TABLE OF CONTENTS

Introduction .................................................. 312
Table of Statutory References ............................ 314
I. Commentaries ........................................... 314
   A. Alternative Dispute Resolution ...................... 314
   B. Bankruptcy ......................................... 314
   C. Bifurcation of Issues ................................ 317
   D. Business, Effects on ................................ 318
   E. Case Summaries and Introductory Works .......... 318
   F. Constitutionality .................................... 321
   G. Contribution ........................................ 322
   H. Defenses ............................................ 323
   I. Enforcement ......................................... 323
   J. Injuries to Persons, Should CERCLA Cover? ...... 326
   K. Insurance ........................................... 330
   L. Legislative History .................................. 333
   M. Liability ............................................ 333
      1. Generally ........................................ 333
      2. Liability of Generators .......................... 335
      3. Liability of Owners ................................ 338
      4. Joint and Several Liability ..................... 338
   N. Natural Resources Damages Actions ............ 340
   O. Pesticide Contamination, Should CERCLA Cover? 341
   P. Pre-Enforcement Review ................................ 342
   Q. Private Cause of Action ........................... 343
   R. Reauthorization ..................................... 345
   S. Real Estate Transactions, Impact on ............ 346
   T. Settlement .......................................... 346
   U. State Involvement—Federalism Issues .......... 348

II. Looseleaf Services .......................................... 350
III. Newsletters and Magazines ............................ 352
IV. Organizations and Associations ..................... 353
V. Databases ............................................... 357

Copyright © 1986 by Ecology Law Quarterly
CERCLA is . . . a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions. . . . Numerous important features were deleted during the closing hours of the Congressional session. . . . The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation.¹

INTRODUCTION

In 1980, a “lame-duck” Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)² to address the pressing national problem of hazardous waste pollution. The primary purpose of the Act was to give the federal government the authority to clean up hazardous waste sites and fund its own cleanup activities, or to require others to begin remedial work without first having to determine liability. Unfortunately, the urgency of the waste problem and political disagreements about how to solve it combined to produce a poorly worded compromise bill that was rushed through Congress. As a result, courts, litigants, and commentators have struggled since 1980 to interpret ambiguous aspects of the Act. This Guide is designed to help researchers understand the body of law that developed during CERCLA’s first five years and to provide tools for learning about new legal developments.

The concept of a “research guide” was pioneered by Professor Robert Berring, who serves both as the Dean of the Library School, University of California at Berkeley, and as the Chief Librarian, Boalt Hall School of Law, University of California at Berkeley. This Guide began as a project for his class on advanced legal research. A research guide is more than an annotated bibliography or a series of abstracts. In addition to summarizing primary and secondary sources, a research guide directs users to the most useful kinds of sources in a particular field. Thus, in addition to annotating and classifying commentaries relating to CERCLA, this Guide provides users with descriptive information about looseleaf services, newsletters, organizations, associations, and databases. Cases are not summarized because several outstanding overviews of case law already have been prepared.³ As Dean Berring emphasizes, a research guide helps busy practitioners, students, academics, and other researchers by giving them a comprehensive list of the most useful sources and saving them the time of searching for materials and weeding out the less useful items.

The Guide is divided into five major sections. The “Commentaries”

³ See infra Section I.E “Case Summaries and Introductory Works.”
section contains annotated references to almost all of the articles written about CERCLA from 1980 through 1985. The annotations frequently draw on language used in the original works to ensure accurate summaries of the authors’ ideas. The section is divided into subject categories for easy reference and the page length of each article is clearly indicated so users can select articles according to the depth of their research needs. A limited number of complete works (books and legislative histories) are also included. Although newsletters, looseleaf services, and periodicals generally contain the most up-to-date information about CERCLA, the complete works listed here provide collections of information not available elsewhere.

The “Looseleaf Services” section of the Guide describes the four major looseleaf services that cover CERCLA matters. They provide a range of services and are described in detail so users may select the service best suited to their needs.

Periodicals are often the only sources able to keep pace with new CERCLA developments. The “Newsletters and Magazines” section of the Guide provides examples of four frequently published periodicals. Periodicals published by CERCLA-related organizations and associations are listed in the annotations describing those groups.

Individuals and groups of people active in the hazardous waste field are also an invaluable source of CERCLA information. The names, addresses, and phone numbers of several prominent groups involved with CERCLA, along with a brief description of their activities, are listed in the “Organizations and Associations” section of the Guide. Additional references to organizations and associations may be found in the Encyclopedia of Associations (K. Gruber 20th ed. 1986). The Encyclopedia contains an elaborate indexing system in which the most useful keywords are Waste(s), Hazard(s), Hazardous, Environment, Environmental, and Liability.

Printed information on CERCLA may be hard to locate. Libraries that carry CERCLA-related sources can be found by using the Directory of Special Libraries and Information Centers (B. Darnay 9th ed. 1985). In this directory, the most useful index entries are Ecology, Environmental Health, Environmental Law, Hazardous Substances, and Solid Waste.

With increased computer use, more researchers are turning to databases to find different types of information on CERCLA. The final section of the Guide contains an illustrative sample of databases available through a popular commercial vendor. A brief description of the contents of each database is provided. Readers interested in additional information on databases should consult Computer-readable Databases: A Directory and Data Sourcebook (M. Williams ed. 1985).

A unique source of CERCLA information not mentioned in the body of the Guide is the RCRA/Superfund Hotline. Anyone may call
the Hotline at (800) 424-9346 for answers to technical and regulatory questions concerning the requirements of the United States Environmental Protection Agency (EPA).

The goal of this Guide is to aid and improve users' abilities to research problems in a complicated and dynamic area of statutory law. Although the Guide is not exhaustive, it covers most of the first five years of legal literature on CERCLA and describes the best sources to turn to for the latest CERCLA developments so researchers can stay on the leading edge of legal analysis.

Table of Statutory References


Carpenter-Presley-Tanner Hazardous Substance Account Act, CAL. HEALTH & SAFETY CODE §§ 25300-25395 (West 1984)


I

COMMENTARIES

A. Alternative Dispute Resolution

See Settlement Issues

B. Bankruptcy


Provides an overview of federal hazardous waste and bankruptcy laws and explores their interaction in four major areas: the discharge of cleanup liability, the priority of a cleanup claim in relation to other creditors, the abandonment of waste sites to avoid liability, and the effect of the automatic bankruptcy stay on hazardous waste litigation. Concludes that the relationship between environmental
statutes and bankruptcy laws has far-ranging implications for a wide spectrum of the business community. Notes that the contours of the law are just beginning to develop in this area and recommends that creditors and debtors begin to learn about potential problems areas and plan their business activities accordingly.


Notes that many states have enacted or proposed hazardous waste cleanup legislation that includes a superpriority lien provision, entitling the state to a superpriority lien over all other claims against the real and personal property of any person when the state incurs expenditures through a hazardous waste remedial fund. Examines whether retroactive application of a superpriority lien against secured creditors whose rights vested before the statute was enacted violates the fifth amendment. Discusses recent cases relating to this issue and concludes that while states have the power to retroactively effectuate such legislation, use of this power would destroy secured creditors' prior vested property rights without sufficient notice and would therefore constitute a compensable fifth amendment "taking."


Reviews case law pertaining to sections 362 and 554 of the Federal Bankruptcy Code and analyzes the recent Supreme Court decision, Ohio v. Kovacs, 105 S. Ct. 705 (1985), in light of that body of law. Reviews section 554 issues as they related to the then-pending Supreme Court case Midlantic National Bank v. New Jersey Dep't of Envtl. Protection, 106 S. Ct. 755 (1986). Concludes that the Supreme Court did not resolve crucial bankruptcy issues in Kovacs, and that legislative amendments to the Code will be necessary to close loopholes, deter irresponsible waste disposal, and improve the chances that debts owed by polluters will be repaid. Recommends qualifying the abandonment privilege and preventing the discharge of cleanup orders in personal bankruptcy.


Identifies basic conflicts between the Bankruptcy Code and hazardous waste laws. Focuses on issues that have been raised in recent cases and characterizes the general problem as a clash between the
economic interests reflected in the Bankruptcy Code and the public health and safety concerns underlying CERCLA and RCRA. Proposes a "balancing of the equities" approach to resolving the conflicts, which concentrates on three factors: qualitative interests (what kinds of interests are at stake?), quantitative interests (how much does each party stand to lose if its interests are subordinated?), and the good or bad faith of the parties. Concludes that a balancing test is necessary to ensure the proper resolution of the competing concerns at issue and illustrates the test by applying it to concrete fact patterns.


Analyzes the policies underlying the United States Bankruptcy Code and compares them with the policies promoted by environmental protection statutes. Discusses recent cases in which courts have addressed conflicts between these policies and looks at the statutory framework in which these conflicts arise. Concludes that, without a change in either the law or the courts' statutory interpretation, hazardous waste site owners will continue to receive significant protection in bankruptcy from most government efforts to require environmental cleanup. Argues that any other result under existing laws would constitute an "inordinate" infringement upon the rights of a bankrupt's creditors. Proposes solutions to the dilemma and concludes that the ultimate solution is congressional action to clarify the rights of all parties potentially affected by the bankruptcy of a hazardous waste operator.


Attempted to clarify the issues involved in Ohio v. Kovacs, 105 S. Ct. 705 (1985), prior to the Supreme Court's decision. Argues that Kovacs presented two distinct but often confused issues: (1) what is the status in bankruptcy of any rights the state or federal government has against a debtor's existing assets, and (2) whether an individual's right to a discharge of pre-bankruptcy obligations, and hence to enjoy future earnings, includes a right to be relieved of the duty to clean up toxic wastes.


Reviews case law defining cleanup liability and claims enforcement
procedures under RCRA and CERCLA and investigates the relationship between this body of law and the Bankruptcy Code. Concludes that the Bankruptcy Code poses serious environmental enforcement problems. Describes and analyzes H.R. 2767, 98th Cong., 1st Sess. (1983), which was designed to resolve these problems by giving the government a superpriority lien for all costs of remedial action and for all associated fines or penalties incurred by environmental violators. Concludes that a “superlien” for remedial costs is basically a good idea, but that H.R. 2767 was poorly drafted and did not adequately address the complex nature of the problems involved.

C. Bifurcation of Issues


Reviews the holding in United States v. Price, No. 80-4104 (D.N.J. Mar. 8, 1985), in which the court ordered bifurcation of a CERCLA trial into liability and remedy segments, with the remedy portion to be heard first. Argues that the order was an appropriate invocation of Rule 42(b) of the Federal Rules of Civil Procedure and an effective approach to case management, given the difficulties of devising a remedial plan in this case.


Argues that bifurcation of CERCLA trials into remedy and liability segments, with the remedial issues to be tried first, creates a number of interesting and some disturbing possibilities for CERCLA litigation. Concludes that although bifurcation may have been appropriate for the parties in United States v. Price, No. 80-4104 (D.N.J. Mar. 8, 1985), generators in other cases may find this approach more troublesome. Sets up a list of considerations for and against bifurcation.


Argues that a preliminary determination on remedies prior to any rulings on liability is a logical approach to handling the complexities presented in CERCLA cases. Notes, however, that there are both risks and benefits associated with a bifurcated remedies trial and
urges individual lawyers to weigh the trade-offs before agreeing to such a procedure. Outlines the risks and benefits.

**D. Business, Effects on**


Introduces corporate counsel to the ways in which liability for environmental damage may affect business transactions. Reviews basic CERCLA provisions and examines how liability might arise in the context of real estate transactions or in the corporate acquisition, financing, or bankruptcy processes. Briefly reviews protective measures business clients may be able to take to shield themselves from liability.


Reviews problems accountants typically face when trying to record and document business costs associated with hazardous wastes. Attempts to define accounting problems, identify different types of costs, and suggest solutions. Encourages accountants to help business managers plan hazardous waste programs by clearly and accurately portraying in accounting documents the costs associated with waste generation and cleanup.


Draws on findings of successor liability in defective products cases to argue that corporations that purchase “substantially all” of the assets of a corporation held liable under CERCLA should be liable for cleaning up the predecessor corporation’s waste.


Primarily reviews requirements under RCRA for treatment, storage, and disposal facilities, but contains a section that integrates liability under CERCLA with RCRA compliance. Reviews waste management strategies designed to avoid liability.

**E. Case Summaries and Introductory Works**


Presents a comprehensive overview of the emerging body of law
under CERCLA. Covers the first four and one-half years of efforts to interpret the Act. Briefly describes CERCLA's major provisions and legislative history and devotes the remainder of the report to an issue-by-issue discussion of CERCLA case law. Includes a table of cases cited in the report.


Outlines CERCLA issues and holdings. Uses standard outline format and phrases propositions of law as either statements or questions. When most courts lean in one direction, issues are presented as statements, and supporting holdings follow in the outline. Holdings contrary to the majority are also included, but contain notations indicating their minority status. When most courts are split, issues are framed as questions, and holdings providing different answers are presented as having equal weight. Designed to help CERCLA researchers find cases and organize issues.


Argues that CERCLA, as implemented, is inequitable and inefficient and that large, unexpected liabilities coupled with litigation costs are forcing insurers from the market. Asserts that the government's litigation-oriented implementation strategy tends to delay remedial action, that litigation is burning up funds better devoted to cleanup or prevention, and that the liability scheme is inherently unfair.


Reviews the eighteen months of CERCLA litigation subsequent to Reed, *infra* p. 320. Updates the issues examined in Reed's earlier article and also considers pre-enforcement reviewability of EPA cleanup and enforcement actions, the relationship of EPA's broad power to implement cleanup plans to the property rights of those owning land under or next to toxic waste sites, landowner liability, affirmative defenses, private party recovery, and the scope of personal jurisdiction under the Act. Combines analysis with description to provide a concise and helpful discussion. Good introductory reading, especially when combined with the earlier piece.

Presents discussions recorded at a roundtable symposium on hazardous waste litigation. Part I includes conversations on the viability of hazardous waste remedial technology, the appropriate extent of remedial actions, and the degree to which responsible parties should take unilateral action at waste sites. Part II examines how environmental standards under laws other than CERCLA affect government and private cleanups under CERCLA and how EPA’s community relations program influences confidential settlement negotiations.


Provides a general introduction to CERCLA and EPA’s enforcement practices under the Act. Includes citations to major cases and regulations. Written as a broad overview for practicing attorneys new to the subject. Published by the American Law Institute—American Bar Association Committee on Continuing Professional Education.


Reviews issues that were prominent in early CERCLA litigation in the context of then-recent court decisions. Covers the definition of liable parties, liability for pre-CERCLA acts, strict liability, causation, defenses, joint and several liability, and contribution. Also compares CERCLA sections 104 and 106. Blends analysis with description and provides a concise and valuable summary of the issues addressed. Provides a nice summary of CERCLA law when combined with Reed, supra p. 319.


Presents discussions recorded at a roundtable seminar on hazardous waste litigation. Includes exchanges on CERCLA section 106 orders, contribution under CERCLA, settlements under CERCLA, and the government’s burden of proof with respect to causation.


Reviews CERCLA’s major provisions soon after the Act’s passage.
CERCLA RESEARCH GUIDE

Compares legal mechanisms available for hazardous substance cleanup before and after CERCLA. Examines CERCLA's liability provisions and the constitutionality of the fee system. Recommends several interpretations of the Act that have been adopted.

F. Constitutionality


Examines four constitutional bases for challenging the retroactive application of CERCLA: the due process clause of the fifth amendment, the contracts clause, the taking clause of the fifth amendment, and the ex post facto doctrine. The first three challenges are based on the principle of substantive due process which requires that legislation bear a rational relationship to a legitimate end of the statute. The ex post facto doctrine prohibits Congress and the state legislatures from enacting laws criminal in nature that seek to penalize past transactions. Discusses cases that support the argument that CERCLA satisfies due process requirements. Concludes that the retroactive application of CERCLA is constitutional and necessary to effectuate congressional intent to clean up abandoned waste sites.


Asserts that imposition of strict liability for hazardous waste damages on "innocent landowners" (landowners that did not cause the harm) runs counter to the constitutional guarantee that land cannot be taken for a public purpose without just compensation. Points out that, under CERCLA, a landowner need not have participated in creating or maintaining a harmful situation in order to be held liable for cleanup costs. Argues that asking an innocent landowner to pay for cleanup costs is equivalent to asking him to pay the cost of a public benefit. Concludes that this imposition of liability is not reasonably related to the purpose of CERCLA, is unduly oppressive to the individual, and amounts to a taking without due process of law.

Thomas, Superfund and the Eleventh Amendment: Are the States Immune From Section 107 Suits?, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,156 (1984). (5 pages)

Argues that Congress intended to hold states strictly liable under CERCLA section 107 for costs incurred by private parties responding to hazardous pollution incidents traceable to state-owned facilities. Discusses and criticizes United States v. Union Gas Co., 575 F.
Supp. 949 (E.D. Pa. 1983), which held that private party liability suits against states are barred by the eleventh amendment.

G. Contribution


Explores apportionment and contribution issues under CERCLA. Reviews relevant portions of the statute, their legislative history, and recent judicial interpretations. Concludes that, although a right to contribution would promote equity, a strong legal argument can be made that Congress did not provide for such a right, and the federal courts are therefore not justified in creating a federal common-law right to contribution. Notes that even if Congress amends the Act to allow explicitly for contribution, the problem of developing a reasonable basis for apportioning costs will still exist. Explores different methods of allocating costs among responsible parties, including the pro rata and comparative fault methods suggested by the comments to section 886A of the *Restatement (Second) of Torts*.


Examines three questions in light of recent court decisions and federal policy: (1) When can a party sue for contribution?, (2) How should damages be apportioned?, and (3) How will a settlement with EPA affect a future contribution suit? Explains that, under CERCLA, it is now settled that a strict liability standard applies and that liability can be joint and several under appropriate circumstances. Predicts that courts will probably find that a federal common law right to contribution exists under CERCLA. Presents specific answers to the above questions and suggests an overall framework for evaluating contribution issues that stresses the goals of immediate cleanups, quick repayment of Superfund monies, and equitable payments between liable parties.


Traces the evolution of the law of contribution and the passage of CERCLA. Discusses potential applications of contribution in different factual contexts and related policy considerations. Assesses whether state or federal law should apply and analyzes the types of rules that could govern. Concludes that, although there is no express or implied right to contribution under CERCLA, federal
courts may recognize a right of contribution to effectuate the congressional goal of rapid cleanup of waste disposal sites; recommends the adoption of a particular set of rules.


Examines contribution in general and as it relates to comparative negligence, federal common law, and practical settlement difficulties. Concludes that, in light of contribution law, joint and several liability is not inevitably a rule favorable to plaintiffs, particularly in the context of settlements, partial settlements, and comparative negligence statutes.

**H. Defenses**


Outlines legal defenses common to all CERCLA actions and defenses tailored to claims for reimbursement and abatement actions. Recommends early and prompt reaction to government investigation and a thorough understanding of EPA’s motivations for bringing suit. Written from an adversary perspective. Does not address cooperative approaches to resolving CERCLA disputes.

**I. Enforcement**


Explores unclear aspects of CERCLA section 106, which authorizes suits for equitable relief by the government to abate imminent and substantial endangerment to health or the environment due to the release or threatened release of a hazardous substance from a facility. Reviews the hazardous waste problem (with an emphasis on groundwater contamination), RCRA and CERCLA operations, and EPA’s use of section 106 as an enforcement tool. Concludes, following an analysis of section 106 case law, that (1) section 106 can be used to address dangers resulting from past actions of generators, (2) section 106 is merely a jurisdictional statute which specifies neither the parties liable nor the standard of liability to be applied, (3) the proper source of substantive standards is section 107, and (4) given section 107 case law, generators may be considered responsible parties for the purposes of section 106, and strict liability is the standard of liability that should be applied.

Provides an overview, in outline form, of issues relating to government and private party enforcement actions under RCRA and CERCLA. Prepared by a defense practitioner and designed to be illustrative rather than comprehensive.


Critically analyzes EPA's use of CERCLA section 106 as the cornerstone of its enforcement strategy. Argues that using section 106 to encourage "voluntary" private party cleanup (1) hinders the effectiveness of the enforcement program, (2) allows EPA to shift to the courts its responsibility to determine appropriate and reasonable remedies, (3) extends section 106 beyond its intended emergency application and converts it into an unclear general liability provision, and (4) potentially exposes private parties to a broad, implied liability, not anticipated by existing laws, through the determination of "imminent and substantial endangerment." Reviews CERCLA's structure, EPA's implementation of the Act, the rationale behind EPA's enforcement strategy, the results of EPA's strategy, and the future of EPA's "voluntary liability" scheme.


Examines the statutory basis for and content of the revised National Contingency Plan—the major document guiding remedial activities at hazardous waste sites. Argues that the revised Plan fails to provide standards by which the EPA, responsible parties, or the courts can determine when a site is clean enough to cease remedial activities. Points out that inadequate standards will discourage voluntary cleanup by responsible parties because the parties will not be able to determine when they have discharged their obligations. Also notes that inadequate standards complicate the process of judicial review. Recommends incorporating regulations from other environmental acts into the National Contingency Plan as a means of developing standards.


Describes some RCRA and CERCLA enforcement policies and practices adopted by the Land and Natural Resources Division of
the United States Department of Justice. Consists of the transcribed remarks of Carol Dinkins, then-Assistant Attorney General, Land and Natural Resources Division.


Reviews the hazardous waste disposal problem from an historical perspective, EPA's enforcement policies under CERCLA, the evolution of EPA's enforcement policies, congressional investigative activities, and considerations regarding settlement strategies. Written from a practitioner's perspective.


Reviews EPA's enforcement strategy of bringing abatement actions under CERCLA section 106 and negotiating settlement agreements to force private cleanups rather than carrying out cleanups using CERCLA's "revolving door" fund under sections 104 and 107. Argues that the section 106 strategy runs contrary to congressional intent and concludes that the ambiguities of section 106 and differing court interpretations have generated substantial confusion in the business community. Recommends congressional action to clarify the scope of liability and permissible strategies for enforcement.


Argues that CERCLA and its legislative history provide little conclusive guidance concerning the proper use of section 106, CERCLA's "emergency response" provision. Examines the contours of section 106 law, as they were beginning to develop in 1982, and reviews considerations, such as the traditional standards of equity, that can help set parameters for section 106 suits.


Explores the relationship between the federal common law of nuisance and the "imminent hazard" provisions of RCRA (section 7003) and CERCLA (section 106). Concludes that, under Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981), RCRA and CERCLA have probably displaced the federal common law of nuisance. Notes, however, that common law may still play a role within the imminent hazard provisions of both statutes because Congress appears to have intended that the federal common law of
nuisance serve as the substantive basis of decision under these provisions.

J. Injuries to Persons, Should CERCLA Cover?


Summarizes and compares proposed federal legislation and existing state statutory schemes designed to compensate hazardous waste victims. Analyzes findings contained in the report of the Superfund Section 301(e) Study Group, established pursuant to CERCLA section 301(e) to assess available common law and statutory remedies and to devise a federal statutory system of victim compensation. Describes a model federal victim compensation scheme proposed by the Environmental Law Institute and briefly reviews S. 917, S. 945, S. 946, H.R. 2330, and H.R. 2582, all from the 98th Congress, 1st Session (1983). Looks at California and Minnesota legislative approaches to the problem. Concludes that none of the federal proposals adequately address the problems in this area and recommends that interested parties work to reestablish priorities in the hazardous substance injury area.

Recovery for Exposure to Hazardous Substances: The Superfund Section 301(e) Study and Beyond, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,098 (1984). (44 pages)

Introduces and reproduces the nineteen presentations delivered at the Twelfth Annual ABA Standing Committee on Environmental Law Conference on the Environment, held May 6-7, 1983. Explores the arguments for and against a legislative program to compensate victims of toxic torts. Notes that early CERCLA bills contained controversial provisions requiring compensation for human health injuries associated with hazardous wastes, but that the “lame-duck” Congress that enacted CERCLA decided to create a Study Group (through CERCLA section 301(e)) to evaluate compensation issues rather than institute a compensation program. Refers extensively to the Superfund Section 301(e) Study Group’s report, which (1) recommended that Congress amend CERCLA to provide a no-fault compensation scheme managed by the states under a federal program, (2) advocated maintaining the ability of parties to sue under state tort common law, and (3) suggested ways to improve available tort remedies. See SUPERFUND SECTION 301(e) STUDY GROUP, SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH Cong., 2D Sess., INJURIES AND DAMAGES FROM HAZARDOUS
WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES (Comm. Print 1982). The transcribed articles from the conference present the views of an impressive array of authorities:

Stafford, The Supreme Court, Federal Common Law, and Congressional Efforts to Protect Health and the Environment, at 10,103.

Grad, Remedies for Injuries Caused by Hazardous Waste: The Report and Recommendations of the Superfund 301(e) Study Group, at 10,105.


Strohbehn, Policy Choices Involved in Designing a Victim Compensation Fund: A Comparison of California's Fund and the Section 301(e) Report, at 10,110.

Long, Legislative Developments in Minnesota, at 10,114.


Hall, Health Risks from Exposure to Hazardous Wastes, at 10,118.

Stoll, The 104(i) Litigation and the Chemical Industry's Concerns About Recent Compensation Proposals, at 10,119.


Corash, Evaluating the Effects of Alternative Compensation Systems, at 10,121.

Cheek, Why Current Victim Compensation Proposals are Unfair and Ineffective, at 10,124.

Voigt, Actual and Punitive Damages for Exposures Within Regulatory Limits: The Karen Silkwood Case, at 10,125.

Nathan & Weiner, Superfund for Asbestos Liabilities: A Sensible Solution to a National Tragedy, at 10,127.

Cummings, A Review of Legislative Proposals in the U.S. Senate, at 10,131.

Harris, A Review of Legislative Proposals in the U.S. House of Representatives, at 10,132.

Light, A Comparison of the 301(e) Report and Some Pending Legislative Proposals, at 10,133.

Breitel, A Philosophical Perspective, at 10,140.

Outlines barriers that common law tort doctrines pose to compensating victims of toxic hazards. Points out the "compensation gap" in RCRA and CERCLA and examines flaws in the Federal Torts Claims Act and the common law doctrines of nuisance, trespass, negligence, and strict liability. Concludes that Congress should enact a compensation scheme.

Note, Amending Superfund to Include a "Discovery Rule" for Personal Injury Caused by Hazardous Substance Exposure, 4 VA. J. NAT. RESOURCES L. 131 (1984). (23 pages)

Urges amending CERCLA to provide a federal cause of action for victims injured by hazardous wastes. Argues that a broadly defined "discovery rule" should be adopted, which provides that the statute of limitations should run from the time the injury is discovered rather than from the time the injury occurs.

Barnard, Comparison of Toxic Tort Compensation Legislation, 2 J. PROD. L. 127 (1983). (6 pages)


Enumerates and briefly explains some of the problems confronting federal legislative attempts to compensate victims of "toxic torts." Focuses on problems related to occupational disease and exposure to hazardous waste. Poses questions about causation, burden of proof, permissible and necessary parties, exclusivity of legislative remedies, and funding.


Argues that CERCLA's "missing link" is its failure to provide compensation for victims of haphazard toxic waste disposal. Examines barriers the tort system poses for plaintiffs seeking compensation for toxic injuries and looks at then-current legislative proposals for establishing administrative compensation schemes. Includes analysis of H.R. 7300, H.R. 5224, and S. 1643, all from the 98th Congress,
1st Session (1983), proposed in response to the Superfund Section 301(e) Study Group’s report referred to supra p.


Critically analyzes the Superfund Section 301(e) Report’s recommendations and the legislative proposals offered in response to those recommendations. Reviews S. 917, S. 946, and H.R. 2582, all from the 98th Congress, 1st Session (1983). Written by a member of the Superfund Section 301(e) Study Group who disagreed with some of the group’s recommendations. Attaches dissenting views written by other Study Group members who did not fully share the Group’s conclusions.


Summarizes the recommendations of the Superfund Section 301(e) Study Group and places them in a larger analytic context. Briefly comments on common law and statutory remedies, barriers to recovery, then-current developments, and future concerns. Written by the reporter for the Superfund Section 301(e) Study Group.


Analyzes the need for reform in the laws governing harm caused by toxic substances. Discusses a theoretical framework for efficiently allocating costs associated with toxic chemicals and explains the failure of both market and private liability systems to effectively allocate such costs. Also notes the failure of regulation and public enforcement as effective cost reduction measures. Suggests general and specific principles for reform and presents a model statute designed to incorporate these suggestions. Provides interpretive comments along with the text of the model statute (47 pages). Based on a research project of the Toxic Substances Program of the Environmental Law Institute.


Analyzes the current relationship between environmental legislation and federal common law remedies. Argues that environmental legislation should not preempt federal common law remedies. Con-
cludes that because administrative remedial schemes are unlikely to make victims of toxic injuries whole, courts should recognize a private right of action under the federal common law of strict liability.


(31 pages)

Argues that a government-operated compensation fund is the only effective means of compensating hazardous waste victims whose injuries result from problems at closed sites, and that mandatory third-party liability insurance is the best compensation mechanism for victims of active site releases. Argues that CERCLA should be amended to allow victims to recover for personal injury and property damage and that a federal statutory liability provision should be enacted to remedy causation and burden of proof difficulties in the tort system.

**K. Insurance**


Provides an analytical “roadmap” for courts attempting to apply the finely crafted provisions of the Comprehensive General Liability Insurance Policy (the “china”) to liability under developing environmental law (the “bull”). Briefly describes different types of liabilities under environmental law and considers the application of liability insurance to those liabilities.


Postulates that the financial responsibility requirements of RCRA and CERCLA place the commercial insurer in the position of having to act as a surrogate regulator for EPA. Poses the question, “Is the commercial insurer an appropriate tool to assist EPA in regulating the hazardous waste industry?” Reviews the liability and financial responsibility provisions of RCRA and CERCLA, the development of pollution liability insurance, the theoretical basis for the model of insurer as surrogate regulator, and the problems with placing the insurer in such a role. Concludes, for both practical and theoretical reasons, that the insurer can and should serve only a very limited “regulatory” function.

Analyzes court decisions that directly address the issue of insurance coverage for environmental harm from the disposal of hazardous wastes. Attempts to describe the boundary lines courts have drawn to separate coverage from noncoverage.

Fields, *Superfund: The Court Search for Insurance Money*, BRIEF, Fall 1984, at 6. (4 pages)

Examines insurance issues that arise under the “pollution exclusion” clause of standard general liability insurance policies.


Analyzes the basic coverage provided by environmental liability policies. Compares the scope of time covered by environmental insurance to the time for which an insured may have liability under environmental laws and compares the scope of the liability protection afforded by insurance policies to the scope of liability under RCRA and CERCLA. Examines specific insurance policies that represent a cross section of the broader market and concludes that insurance coverage does not in many respects address or cover the broad liabilities created by RCRA and CERCLA. Postulates that, in the face of open-ended liability, the insurance industry has decided to insure against only a limited portion of environmental risks. Notes that there are significant differences between policies and recommends that businesses carefully analyze and try to match their exposure and the coverage afforded by different policies.


Provides introductory guidance for corporate counsel who must concern themselves with environmental damage liability insurance. Notes that insurance policies cannot be accurately understood without careful study and presents the basic concepts and issues necessary to conduct such an inquiry. Reviews the history of environmental damage liability insurance, the kinds of risks to be insured, and the types of insurance policies available. Focuses on the scope and coverage of two principal types of policy forms used for covering gradual pollution damage. Comments briefly on factors to consider when purchasing insurance and on pitfalls to avoid.

Argues that recent decisions rejecting liability insurers' attempts to limit their obligations for unforeseen hazardous pollution liability will increase premiums and drive insurers from the market at a time when the government is increasing the demand for hazardous waste coverage.


Discusses judicial interpretation of the standard pollution exclusion clause included in most corporate liability insurance policies. Finds that courts hold the pollution exclusion clause inapplicable in three circumstances: (1) if the discharge, release, or escape of pollutants is "sudden and accidental"; (2) where there is a possibility that a circumstance other than pollution may have caused the harm; and (3) where the pollution was not intentionally caused. Concludes that these interpretations are consistent with the original intent of the pollution exclusion clause and insurance law.


Provides guidance to those in charge of corporate risk management who are interested in pollution liability policies. Includes a three-page chart comparing the form provisions of eleven major policies.

Schmalz, Superfunds and Tort Law Reforms—are They Insurable?, 38 BUS. LAW. 175 (1982). (18 pages)

Outlines a statutory scheme designed to help the insurance industry respond to the increasing need for toxic-related liability insurance. Argues that an effective scheme must both strike a balance between eligibility rules and levels of compensation for injured parties and place reasonable limits on industrial liability. Written by the general counsel for the Hartford Accident and Indemnity Group.
L. Legislative History


Contains the major bills, reports, and debates of the 96th Congress concerning CERCLA. Includes as appendixes various documents and statements relating to the history of the Act. Provides a bibliography of congressional documents, a chronological guide to the bills and amendments, and a section-by-section index, which gives cross-references between each section of CERCLA and the relevant legislative materials.

SUPERFUND: A LEGISLATIVE HISTORY (H. Needham & M. Menefee eds. 1982). (3 volumes, 1852 pages)

Volume I tracks the legislative history of specific CERCLA provisions and issues. Volumes II and III contain complete reproductions of relevant floor debates and congressional reports and bills. Excludes hearings and mark-up transcripts. Well-organized and indexed, with several layers of cross-references.


Describes CERCLA as the product of a hastily drawn compromise which was rushed through in the closing minutes of a lame-duck Congress. Reviews the limited legislative history of CERCLA and examines its close relationship with the contemporaneous amendment and reaffirmation of RCRA. Argues that this history indicates that CERCLA should be read as logically connected to regulation of hazardous waste disposal sites under Subtitle C of RCRA. Concludes that effective implementation of CERCLA depends on enforcement of hazardous waste provisions contained in RCRA.

M. Liability

1. Generally

Burack & Brown, EPA's Policy on Corporate Successor Liability Under Superfund: Or, the Deep Pocket Has No Bottom, 9 CHEMICAL & RADIATION WASTE LITIGATION REP. 649 (1985). (6 pages)

Explains and critiques the legal basis for corporate successor liability, discusses the potential impact of this policy on CERCLA cases,
and suggests limitations on the doctrine derived from case law and policy considerations.


Discusses liability issues in government enforcement actions under CERCLA and examines the role the courts have played in developing applicable standards. Reviews legal developments in actions under CERCLA section 107 for cost-recovery, and actions under CERCLA section 106 for injunctive relief. Addresses the questions: (1) Who may be held liable?, (2) Under what conditions may liability arise?, (3) What standards for liability exist?, and (4) What is the extent of potential liability? Asserts that CERCLA’s unclear provisions and limited legislative history have placed the burden of forging standards on the courts. Notes that courts have so far crafted standards of liability in the context of litigation involving sites high on the National Priorities List, and predicts that these standards may need to be modified as courts turn their attention to cases where fault is less obvious and risks to health and environmental damage are more attenuated.


Reviews the liability provisions of CERCLA and discusses the following issues emerging in CERCLA litigation: strict liability, joint and several liability, burden of proof, causation, and settlement. Briefly discusses then-current EPA settlement policies and the advantages to defendants of settling this type of litigation.


Examines the scope of defendants’ liability to private party plaintiffs under various federal environmental statutes and assesses liability under common law theories. Concludes that federal legislation does not provide adequate compensation for the monetary loss of private party plaintiffs and suggests that such plaintiffs bring their cases under state law.

Relates the history of liability and enforcement under FWPCA section 311 to similar provisions in CERCLA. Argues that although many of the problems that arise under FWPCA have been addressed by CERCLA, several have not (e.g., measuring liability and the statute of limitations). Examines these issues in the context of pollution from vessels.


Outlines the statutory and common law bases for imposing liability for toxic cleanup on generators, site owners, and operators, and examines the growing body of case law that defines the dimensions of and criteria for liability. Addresses four questions regarding the nature and scope of relief: (1) Are generators strictly liable for improper disposal of their hazardous wastes?, (2) What threshold of "risk" is necessary to trigger general remedial action?, (3) How is liability allocated among successive owners of a site?, and (4) Does a finding of liability in a government-initiated abatement case collaterally estop defendants in third-party private damages actions?


Discusses and compares CERCLA and the California Carpenter-Presley-Tanner Hazardous Substance Account Act of 1981. Briefly describes the development of hazardous substance statutes enacted before these two "superfund" acts, and then examines the liability provisions of these two statutes along with their legislative histories and judicial interpretations. Concludes that both statutes leave significant questions unresolved and that the courts and legislatures will have to clarify both acts. Recommends caution on the part of potentially liable parties pending resolution of ambiguous provisions.

2. Liability of Generators


Examines the meaning of the phrase "arranged for disposal" in CERCLA section 107(a)(3). Points out that it could mean that gen-
operators who arranged for the disposal of wastes are not liable for cleaning up subsequent releases to the environment unless they chose the unsafe site at which the release occurred. Argues that this interpretation is irrational in light of CERCLA's broad approach to liability because it rewards generators who avoided confronting the question of where their hazardous waste should be disposed. Concludes that, although this reading of the phrase could be inferred from some courts reasoning, every court to date has found a way to make generators potentially liable and broad liability seems to be what Congress intended.


Examines judicial decisions under CERCLA addressing the issues of joint and several liability and causation as they relate to generators. Concludes that there are still several issues the courts have not yet addressed, but which must be resolved in order to determine when one generator will be liable for the waste of another. Unresolved issues include (1) when small contributors will be excused from joint and several liability for massive cleanup costs, (2) what will count as an "indivisible" injury for the purposes of joint and several liability, and (3) how contribution among generators should be handled when one company can be held liable for another's waste.


Presents an overview of the common law and statutory theories under which generators can be subject to liability for improper waste management. Reviews the duties imposed on generators by federal and state laws and the standards of liability used to assess violations of those duties. Concludes that, although this area of the law is underdeveloped, the concept of generator liability is expanding rapidly. Predicts aggressive attempts by government and private litigants to broaden generator liability whenever possible.


Reviews the impact of specific CERCLA provisions and general contract principles on the validity of "hold harmless" clauses in generator-disposer agreements. Notes that both CERCLA provisions and contract principles lay a number of traps for the unwary drafter and recommends guidelines for avoiding these problems.
Reviews the scope of generator liability under CERCLA as it was developing in 1982. Covers the following questions: (1) Are all generators liable?, (2) What defenses are available to a generator?, and (3) Is a generator liable for costs resulting from hazardous substances originating with other generators?

Explores EPA's argument that hazardous waste disposal is a "non-delegable duty" subjecting generators to strict liability. Looks at strict liability in the context of CERCLA section 107 cost-recovery actions and CERCLA section 106 prospective actions. Concludes that defenses to cost-recovery actions may be more difficult to sustain than defenses to prospective relief actions because of statutory language and equitable considerations. Argues that generators exercising reasonable diligence in off-site disposal should be afforded some level of increased protection under CERCLA.

Describes the application of RCRA and CERCLA to generators of toxic wastes. Outlines several issues that were left unresolved by early CERCLA litigation and discusses settlement issues in light of then-recent decisions. Argues that the government's inconsistent and ambiguous standards and settlement policies are forcing generators' counsel to take hard-line legal positions they would not otherwise adopt. Written from a defense attorney's perspective.

Argues that retroactive application of CERCLA to pre-enactment hazardous waste generators was intended by Congress and is within constitutional boundaries. Relies on CERCLA's legislative history to determine the scope of the Act's liability provisions. Concludes that pre-enactment waste generators are not strictly liable for cleanup costs, but are subject to a "due care" standard. Outlines the parameters of joint and several liability under the Act.
3. **Liability of Owners**


Discusses in detail the distinction between original and successor liability and looks at how the two relate to one another in common law and statutory schemes dealing with hazardous wastes. Compares the traditional rule of corporate successor non-liability with CERCLA’s imposition of strict liability on the basis of “mere ownership.” Concludes that the severity of hazardous waste problems may lend support to CERCLA’s approach despite the fact that the traditional rule is well-settled.

4. **Joint and Several Liability**


Critically analyzes the holding in United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984), where the court found that Congress left the courts with some discretion to apportion damages if the imposition of joint and several liability would be harsh and unfair. Argues that the court wrongly interpreted CERCLA’s legislative history to arrive at a generally correct result. Asserts that CERCLA’s legislative history indicates that issues of liability not resolved by the Act should be governed by common law. Points out that instead of referring to common law principles, the court in *A & F Materials* relied heavily on the language of a proposed amendment to an early House CERCLA bill, neither of which was enacted into law. Notes that the court could have reached a similar result by looking to the common law principles of joint and several liability as they have developed in the context of pollution problems and recommends this as a more accurate and less misleading route for future courts.


Argues that CERCLA’s legislative history runs counter to the imposition of joint and several liability and that the application of common law tort principles supports pro rata apportionment of liability among contributors to the hazardous waste harm. Written from the perspective of counsel for non-negligent, off-site waste generators.

Reviews the court's holding in *United States v. Chem-Dyne Corp.* that multiple defendants can be held jointly and severally liable under CERCLA as long as the harm at issue is indivisible. Examines that decision in light of CERCLA's legislative history and explores federal law governing liability under CERCLA and state common law governing analogous situations. Concludes that, although there was no federal precedent and little congressional guidance, the court succeeded in fashioning a rule that is consistent with the modern common law trend and that best achieves the goals and purposes of CERCLA.


Argues in favor of joint and several liability. Stresses the severity of hazardous waste problems, the difficulty of allocating liability among multiple defendants, and the limited amount of money available for direct government action under CERCLA.


Examines the issue of joint and several liability from two vantage points: (1) joint and several liability at common law, and (2) statutory developments in joint and several liability.


Recommends adopting a joint and several standard of liability under CERCLA. Reviews CERCLA's liability provisions and their legislative history, section 311 of the Federal Water Pollution Control Act (upon which CERCLA's liability provision is based), the history of joint and several liability under common law, and the application of joint and several liability to cases involving hazardous substance releases. Bases support for joint and several liability primarily on the argument that this is the only standard of liability that will "get the job done."

Discusses CERCLA’s language and legislative history, the development of different approaches to allocating liability among multiple tortfeasors under state common law and federal common law in the environmental context. Analyzes the possible development of federal common law in hazardous waste enforcement cases. Concludes that only the development of a federal common law applying a joint and several liability standard will serve congressional objectives. Written before the issue of joint and several liability had been addressed by the courts. Frequently cited.

N. Natural Resources Damages Actions


Points out that, although Congress declared that responsible parties could be liable for “damages for injury to, destruction of, or loss of natural resources” (CERCLA section 107(a)), it did not provide much guidance as to how this liability provision should work in practice. Reviews the status of natural resource recovery law under CERCLA as of late 1984 and outlines ways in which a resource recovery action may be brought. Addresses the issue of how damages should be measured and argues that CERCLA allows, at minimum, recovery of the full cost of restoring damaged natural resources.


Provides an economist’s overview of the available alternatives for valuing damage to natural resources in connection with a CERCLA 107(a) resource recovery action. Argues that, where practical, the measure of damage should be the loss in the value of the services that the damaged resources provide for their users.


Notes that CERCLA section 107(f) both creates a state cause of action for recovery for injuries to natural resources and provides that sums recovered shall be used to “restore, rehabilitate, or acquire the equivalent of” the damaged resources. Argues that, although Congress did not provide explicit guidelines for damages assessment, the language of the statute clearly invites states to draw
on natural resource damages cases in other areas of law and to fashion damage requests tailored to their particular resource needs.


Provides a step-by-step guide to natural resource recovery actions under CERCLA. Outlines the operation of CERCLA’s natural resource damage liability provisions along with the natural resource trusteeship responsibilities CERCLA places on federal agencies and examines their relationship to the statute’s timeliness requirements for enforcement actions. Describes the kinds of costs recoverable and notes that some had to be brought before December 1983. Describes which actions had a December 1983 deadline, analyzes likely defenses to such actions, and reviews the procedures used by one agency to preserve actions subject to the 1983 cutoff.


Notes that CERCLA section 111(h) establishes a rebuttable presumption in favor of damage assessments made by government claimants in natural resource damages actions, provided they comply with regulations promulgated under CERCLA section 301(c). Points out that this presumption will play a critical role in natural resource damages litigation because information about damage to the environment is usually complicated and controversial. Concludes that, in addition to helping government claimants prove their claims, the presumption will add an element of consistency to the valuation process after the proper application of the presumption has been worked out by the courts.

**O. Pesticide Contamination, Should CERCLA Cover?**


Examines the controversy over whether CERCLA should be used to respond to groundwater contamination resulting from the routine use of pesticides. Reviews pesticide problems, examines CERCLA for authority to respond to this type of contamination, and considers whether Congress should amend CERCLA to clearly address the issue. Concludes that EPA should exercise authority over pesticide problems and that, if anything, Congress should broaden the liabil-
ity provisions so that pesticide manufacturers can, without doubt, be held liable for contamination resulting from normal pesticide use.

P. Pre-Enforcement Review


Considers the extent to which EPA cleanup plans under CERCLA section 104 should be subject to judicial review prior to their implementation, rather than only during subsequent EPA cost-recovery actions under CERCLA section 107. Frames the major issues as: (1) whether there is any statutory authorization for pre-cost-recovery review of EPA cleanup activities, (2) whether there is adequate standing, finality, and ripeness at that stage of remedial activity, (3) whether the absence of judicial review prior to the initiation of a cost-recovery action violates the constitutional guarantee of due process, and (4) if judicial review is appropriate, what the standard of review for agency action should be. Examines these issues in the context of then-pending appellate cases. Recommends limited pre-cost-recovery review and an arbitrary, capricious, in bad faith, or abuse of discretion standard of review.


Explores the manner in which NEPA must be incorporated into CERCLAl response planning. Notes that where, as in CERCLA, Congress has been silent regarding how NEPA applies to government action under a statute, some courts have required EPA to provide opportunities for public participation that are "functionally equivalent" to NEPA's Environmental Impact Statement requirements. Outlines NEPA's underlying goals and the procedures designed to fulfill them. Traces the development of the functional equivalence standard for EPA compliance with NEPA and argues that the agency's policies for planning CERCLA remedial actions fail to meet that standard. Proposes a public participation program designed to carry out NEPA's goals while still permitting expeditious relief. Concludes that EPA should amend CERCLA to provide a more substantial opportunity for public comment to meet the standard of functional equivalence.

Notes that CERCLA permits EPA to issue demand letters requesting that "responsible parties" take prescribed remedial action at the risk of liability for punitive damages if the government must assume cleanup duties. Reviews the extent to which a "responsible party" who receives a demand letter directing extensive remedial action can obtain judicial review of the demand letter's legality. Concludes that judicial review of questions of law at least would be ripe upon EPA's issuance of a demand letter.

Q. Private Cause of Action


Reviews the court's holding in Cadillac Fairview/California v. Dow Chemical Co., No. CV 83-7996 LTL(Bx) (C.D. Cal. Mar. 5, 1984), that a private litigant may not maintain a cause of action for cleanup expenses for the removal of hazardous substances from property not listed on the National Priorities List (NPL). Notes that CERCLA section 107 confers a private right of action for "costs of response" as long as those costs are "consistent with the National Contingency Plan (NCP)," which is EPA's comprehensive plan dealing with the cleanup of inactive waste sites under CERCLA. Notes also that CERCLA section 105, which mandates the NCP, requires establishment of a NPL as part of the NCP. Concludes that under Cadillac Fairview and related cases, "consistency" with the NCP seems to require that the litigated site initially be placed on the NPL.


Identifies two broad categories of court opinions responding to CERCLA's private right of action provision (section 107(a)(4)(B)): (1) restrictive opinions that only allow suit by those who acted in conjunction with government cleanup efforts, and (2) liberal opinions that interpret the language of the act literally and impose few restrictions on private actions. Concludes that the legislative history of the Act generally supports an interpretation that liberally permits private recovery and that the credibility of the restrictive opinions is weakened by the fact that they generally do not follow prior CERCLA decisions in their holdings. Recommends a cautious attitude...
towards the viability of a 107(a)(4)(B) action until circuit courts have reviewed the issues involved.


Argues that CERCLA section 111(a)(2) creates a right of action for private parties to recover cleanup costs from the Hazardous Substance Response Trust Fund. Reviews the extent of the hazardous waste problem and discusses the scope of governmental authority created by CERCLA to respond to environmental emergencies created by toxic chemical releases. Presents the public policy reasons for encouraging private responses to environmental accidents. Finds authority for a private right of action in the statutory language of CERCLA, its implementing regulations, and relevant case law. Discusses the practical limits to a private right of action against the Fund and suggests ways to limit the right. Attempts to define the point at which a claim against the Fund may be commenced and reviews the procedures for bringing such a claim.


Identifies four major areas of disagreement that show up in cases concerning private cost recovery actions under CERCLA: (1) the procedures necessary for a private cleanup to be "consistent with the National Contingency Plan," (2) the types of expenditures that rise to the level of "necessary costs of response," (3) the point in a cleanup when response costs are "incurred," and thus become recoverable, and (4) the notice requirements that apply in private cost recovery actions. Discusses each of these problem areas and suggests possible resolutions.


Analyzes problems associated with private cost-recovery actions under CERCLA and concludes that both Congress and EPA have shirked their responsibilities to determine whether CERCLA should permit a general self-help remedy or only a limited and directed private role for hazardous waste cleanups. Argues that to allow federal courts to decide *de novo* what response actions are reasonable would create a new federal common law of environmental remedies, a prospect the authors consider "scarcely promising."

Presents a thorough summary of the cases and issues in this area of the law. Predicts that the standards for maintaining private actions under CERCLA will remain in flux for some time given the judicial need to balance competing considerations of (1) facilitating the prompt cleanup of contaminated sites, (2) avoiding a proliferation of premature or frivolous suits by private parties, and (3) ensuring that private party cleanup actions are cost-effective and adequately address the environmental problems at a particular site.


Reviews CERCLA provisions that govern municipal cost-recovery actions and outlines the types of costs that may be recoverable. Analyzes two avenues for recovery: (1) actions directly against persons responsible for releases under section 107 and (2) claims against the “Superfund” under section 112. Presents a step-by-step guide to developing a 107 action or a 112 claim and highlights key problem areas.

R. Reauthorization


Compares current CERCLA provisions with amendments supported by EPA and amendments contained in the House and Senate bills (H.R. 2817 as approved by the House in December 1985 and S. 51 as approved by the Senate in September 1985, 99th Congress, 1st Session (1985)). Presents the information in an easy-to-read chart format and organizes the comparisons by issue rather than statutory provision.


Reviews the unsuccessful 1984 efforts to reauthorize CERCLA. Describes how the proposed legislation wound its way through and around numerous congressional committees. Designed to help participants and observers follow the 1985-86 reauthorization process.
S. Real Estate Transactions, Impact on

Bleicher & Stonelake, Caveat Emptor: The Impact of Superfund and Related Laws on Real Estate Transactions, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,017 (1984). (8 pages)

Notes that under CERCLA and other toxics legislation, a current owner of land may be liable for the costs of cleaning up toxic waste, even if the owner was not responsible for the waste and did not know it was hidden on the land when she purchased it. Outlines practical steps a purchaser of land can take to minimize the risk of exposure to liability for the cleanup of toxic substances.


Notes that hazardous waste regulations affect virtually every aspect of real estate transactions. Points out that although hazardous waste law is an area of specialization, general or real estate practitioners may be asked to answer related questions and can help identify hazardous waste legal problems before they affect concerned clients. Provides basic background information and guidance to help general and real estate practitioners recognize the symptoms of environmental problems.

T. Settlement

Anderson, Negotiation and Informal Agency Action: The Case of Superfund, 1985 DUKE L.J. 261. (120 pages)

Gives an extensive analysis of EPA policies concerning negotiated cleanups under CERCLA from 1980 to 1985. Concludes that, although EPA negotiations were tainted by political abuse during CERCLA’s first three years, the current trend away from negotiated cleanups will result in an inefficient use of CERCLA funds. Proposes a revised approach to CERCLA negotiations that draws on principles and techniques developed in the field of alternative dispute resolution. Uses EPA’s CERCLA experiences to evaluate the effectiveness of four basic domestic policy tools—litigation, regulation, negotiation, and public works—and posits that a renewed commitment to “principled” negotiation under CERCLA could provide insights about when and how negotiation might supply the preferred problem-solving tool in other policy arenas.


Reviews and documents a major settlement under CERCLA involving over 160 private parties. Designed to help future parties facili-
tate settlements. Concludes that potentially responsible parties should begin to organize as soon as possible after they hear from EPA to (1) negotiate the work plan for a remedial investigation/feasibility study, (2) perform the study, and (3) implement the resulting remedial plan without litigation. Recommends EPA involvement to bring pressure to bear on those potentially responsible parties who refuse to acknowledge their responsibility at the site.


Reviews a proposed framework for settling third-party claims in CERCLA cases. Discusses the advantages of using alternative dispute resolution techniques and advocates use of the proposed model when contribution issues are involved in CERCLA negotiations.

Rikleen, Superfund Settlements: Key to Accelerated Waste Cleanups, ENVT. F., Aug. 1985, at 51. (3 pages)

Describes the work of Clean Sites, Inc., an independent, nonprofit organization established to facilitate CERCLA settlements and cleanup activities. Discusses Clean Sites' role in settlement negotiations. Written by the Assistant Vice-President of Negotiations for Clean Sites.

Moore, Settlement of Superfund Cases, 8 CHEMICAL & RADIATION WASTE LITIGATION REP. 29 (1984). (12 pages)

Sets forth principles and lessons that have emerged through the course of CERCLA settlement negotiations. Designed to guide corporate counsel who must advise their clients whether to litigate or settle CERCLA cases.


Reviews the terms of a consent decree involving 246 settling companies. Argues that this particular settlement indicates that CERCLA can function as written and is not in need of a major overhaul.


Describes how parties to a large CERCLA settlement resolved the allocation of liability among generators and established a practical mechanism for operating a cleanup trust fund to pay for remedial activities at the site. Outlines the complaints generators filed against owners and operators of the site and their insurance carriers.

Reviews settlement devices defense counsel can use to more concretely define the scope of their client's obligations to clean up a site. Argues that the key objective in settlement negotiations should be to seek a finite and reasonable ceiling for a client's responsibilities. Discusses cash "buy-outs," specified activities, and objectively defined environmental standards.


Describes the liability provisions of CERCLA and argues that a well-structured settlement has advantages for state and private party defendants. Outlines several problems that are likely to arise in the course of settling CERCLA enforcement actions and discusses their resolution in the context of a settlement in which the author participated. Written by the Assistant Vice-President of Negotiations for Clean Sites, Inc.


Describes some initial experiences with "mega-party" CERCLA negotiations. Reviews issues relating to selection of counsel, group involvement, information exchange, settlement exposure, post-settlement risks, and alternative negotiation approaches.

U. State Involvement—Federalism Issues


Explores state and federal funding mechanisms used to raise money for cleanup activities at hazardous waste sites. Concludes that funding cleanup operations is a major problem and that the determination of how and where funds will be generated is still an evolving issue in political arenas. Makes specific recommendations for the State of Missouri.


Analyzes the role of states in CERCLA's federal program, reviews state "superfund" legislation, and assesses the relationship between
federal and state programs. Concludes that some state superfund legislation complements the federal act, while other state statutes raise preemption issues and doubts about the ability of the states to meet CERCLA matching grants and response authority requirements. Notes that some states have gone beyond CERCLA and may provide models for future federal legislation. Includes charts, tables, and complete statutory references to the different state programs.


Explores federal-state relationships emerging in the area of hazardous waste control. Covers RCRA, CERCLA, and hazardous waste facility siting. With respect to CERCLA, concludes that state efforts will be necessary both to clean up sites that do not receive funding under CERCLA and to extend cleanup activities beyond the level that federal funding alone would allow. Argues that courts should not impede state efforts by an overly broad interpretation of CERCLA’s preemption clause.


Examines the extent to which CERCLA preempts states from establishing local trust funds to finance cleanup costs and related claims associated with hazardous waste releases. Focuses on the magnitude of the hazardous waste problem and the need for an effective regulatory framework. Analyzes both Florida’s and the federal government’s major statutes dealing with hazardous waste and pinpoints regulatory failures and ambiguities. Looks at CERCLA in the context of traditional preemption doctrines to determine the federal legislation’s boundaries and discusses areas of state concern in an effort to clarify CERCLA’s preemptive scope. Argues that states must retain broad statutory powers to finance local remedial efforts to effectuate CERCLA’s ambitious objectives.


Asserts that, under the logic of the holding in City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981), CERCLA supplants the federal common law of nuisance in hazardous waste litigation. Notes that this preemption of federal common law will result in the use of “express” CERCLA standards for situations that Congress addressed and the use of state common law remedies for areas not
covered by CERCLA. Examines the civil liability provisions of CERCLA to determine the extent to which these provisions modify the role of the court by preempting federal common law remedies and by fostering the application of state common law principles. Concludes that, although CERCLA has complicated hazardous waste litigation by making non-CERCLA claims subject to state rather than federal rules of decision, application of state common law standards of liability in those situations that Congress decided not to address will ensure that hazardous waste standards will be developed in accordance with the laws and policies of the parties most directly affected by hazardous waste activities.

II

LOOSELEAF SERVICES

CHEMICAL WASTE LITIGATION REPORTER (monthly, $990/year)

(202) 462-5755

Cumulating issues, approximately two hundred pages per month. Roughly half of the materials relate to CERCLA. Presents news updates as well as major substantive works. Regular features include Articles, Recent Decisions, Recent Developments, and Documents. Each issue contains two or three articles, and the CERCLA articles are usually analytic pieces written to help litigating practitioners. “Recent Decisions” includes a table of contents which organizes recent decisions by topic, provides a shortened citation and one sentence summary of each case, and directs the reader to longer summaries that follow. The longer summaries provide concise descriptions (one-half to five pages) of the cases. The summaries include references to related articles and notations from past articles or summaries in the Chemical & Radiation Waste Litigation Reporter (renamed in 1986 the Chemical Waste Litigation Reporter). “Recent Developments” follows the same format, but gives readers information about case developments prior to a decision (initiation of suits, writs of mandamus, submissions of settlements, important motions, etc.) Finally, each issue contains documents of special interest, which are presented in full or as major excerpts. They provide readers with detailed information not available elsewhere, references to important opinions, and templates for pleadings or agreements.
ENVIRONMENT REPORTER (BUREAU OF NATIONAL AFFAIRS) (weekly, $1100/year)

The Bureau of National Affairs, Inc., 1231 25th St. NW, Washington, D.C. 20037
(301) 258-1033

A complex service that combines cumulating updates with interfiling inserts. Covers a broad range of subjects and provides several different types of information. Separate binders contain Current Developments, Monographs, Decisions, Federal Laws, Federal Regulations, State Air Laws (and regulations), State Water Laws (and regulations), State Solid Waste—Land Use Laws (and regulations), and Mining. The binders include a variety of research aids and indexes. “Current Developments” (approximately fifty pages per week) provides weekly coverage of environmental legislation, regulations, standards, enforcement, research, and litigation. The information is presented in the form of short news updates. Current Developments also reprints the complete text of recent decisions, laws, regulations, and other items of interest. “Monographs” are in-depth (twenty to thirty pages) research articles on specific areas of the law. The Decisions binder contains digests and texts of federal and state court decisions. Although this service does not include many analytic pieces on CERCLA, it provides timely information on fast-breaking developments.

ENVIRONMENTAL LAW REPORTER (ENVIRONMENTAL LAW INSTITUTE) (monthly, $595/year)

Environmental Law Institute, Suite 200, 1616 P St. NW, Washington, D.C. 20036
(202) 452-9600

A service that contains both cumulating and interfiling binders. Separate binders are provided for News and Analysis (cumulating), Pending Litigation (cumulating), Statutes (interfiling), and Regulations (interfiling). “News and Analysis” provides several features on a monthly basis. It includes major “Articles” by outside authors, shorter analytic “Comments” by ELR editors, and brief “Dialogues” by ELR editors and readers, which provide a forum for the exchange of ideas. News and Analysis also includes a “Recent Developments” section that provides summaries of recent actions by courts, Congress, and federal agencies. A comprehensive list of environmental law-related articles, divided by subject category, is also included. Copies of recent court opinions in environmental cases are cumulated in the News and Analysis binder under the heading “Litigation.” Regulatory information is similarly collected under
the heading "Administrative Materials." The "Pending Litigation" binder summarizes developments in ongoing court actions and briefly describes each pleading filed with the court. Copies of the pleadings are available from ELR at cost. The full text of roughly one hundred federal statutes and international agreements concerning environmental matters are contained in the Statutes binder and updated regularly. The Regulations binder provides the same service for selected federal regulations and Executive Orders. This service is beautifully indexed and very easy to use.

HAZARDOUS WASTE LITIGATION REPORTER (bi-monthly, $700/year)

Andrews Publications, Inc., P.O. Box 200, Edgemont, PA 19028
(215) 353-2565

Cumulating issues, approximately seventy-five pages per month. Each issue contains roughly fifteen one-page news items and several documents. More than half the materials relate to CERCLA. The news items concentrate on litigation and regulatory developments. The documents include pleadings, opinions, settlement agreements, statutes, and regulations.

III
NEWSLETTERS AND MAGAZINES

THE ENVIRONMENTAL FORUM (monthly, $95/year)

Environmental Forum, Suite 200, 1616 P St. NW, Washington, D.C. 20036
(202) 328-5150

Magazine format, approximately fifty pages per issue. Covers a variety of CERCLA matters on a regular basis. Articles are two to eight pages in length and contain a mixture of information, opinion, and analysis. Designed to inform and entertain. Usually includes at least one CERCLA article per issue.

HAZARDOUS WASTE NEWS (weekly, $317/year)

Hazardous Waste News, Business Publishers, Inc., 951 Pershing Dr., Silver Spring, MD 20910
(301) 587-6300

Newsletter format, approximately eight pages per issue. Routinely presents CERCLA-related information. Articles are one-half to one page in length and are primarily news updates. Focuses on legislative, regulatory, and judicial developments. Includes the following regular columns on a rotating basis: Slants and Trends, Around the
States, Business & Technology, Calendar of Upcoming Events, and Grants and Contracts.

**HAZARDOUS WASTE REPORT** (biweekly, $325/year)

Aspen Systems Corporation, 1600 Research Blvd., Rockville, MD 20850
(301) 251-5624

Mixture of magazine and newsletter format, approximately fifteen pages per issue. Devoted almost exclusively to CERCLA and RCRA and focuses primarily on government activities. Articles average one page in length and contain information on the full range of regulatory developments (from new legislation to new technologies being used by EPA) as well as describe different perspectives on hazardous waste issues. Presents shorter news briefs in the following regular features: Dateline Washington, D.C., News in Brief, State News in Brief, In the States, (Federal) Register Notices, Enforcement and Litigation, Legal Briefs, and Meetings and Seminars.

**PESTICIDE & TOXIC CHEMICAL NEWS** (weekly, $390/year)

Food and Chemical News, Inc., 1101 Pennsylvania Avenue SE, Washington, D.C. 20003
(202) 544-1980

Newsletter format, approximately twenty five pages per issue. Provides weekly reports on hazardous wastes, pesticides, toxic substances, regulation, and legislation. Approximately one out of every seven entries relates to CERCLA. Articles tend to be one- to three-page news updates with a focus on reporting rather than analysis. Offers an annual index.

**IV**

**ORGANIZATIONS AND ASSOCIATIONS**

Citizens’ Clearinghouse for Hazardous Wastes

P.O. Box 926, Arlington, VA 22216
(703) 276-7070

An organization of individuals who live near hazardous waste sites. Although primarily concerned with injury to human beings (not currently covered by CERCLA), also acts as a support group and source of information for those who wish to get involved in lobbying and/or site classification. Maintains a speakers bureau and publishes a bulletin and a newsletter.
Citizens for a Better Environment

33 East Congress, Suite 523, Chicago, IL 60605
(312) 939-1530

A nonprofit, environmental organization with offices in San Francisco, Milwaukee, and Minneapolis. Acts as a watchdog over public agencies and industry. Engages in litigation and scientific research and provides technical assistance to the public in several environmental areas, including hazardous waste.

Clean Sites, Inc.

1199 N. Fairfax St., Alexandria, VA 22314
(703) 683-8522

A nonprofit, independent organization staffed by scientists, engineers, lawyers, negotiators, and other environmental professionals, with backgrounds in government, public interest, industry, and academic work. Promotes voluntary negotiated settlements among responsible parties at CERCLA sites by helping the parties devise ways to allocate cleanup costs, to review cleanup plans, and to ensure that plans are properly executed. Provides its services when a company, a community, or EPA asks for its help and when it thinks it can speed the removal of contamination from a site. Establishes model techniques for reaching cleanup agreements and preparing cleanup plans which can be used by government, communities, and industries. Publishes a newsletter and brochures.

Environmental Action Foundation

1525 New Hampshire Ave. NW, Washington, D.C. 20036
(202) 745-4870

Promotes education and conducts research on issues related to toxic substances. Prepares fact packets and analytic studies and works with citizens groups, litigants, and Congress on specific issues. Administers the Toxics Accountability Campaign, which educates and trains victims of toxic exposures to help them obtain recovery for their injuries through the legal system. The organizers of the first Earth Day.

Environmental Action

1525 New Hampshire Ave. NW, Washington, D.C. 20036
(202) 745-4870

An environmental advocacy organization that works to promote solutions to toxic substance problems. Lobbies Congress and state legislatures for strong environmental legislation and to preserve and
strengthen tort remedies for toxic tort victims. Acts as a watchdog with the press and helps citizens groups with a variety of toxic related programs. Publishes *Environmental Action Magazine* six times a year.

**Environmental Defense Fund**

444 Park Avenue South, New York, NY 10016  
(212) 686-4191

Public interest organization staffed by lawyers, scientists, economists, and other environmental professionals. Involved in litigation and scientific research on a number of environmental issues. Engaged in specific research and lobbying projects with respect to CERCLA.

**Environmental Hazards Management Institute**

P.O. Box 283, Portsmouth, NH 03801  
(603) 436-3950

A nonprofit corporation devoted to educating industry, government officials, and the public on hazardous materials and hazardous waste management. Provides consulting services and writes and edits two national newsletters (*The Environmental Manager's Compliance Adviser* and *The Right to Know Compliance Adviser*). Chairs the international series of HAZMAT conferences, which address issues in the field of hazardous materials and hazardous waste management.

**Hazardous Waste Treatment Council**

1919 Pennsylvania Ave. NW, Suite 300, Washington, D.C. 20006  
(202) 296-0778

A collection of firms interested in treating rather than disposing of hazardous wastes. Advocates cleaning up CERCLA sites with alternative technologies such as chemical and biological treatments, fixation, neutralization, reclamation, recycling, and thermal treatments. Supports hazardous waste regulations and recommends using land disposal as a last resort after proper pre-treatment. Works with governments and firms to develop waste treatment programs. Provides technical assistance to members, sponsors special studies, and participates in federal litigation and regulatory developments. Maintains a library of materials on new technologies, operates a speakers bureau, and sponsors a major educational conference each spring.
League of Women Voters Education Fund
1730 M St. NW, Washington, D.C. 20036
(202) 429-1965

Conducts citizen education and research in several environmental areas, including hazardous waste management. Publishes a citizen's guide to hazardous waste issues entitled *The Hazardous Waste Primer*, which is updated periodically and is available from their office.

League of Women Voters of the United States
1730 M St., NW, Washington, D.C. 20036
(202) 429-1965

A membership and advocacy organization which is actively involved in environmental politics and has been a leading force in the ongoing CERCLA reauthorization process. Advocates a high level of funding for CERCLA and supports a strong program of hazardous waste regulation.

National Association of Local Governments on Hazardous Wastes
1015 18th St., NW, Suite 1002, Washington, D.C. 20036
(202) 887-5112

Comprised of local governments and local government agencies. Represents members in matters concerning hazardous wastes programs and legislation. Acts as a clearinghouse for information regarding hazardous waste issues, such as emergency response planning, waste management planning, and waste transportation. Publishes the *Washington Letter on Hazardous Waste* on a weekly basis.

National Campaign Against Toxic Hazards
317 Pennsylvania Ave., SE, Washington, D.C. 20003
(202) 547-1196

Lobbying organization made up of labor, environmental, and citizens groups. Mobilizes support for strong environmental legislation and enforcement practices by canvassing, organizing petition drives, monitoring government enforcement efforts, and engaging in legislative advocacy. Maintains a speakers bureau and compiles statistics with special emphasis on CERCLA and waste reduction. Publishes a series of research reports criticizing the rate and quality of EPA cleanup activities.
A professional organization of lawyers, scientists, public health specialists, and planners. Engages in lobbying and litigation. Involved in CERCLA issues as part of larger environmental program.

Waste Watch/Resource Policy Institute

P.O. Box 39185, Washington, D.C. 20016
(202) 363-1133

A volunteer group of citizens and professionals concerned with waste problems. Promotes citizen participation in policymaking and provides information and education on environmental issues. Performs at-cost consulting work on waste management. Offers regional workshops and seminars.

VI

DATABASES

A new and growing tool for researching CERCLA problems is the computerized database. The major advantage of databases over printed materials is that they enable researchers to sift through large amounts of information in short periods of time using computer search techniques. Although computer search techniques are not necessarily the best tools for conceptual research (e.g., tracing the development of ideas about liability for hazardous waste spills), they are ideally suited to factual investigations (e.g., tracking a particular legislative proposal or investigating the toxic effects of a particular chemical).

Tailoring computer searches to individual research needs, however, can be a difficult task. Unless a researcher has computer search skills and the time to learn the characteristics of each relevant database, it may be cost-effective to pay a trained librarian to design and conduct the searches. Many libraries have access to databases and offer search services priced according to the type of database and the sophistication of the search.

Most databases are marketed by commercial vendors. Catalogues for vendors and database directories are available at most libraries that offer computer search services. One useful directory is Computer-readable Databases: A Directory and Data Sourcebook (M. Williams ed. 1985).

DIALOG is a commonly used vendor of databases. The following is a list of DIALOG databases that may help CERCLA researchers. This list illustrates the kinds of databases available through commercial vendors. For additional information on DIALOG databases, contact Di-
alog Information Service, Inc., Marketing Department, 3460 Hillview Avenue, Palo Alto, CA 94304, (800) 227-8282. For additional information on databases in general, see the directory listed above.

**DIALOG Databases**

*Chemical Exposure*

Contains references to journal articles, conferences, and reports. Can be used to trace effects of toxic chemicals and other substances on both humans and animals. Articles contain information on chemical properties, formulas, analytic methodologies, demographics, etc. "All the pertinent information one needs to locate when examining toxicity of various substances."

*Chemical Regulations and Guidelines System*

Provides an index to federal regulatory material relating to the control of chemical substances. Includes federal statutes, regulations, and available federal guidelines, standards, and support documents. Materials are indexed by chemical. Search reports provide references to relevant documents and each document is described in terms of its publication date, title, abstract, index terms, and chemical identifiers.

*CIS*

A computerized copy of the Congressional Information Service’s *Index to Publications of the United States Congress*. *CIS* provides current, comprehensive access to the contents of congressional working papers published by House, Senate, and Joint committees and subcommittees each year. Includes hearings, prints, reports, documents, and other special publications which record the investigative, oversight, and legislative analysis activities of congress. Hearings publications contain transcripts of testimony from public and government witnesses, exhibit reports, statistical data, and articles. Other publications contain the reports of specially commissioned studies, analyses of federal legislation and activities, and compilations of background materials.

*Congressional Record Abstracts*

Provides comprehensive abstracts covering each issue of the *Congressional Record*, the official journal of the proceedings of the United States Congress. Coverage includes congressional activities regarding bills and resolutions, committee and subcommittee reports, public laws, executive communications and speeches, and inserted materials. Records include data on bills, members of
Congress, roll call votes, reference to floor debates, and specific issues.

**Enviroline**

Covers "the world's environmental information." A comprehensive, interdisciplinary database that provides indexing and abstracting coverage of more than 5000 international primary and secondary source publications reporting on all aspects of the environment.

**Environmental Bibliography**

Covers the fields of human ecology, atmospheric studies, energy, land resources, water resources, nutrition, and health. Indexes more than 300 periodicals and provides access to article references.

**Federal Index**

Covers federal actions including proposed rules, regulations, bill introductions, speeches, hearings, roll calls, reports, vetoes, court decisions, executive orders, and contract awards.

**Federal Research in Progress**

Permits access to information about ongoing, federally funded research projects in the fields of physical sciences, engineering, and life sciences. Search records include each project's title, principal investigator, performing organization, and sponsoring organization. Most records also include a description of the research, although the exact record content varies according to the sponsoring agency.

**Insurance Abstracts**

An index of the literature on life, property, and liability insurance. Provides comprehensive coverage of over 100 journals. Corresponds to two printed indexes: *Life Insurance Index* (1979-1984), and *Property and Liability Index* (1980-1981). Search records include brief abstracts.

**Pollution Abstracts**

Covers the subjects of air pollution, environmental quality, noise pollution, pesticides, radiation, solid wastes, and water pollution.