provide a complete record and concrete substantive standards by which a court may subsequently make a determination regarding the EPA’s actions.

In addition, the agency’s awareness of its more formalized accountability to the public and to the judiciary will deter it from acting improperly, regardless of prior legislative or judicial supervision. Indeed, the EPA has demonstrated its sensitivity to criticism by instituting a variety of in-house settlement policies. Since 1984, the EPA has promulgated a series of memoranda delineating the
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contours of its official settlement policy, especially with regard to covenants not to sue. One commentator has suggested that the EPA's self-imposed constraints are so strict that they unduly limit its ability to reach satisfactory settlements with PRPs.

Furthermore, the judiciary's case-by-case method of dispute resolution limits its ability to regulate effectively complex systemic changes such as those contemplated by CERCLA. In considering the wisdom of making the judiciary the public watchdog in any regulatory scheme, one must be careful to differentiate between the courts' ability to adjudicate cases and controversies and their relative inability to manage broad-based institutional change. Accordingly, "nonjudicial review mechanisms [may be] necessary to supplement, and, if they are successful, to displace judicial solutions."  

SARA includes a host of non-judicial provisions included precisely for this purpose. The elaborate new notice-and-comment procedures, the provision for citizen suits against the EPA or industry defendants, and the open rights of intervention all inject substantial public supervision into the potentially unchecked issuance by the EPA of administrative orders under Section 9606. In

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**Notes:**


67 Id at 298-99.


69 42 U.S.C.A. § 9606 (West Supp. 1987). Note also that a violation of an agency administrative order results in an assessment of treble damages. 42 U.S.C.A. § 9607(c) (West Supp. 1987). The effectiveness of citizen group intervention into the enforcement process may vary widely depending on the case and the barriers to organization found within the relevant community. See Lake, Search for Consensus at 7 (cited in note 43). In any event, EPA officials openly acknowledge the possibility that citizen suits will embarrass the agency when it has not taken action against a particular polluter. EPA Region III, Based in Philadelphia, Tackles Enforcement by Targeting Ways of Using Limited Resources to Deter Violations, 17 Env't Rep. (BNA) 760, 763 (Oct. 19, 1986).

The notice-and-comment procedures also ensure that an industry defendant's due process rights are adequately protected when the EPA issues an administrative order against it. Several cases have questioned the agency's ability to issue an order without first conducting hearings with regard to the defendant's liability in fact. See Aminomi, Inc. v. EPA, 599 F. Supp. 69, 74 (C.D. Cal. 1984); Industrial Park Development Co. v. EPA, 604 F. Supp. 1136, 1145 (E.D. Pa. 1985). One court, however, has indicated subsequently that an industry representative's due process rights may already be sufficiently protected by the provision punishing a PRP's failure to comply with EPA orders only upon a showing that the PRP acted "without sufficient cause." Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 748 (D. Kan. 1985).
addition, the substantive standards defining "how clean is clean" and those limiting the agency's ability to pursue expedited remedial actions and to enter covenants not to sue all constrain the EPA's choice of remedies. Finally, even if all of these obstacles should fail in a given instance, the stakes are considerably lower in surface cleanup negotiations if the EPA should indeed "give away the store"—there is little danger that doing so would eventually cost the agency, and ultimately the public, tens of millions of dollars and decades of time.

**Conclusion**

Subsequent to Congress's passage of CERCLA in 1980, the EPA's approach to the Superfund program has been uneven at best. The years immediately following the Act's passage were marked by agency submissions to private industry-group pressures and to its own self-interested motives which were at odds with those of the legislature. When Congress decided to correct this "government failure" by revising the regulatory system, it was justifiably fueled by both anger and frustration with the agency. However, during the two-year period in which the legislature evaluated various proposals to amend the Act, the EPA reversed many of its previous policies which had led to admittedly dismal results in its first years of Superfund action. It now appears that Congress overstepped the limits of imposing checks, supposedly in the public interest, on the agency's already-formalized settlement policies.

Everyone agrees that the problem of toxic waste removal is an issue of public interest which the government should identify and remedy. Private waste generators have not spent and will not spend the time and money to respond to the problem without governmental intervention. Yet this does not mean that the government alone must clean up the majority of the waste sites in the country. To the contrary, such efforts are quite often more costly, more time-consuming, and more likely to diminish the culpable parties' responsibility for cleaning up the messes they create. Thus, CERCLA now favors the increased utilization of private cleanups.

However, to fulfill its obligation to protect the environment and the public health, the government must supervise these private efforts. Congress identified several laudable reasons for in-

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*For example, despite Rep. Florio's vehement attack on the EPA's past history of obstruction and inaction, see Florio, 3 Yale J. Reg. at 351-67 (cited in note 17), the agency practices that he condemns all occurred prior to early 1985.*
cluding a new provision in CERCLA requiring that all remedial agreements forcing industry polluters to clean up a hazardous waste site be entered as consent decrees. It hoped (1) to prevent the EPA from entering into sweetheart deals with industry representatives; (2) to reduce litigation; and (3) to ensure as much as possible that responsible parties would pay for the costs of removing the hazardous wastes they produced, rather than the EPA and ultimately the public.

Congress, though, did not sufficiently consider the theoretical and practical implications of its consent decree framework during its deliberations. Foisting the supervision of vast numbers of hazardous waste cases onto the courts merely prompts the judiciary to abandon its adjudicatory function for a managerial one instead. It imposes undue administrative burdens upon a system unequipped to handle them, and it creates unrealistic expectations of the judiciary as the source of solutions to a host of politically charged problems.

In addition, the mandatory use of consent decrees, when combined with the numerous non-judicial checks on the CERCLA enforcement process, only serves to delay the initiation of cleanups. It not only subverts Congress' original goals in including the provision within CERCLA, but leads in quite the opposite direction—to increased administrative costs, less uniform hazardous waste policies, less judicial oversight, decreased private responsibility for conducting cleanups, and therefore less protection of the public interest in the process.

Bifurcating the process of toxic waste removal into two separate phases—one for surface cleanup, and one for underground cleanup—should eliminate some of the problems created by the current statutory scheme. Bifurcation would allow the EPA to expedite enforcement when faced with an immediate threat to the environment, yet conduct more thoughtful and effective remedial action for the lengthier and more costly ordeal of decontaminating subsurface soil and aquifers.

Neither the legislature nor the courts should be the sole bearers of the burden of hazardous waste enforcement. Through SARA, Congress attempted to provide a workable solution to counteract the excessive influence exercised by private industry polluters in the past, but simply was overeager in so doing. The theoretical consequences of Congress' regulatory program are presently subject to examination. The practical effects will become more apparent in the future. By all indications, however, Congress may eventually be forced to grant the EPA more flexibility in its approach
to the federal Superfund enforcement process, and may be forced to do so especially in the area of surface hazardous waste control management.

Beth I. Z. Boland