

Rethinking Superfund

An Interview With Fred Smith

Fred Smith is the president and founder of the Competitive Enterprise Institute, a Washington-based think tank. He formerly served as a policy analyst for the Environmental Protection Agency.

Manhattan Report—What are the origins of Superfund?

Fred Smith—The Superfund law—the Comprehensive Environmental Response, Compensation, and Liability Act—was passed by Congress in 1980 in the closing days of the Carter Administration. Superfund was to clean up hazardous waste sites that had been abandoned or for which the companies or individuals responsible for the dumping couldn't be identified.

Since then, the role of Superfund has been greatly expanded. It now covers virtually *all* hazardous waste disposal sites. The original act established a \$1.6 billion fund for the cleanup which came out of general federal revenues as well as special taxes imposed on the oil and chemical industries. There is a big push now to increase the spending pot. The House of Representatives has voted \$10 billion in additional funds.

What is even more significant for companies that deal with hazardous waste, however, are the provisions in the Superfund act which allow the government to sue individuals and corporations who are deemed responsible for the dumping. They can be forced to pay directly for the cleanup costs.

MR—Who is liable under those provisions?

Smith—Virtually anyone can be held liable. The rules under Superfund reach back into time and space so that anyone with even the remotest economic connection to the hazardous site can be forced to pay for the cleanup. You can be held liable for the cleanup if you currently own or operate a waste site, if you did so in the past, or if you transported waste materials to the site. Even manufacturers who arranged for their waste products to be transported by disposal companies which they assumed were reputable can be held liable. This leads to all sorts of distorted notions of responsibility. In one case, *U.S. v. Maryland Bank*, the Justice Department is trying to recover cleanup costs from a bank that held title to a waste site from a foreclosure proceeding.

What compounds the problem is the notion of "joint and several liability" where a person or company connected with the waste site in a minimal way can be forced to pay the entire cleanup cost. In *U.S. v. A&F Materials*, a middleman who merely arranged for the sale of the hazardous material was ordered by the court to help pay the cleanup costs along with the actual polluters.

MR—How does the government decide who pays?

Smith—It's purely a discretionary decision. They generally look for the deepest pockets they can



Fred Smith, Competitive Enterprise Institute

find. It is much easier for the courts to determine wealth than it is to determine guilt. In recent hearings on Superfund, an EPA (Environmental Protection Agency) official as much as admitted that the government defines its standards on liability based on what factors make it easier for it to organize its case.

Superfund allows EPA to assign responsibility in a highly irresponsible way. Determining the party actually responsible is difficult, especially for the abandoned sites that are supposedly the foci of Superfund. EPA "solves" this problem by suing the usual corporate suspects and shifting to them the more difficult task of determining—if they can—the facts of the case. The inequities of this approach are astounding. Yet, they make it very easy for the government to "win." The government simply picks a deep pocket and then lets all the other parties involved scramble after each other with lawsuits and counter-lawsuits. The rules are designed to make it easy for the government to win cases, not to apportion blame fairly.

This kind of policy is counterproductive from the standpoint of environmental quality as well. If the law reaches out to grab people who feel they have clearly done nothing wrong, those people tend to resist the punishment. Lengthy litigation delays the actual cleanup of many potentially hazardous sites. Some experts believe the litigation costs of certain cases actually exceed the total cleanup costs. Attorney fees alone may exceed \$5 billion for the 1,800 sites on the EPA's priority list—over one-third of the direct cleanup costs. Moreover, the "deep pockets" approach of the Superfund law discourages the operators of waste sites from acting in a

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responsible fashion. If they know that the government will tend to go after the giant chemical companies that can afford to pay, why should they practice care in the handling of hazardous wastes?

MR—Granted, it does seem unfair to make some people pay for the past negligence of others. Still from the standpoint of future liability, won't large manufacturers be more responsible in who they choose to transport waste for them or where they dump it if they can also be held liable?

Smith—The problem is that the most effective way for the manufacturer to control the other parties is to contractually channel liability, which isn't allowed. Dow Chemical may sign a contract with a disposal site indicating that the operator of the site will be held liable for any deviations it makes from specified safety procedures, but the courts may not honor it. They might argue that "you should have known the guy was a crook" or "you should have foreseen that someone using the same dump as you was depositing harmful materials." Under current liability rules, it's impossible to escape responsibility for other people's actions—even when you have no control over their actions.

MR—If private companies are sued for Superfund cleanups, can't they shift the expense to their insurance companies?

Smith—They are certainly trying. There was a case in Jackson Township, New Jersey where the town was sued by local residents who claimed that the municipal dump was contaminating the water supply. The insurance company that wrote the town's general liability policy, which excluded coverage for pollution unless the release was "sudden and accidental," thought that it was not financially responsible for a contamination that occurred over many years—in this case, twelve years. The court, however, ruled that each contaminated well constituted a separate "occurrence" and found coverage under the policy. Rather than insuring \$1 million of risk, the insurance company found itself responsible for insuring up to \$160 million in potential damages. That shook the insurance industry to its roots and led to a dramatic pullout from the reinsurance market. Although the Jackson Township decision was moderated in subsequent appeals, it convinced many insurance companies that there was no way of guaranteeing certainty in the area of environmental risk.

MR—The notion of liability seems fairly broad. What about the definition of "hazardous waste" itself?

Smith—That's an equally broad area. It includes everything that is flammable like charcoal lighter fluid, reactive like Clorox or ammonia, corrosive like Drano, or toxic like roach poison. The EPA really has no coherent standards concerning what concentrations of these materials constitute a health hazard. Since almost every home contains these

types of substances, one can imagine a situation where if a house was abandoned or burned down it could be declared a hazardous waste site.

MR—If that's the case, how does the EPA decide what sites to clean up?

Smith—The EPA works with the various state agencies in determining sites, but it's essentially a giant "pork barrel" public works operation. If you were to assign a political science class to come up with the perfect public works program, one which had zero political opposition and which wasted unlimited amounts of money, it would come up with the Superfund. Superfund is the "black hole" of public works programs. Of course, Superfund undoubtedly achieves some environmental benefits—it's not easy for even an agency like EPA to waste every penny of the billions being spent. However, Superfund contains almost no incentives to consider costs or benefits.

Most federal programs involve some local cost-sharing. With Superfund the local cost is zero. The federal government pays 90 percent of the cleanup and the state picks up the rest of the tab. From the perspective of defusing political opposition, again, Superfund is pretty much the ideal program. Ordinarily with the location of a prison, or a disposal plant, or even a parking garage, there is usually some local opposition. Superfund, however, promises to clean up your local dump and move it somewhere else.

MR—Where does it go?

Smith—That, of course, is the problem. Everyone wants it out of their own backyard but where do you put it? You end up with this "move-a-dump-a-day" plan that goes nowhere. I can envision by the year 2000 a million waste haulers traveling day and night around the country with nowhere to park, which is undoubtedly the most hazardous way to deal with the problem.

It's ironic that the overriding goal of Superfund is to improve public health when the first step in the cleanup is to uncover the waste. You'd wonder about a public health program where the first step was to dig up the town graveyard, which is exactly what waste sites are—chemical graveyards. By exposing these materials to both wind and water flows, you may well create a greater hazard than before.

MR—Superfund may not be the appropriate solution to the hazardous waste problem, but isn't some government action required to deal with the abuse of private companies?

Smith—The story that led people to endorse Superfund was the Love Canal incident in upstate New York. The way the story is usually told, a chemical company, totally disregarding public health concerns, indiscriminately dumped chemicals in the local area, contaminating the water supply, leading to health problems, and even death, among mem-

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Wide World Photos

Toxic Waste Cleanup At Love Canal

bers of the local community.

The facts are actually quite different. Back in the 1940s, the Hooker Chemical Company purchased the Love Canal site as a place to dump their hazardous wastes. The canal was a heavily-lined clay ditch. After dumping their wastes, the Hooker company sealed off the ditch with a heavy clay coating to protect local residents from any dangerous exposure to the materials. They weren't environmentalists. They were just individuals worried about the future liability of their company.

It was some years later that the local school board approached the Hooker company about purchasing the site for the construction of a school. Hooker demurred on the grounds that the site was dangerous. The school board insisted, threatening to seize the land by eminent domain.

The company finally donated the site to the school board with the proviso that the land never be disturbed below the surface in the area of the toxic deposits. The school board ignored repeated warnings from the Hooker company about developing the property. In the mid-1960s, the land was sold to a developer, and streets, sewers, and electrical lines were dug.

The real story at Love Canal is that private companies have strong incentives to deal responsibly with hazardous waste as long as there are sensible rules regarding liability. On the other hand, today Superfund policy makes *everyone* responsible for toxic waste, and thus in the end, makes *no one* responsible.

MR—What other alternatives do we have?

Smith—One way would be to try to develop a better system of property rights for underground water tables. The major health concern with hazardous wastes is that they seep into and contaminate under-

ground water supplies (aquifers). There are so many users of such aquifers that no one has an effective ownership incentive to protect their future value.

The petroleum industry has handled the same problem in the case of underground oil with a scheme called "unitization." With unitization, all of the users of the oil transfer their management rights to a single party, within an association, much as in an apartment condominium. Then that single company regulates the extractions and revenues for all of the users.

Another approach would be to encourage greater regulation by the insurance industry. In the nineteenth century, steam boilers were extremely unsafe until the insurance industry stepped in to implement safety standards and inspections. They could do the same with toxic wastes if the courts were willing to enforce insurance contracts that held companies liable to insurers for disregarding safety standards. The insurance companies, themselves, should not be held liable for damages incurred by companies that disregard the safety requirements written into their insurance contracts.

The problem here, though, is not merely liability. The insurance industry is one of the most heavily regulated in the country. Any time that insurance companies attempt to institute new policies to adapt to changing market conditions, they are forced to pay a price. State regulations usually insist that they take on a certain number of undesirable clients. Assigned risk pools in auto insurance are a well-known example. Those kinds of trade-offs just won't do. What we need is a deregulated, competitive insurance industry if we are going to develop innovative ways of handling the risks that toxic wastes pose. □