THE WHITE HOUSE

WASHINGTON

June 6, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Superfund Improvement Act of 1985

OMB has provided us with a copy of testimony Hank Habicht proposes to deliver before the Senate Judiciary Committee tomorrow on the Superfund program and proposed amendments to the Superfund Act. The testimony describes at some length the EPA and Lands Division procedures for securing private clean-up of hazardous waste sites by responsible parties. From both monetary and timeliness perspectives, such negotiated clean-ups are far preferable to litigation. The testimony also discusses the Department's policy on choosing defendants when litigation is necessary, in an effort to quiet fears that the Department will seek to hold an insignificant contributor to a waste site liable for the entire clean-up on the basis of joint and several liability of tortfeasors.

Turning to proposed amendments to the Superfund Act, Habicht supports an Administration proposal to codify various settlement procedures, and to codify the right of defendants in Superfund cases to contribution from joint tortfeasors. The testimony also supports a proposal to permit the responsible waste generators to participate with EPA in selecting an appropriate clean-up remedy. Habicht opposes, however, a proposed amendment that would create a new private cause of action for any citizen for non-compliance with the Superfund Act. As the testimony explains, the goal of Superfund is prompt and efficient clean-up of the hazardous waste sites, a goal that will not be advanced by private litigation.

I have no objection to the testimony. I have already alerted Habicht to some redundancy in the draft, which he has cleaned up. No action is necessary.

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5/81

STATEMENT OF F. HENRY HABICHT II
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

JUNE 7, 1985

DRAFT

Mr. Chairman, members of the Committee, I am pleased to have this opportunity to discuss with you S. 51, the Superfund Improvement Act of 1985. As you know, S. 51 incorporates several provisions from the Administration's CERCLA reauthorization proposal, including some enforcement-related provisions that we believe would significantly increase both the efficiency and the fairness of the Superfund program. The bill also includes, and I would also like to discuss, certain provisions that the Administration opposes and that we believe would be extremely detrimental to the program. We are very interested in the Committee's perspective on these important issues and look forward to working closely with you on them.

INTRODUCTION AND SUMMARY

As the Committee is well aware, implementing the objectives of the Superfund law in the most effective and responsible manner possible has been occupying most of EPA's and our own attention over the last several years. We have used the occasion of the reauthorization process to review our practical experience and see what kinds of changes could improve the program that has been put in place without impeding the forward movement of that program.

The fundamental purpose of Superfund is, of course, to provide the right mix of public and private resources to get the job of cleaning up hazardous waste sites done quickly and effectively. Over the past four years, we have learned a great deal on how to achieve that mix, and it is clear that a strong enforcement program is critical to attaining the right balance.

Given that cleanup has to be performed, effective enforcement ensures that the costs are borne, to the extent possible, by those responsible rather than by taxpayers. By encouraging private cleanup, enforcement can increase the total resources that are available at any given time for clean-up. Private liability for cleanup should ensure lower cost -- but equally effective -- solutions, and judicial and public scrutiny in the enforcement process will impose a reasonable degree of discipline on the government in its approach to this difficult problem.

It has taken several years to sort out the liability rules and to regularize the enforcement process. And now that the rules are becoming settled and the process is more predictable, we are beginning to see the real benefits of an effective, yet fair, enforcement program. For example, most of our more than $330 million worth of private party clean-up settlements to date have come in the last 18 months, and we have obtained several settlements in the last few weeks which are representative of the trend we are likely to see in future cases. In Chem-Dyne, a case involving a site near Hamilton,

Ohio, more than 150 companies have agreed to undertake a long-
term remedy worth more than $18 million. By spreading the cost
among the parties and using some creative "cash-out" technique
to encourage small generator participation, the responsible
parties rather than the government will be implementing th
remedy. Moreover, the parties will be paying shares of
cost roughly proportional to their responsibility for
tion at the site. In Westinghouse, the company has
clean up six sites in Indiana where it had dispos
and when it gets the necessary permits, Westin
also build an incinerator with the capacity
PCBs and additional contaminated material
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however, we have focused on concerns raised by private parties and sought to add several positive incentives designed to bring people forward without our having to pursue enforcement to litigated judgments. We recognize that a strong liability scheme must be rationally and fairly applied, and we support amendments to Superfund aimed at increasing positive incentives, ensuring the rational application of the liability rules, and minimizing enforcement litigation as much as possible consistent with the need for effectiveness and fairness. Similarly, we support amendments aimed at making the enforcement process even more regularized, predictable, and accessible to the public and responsible parties. This should eliminate some uncertainties that were the subject of early litigation.

Using our joint EPA-DOJ settlement policy as a starting point, the Administration drafted several provisions which were intended to regularize the enforcement process and provide incentives for settlement by giving responsible parties and the public the right to participate in the Agency's decision-making process. Because the Agency will now be required to consider all of these views in advance of taking action, we also hope to improve the decision-making process. In addition, our amendment that expressly protects those who come forward to settle from the contribution claims of non-settlors will encourage settlements by ensuring a greater degree of finality than is presently available.

Fundamentally, we see the success of the enforcement program resting on a proper balance of incentives and disincentives that, on the one hand, encourage responsible parties to coalesce and come forward as a group to clean up sites, and that, on the other hand, discourage unnecessary and costly litigation. Accordingly, those that want to come forward and settle with others to undertake or fund a remedy should be given the incentives to do so. And while we certainly want to discourage parties from litigating without justification, we recognize that the success of an enforcement program also hinges on the fairness of the process and on ensuring that a party gets a full and meaningful day in court in the event settlement is not possible. It is for this reason that we have proposed amendments aimed at preserving a party's full rights to challenge the agency's response action and to secure complete relief in the event the agency was wrong.

Obviously, in drafting any amendments to Superfund, some will believe that the proposed changes go too far and others will believe that they do not go far enough. We are sensitive to those concerns and are open to ideas that will promote our goals. For this reason we have spent the past few weeks and months meeting with industry groups, environmental groups, and congressional staff members to discuss the enforcement issues, to listen to their concerns, and to describe our enforcement goals to those outside government. These

discussions and exchanges have been very helpful, and we look forward to learning more about the Committee's views.

Our goal in Superfund reauthorization has been to take the tools and program already in place and ensure their more rational and cost-effective implementation. We are therefore strongly interested in the Committee's perspective on proposals which would go beyond Superfund's cleanup focus and engraft onto the statute different programs and causes of action that may result in delaying cleanups by shifting the primary focus of the statute away from cleanups. We believe, as you can well imagine, that these additional programs and causes of action will not only encourage litigation of an extensive array of complex and emotional issues, but will also interfere with the government's primary mission of cleaning up these sites in an effective and expeditious fashion.

Goals of Enforcement Program

The Superfund enforcement program and the Administration's Superfund reauthorization proposals are based on the fundamental belief that the public interest is best served through a program that effectively and fairly secures voluntary cleanup action from the persons who are responsible for the contamination of given sites. There are simply too many hazardous waste sites and too few government resources, both financial and managerial, for the government to accomplish the cleanup job quickly and efficiently without substantial private party participation. With such participation, however, cleanups will

be quicker and more cost-effective, and innovation will also be encouraged.

Our goal is to have enforcement tools that encourage financially viable responsible parties to coalesce and come forward to clean up hazardous waste sites without litigating unnecessarily. Our goal in such settlements is also for parties to be able to work out terms which ensure that they pay in close proportion to their contribution to the problem at the site. Our experience over the last few years, and particularly over the last few months, has demonstrated that a fair and effective enforcement program can yield excellent results. We estimate that we obtained about $238 million of private party response activity in fiscal years 1982, 1983, and 1984 through our judgments and consent decrees under CERCLA and the Resource Conservation and Recovery Act (RCRA). In 1984 alone, we obtained 21 hazardous waste settlements valued at nearly $120 million. So far in fiscal year 1985, we have obtained or are about to obtain additional settlements worth a total of close to $100 million. Other valuable private party actions have occurred in response to EPA administrative orders that have not required civil enforcement.

The recent well-publicized settlements in Chem-Dyne Corporation and Westinghouse Electric Corporation, the tentative settlement in Midwest Solvent Recovery (Midco), and the progress being made in resolving Conservation Chemical Company

(CCC) all show how an effective enforcement program encourages the parties to work together to achieve an appropriate result. In Chem-Dyne, for example, more than 150 companies have agreed to undertake a long-term remedy worth more than $18 million, including groundwater treatment, at a hazardous waste site near Hamilton, Ohio. This follows a 1982 settlement with 112 companies for surface cleanup of the site. In Westinghouse, the company agreed to clean up six sites in Indiana where it had disposed of PCBs, and also agreed that, after receiving the necessary permits, it will build an incinerator with the capacity to destroy PCB-contaminated materials. Thus, the settlement resulted in the increased application of a new technology that will safely and permanently dispose of hazardous wastes.

Fundamentally, we believe that the success of the enforcement program rests on finding a proper balance of incentives and disincentives that, on the one hand, encourage responsible parties to coalesce and come forward as a group to clean up hazardous waste sites, and that, on the other hand, discourage unnecessary and costly litigation. We also recognize that the success of the program hinges on the fairness of the process and on ensuring that a responsible party gets a full and fair hearing in court on questions of liability and appropriateness of the remedy in the event that a settlement is not possible.

The enforcement provisions currently in CERCLA already discourage recalcitrance and litigation. Our recent efforts in the program and in our proposed amendments have been directed to finding positive inducements that will increase the

number of positive incentives for voluntary cleanup. In essence, the provisions:

- o address the public's need to obtain prompt cleanups by making the enforcement process more orderly and efficient;
- o preserve the rights of responsible parties to secure reimbursement from others who may also be responsible and from the United States in the event that the remedy sought was improper or the party was not liable;
- o address the needs of responsible parties for a sense of finality in their dealings with the government; and
- o strike a balance between the right of citizens to participate in the remedy selection process and the right of the government to settle upon an appropriate remedy without undue litigation or judicial second-guessing.

I would like to emphasize that we are extremely willing to work with the Committee in fashioning additional amendments to promote the fairness and the efficiency of the enforcement program.

Because an understanding of how the federal government selects and settles its hazardous waste cases is important to an understanding of the philosophy behind the Administration's enforcement proposals, I would like to describe briefly how key elements of the Superfund enforcement program work.

The Superfund Enforcement Process

Once either a potentially responsible party or EPA has performed a remedial investigation of the site and prepared a feasibility study of the various cleanup alternatives, EPA receives public comment on the study and then selects an appropriate remedy. After the remedy has been selected, EPA

will seek to obtain a cleanup or the costs of cleanup through negotiations with potentially responsible parties. As I will discuss further later on, EPA shares extensive information about the site with potentially responsible parties to facilitate preparation of private settlement proposals.

If these parties are unable to reach agreement with EPA within a reasonable period of time, the Agency has several options. It may implement the remedy itself and seek to recover cleanup costs from responsible parties, it may issue an administrative order to require the responsible parties to undertake the cleanup, or it may refer the case to the Justice Department to obtain court-ordered injunctive relief. In some cases, a combination of enforcement options may be employed.

Because enforcement resources are limited, EPA does not refer all potential enforcement cases to the Department. Generally speaking, the Department will initiate action to compel responsible party cleanups only when there is a substantial health or environmental threat and we have identified an adequate number of responsible parties who are financially capable of implementing the remedy and who represent the bulk of the response demands at the site.

In selecting the defendants to be sued in a particular case, EPA and the Justice Department try above all else to bring a meritorious case against the largest number of financially sound parties who are responsible for the environmental

contamination at the site. Although it is frequently difficult or impossible to gather comprehensive information on each point about each potential defendant, the following specific considerations are important:

1. The quantity of material sent to the site by the responsible party;

2. The nature of the wastes sent to the site by the responsible party, such as their toxicity, environmental persistence, migration potential, and disproportionate effect, if any, on the total cost of cleanup;

3. The strength of available evidence tracing the wastes at the site to the party;
4. The ability of the party to undertake or pay for the cleanup; and

5. The government's estimate of the number of defendants that can be included in the case fairly and efficiently.

The government seeks to initiate actions against parties that have either contributed significant quantities of waste or contributed waste that is markedly hazardous. Great care is taken to ensure that a fair and appropriate number of responsible parties are named in any action that is filed. Indeed, if the most significant contributors cannot be identified, we would not proceed on an enforcement track. We realize that we cannot be assured of obtaining complete relief, either through court order or through settlement, unless we have brought into the case the parties that are responsible for the bulk of the wastes and the most troublesome wastes at the site. Contributors of relatively small volumes will clearly be named if their wastes, for toxicity or other reasons, significantly add to the cost or complexity of the necessary remedy. Defendants are not

selected on the basis of any "deep pocket" theory; financial status is relevant only because the litigation would be pointless if the parties sued could not afford to undertake or pay for the cleanup.

One example of a case in which the defendants represented a substantial portion of the waste at the site was United States v. Western Processing, which involved a waste recycling facility in a town near Seattle, Washington. In that case, we entered into a partial consent decree with 198 waste generators and transporters that provided for completion of a surface cleanup at the site. By the government's calculation, these parties had contributed over 80 percent of the wastes at the site. Negotiations are continuing with respect to subsurface remedial action.

In another case, United States v. A & F Materials Co., four of the six generator defendants sued in the action agreed to pay for past government response costs, surface cleanup, and a remedial investigation and feasibility study of any long-term problems at the site. The six parties that the government had sued were responsible for virtually all of the waste at the site. The four settling defendants were responsible for about 94 percent of the waste at the site. A fifth defendant subsequently settled as well, for a substantial sum of past response costs.

A concern has been repeatedly expressed over the past few years that the federal government may seek to hold

one minor contributor responsible for the entire cost of site cleanup under the theory of joint and several liability. I would like to emphasize that this concern has absolutely no basis in fact. Not only does the government consistently seek in its cases to join the parties that are responsible, in the aggregate, for most of the problems at the relevant site, but the courts would be extremely unlikely to allow the government to obtain such a recovery. To avoid any misconceptions on this issue, let me take a few moments to explain further about the application of joint and several liability in Superfund cases.

Explicit mention of joint and several liability was deleted from CERCLA before its passage in 1980 in order to enable courts to establish the scope of liability through a case-by-case application of "traditional and evolving principles of common law" and pre-existing statutory law. In the seminal decision of United States v. Chem-Dyne Corporation, located at 572 F. Supp. 802, the court held that a uniform rule of federal common law should apply to Superfund cases, and that the rule, which because of its importance I will quote in full, should be as follows:

> [W]hen two or more persons acting independently caused a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject only to liability only for the portion of the total harm that he himself caused. But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm. Furthermore, where the conduct of two or more persons liable under § 9607 [section 107 of CERCLA] has combined to violate the statute, and

> one or more of the defendants seeks to limit his liability on the ground that the entire harm is capable of apportionment, the burden of proof is upon each defendant.

572 F. Supp. at 810. In other words, if the harm presented by the site contamination is divisible and there is a reasonable basis for apportionment of damages, joint and several liability does not apply, and each defendant is liable only for the portion of the harm for which it can show it was responsible.

For example, where a site consists of barrels of hazardous substances that are threatening to leak, and the barrels are all labeled or clearly identified as to source through records or other evidence, no one is suggesting that the owner of 10 percent of the barrels could be held liable for 100 percent of the cost of cleaning up all of the barrels. Similarly, the apocryphal "one barrel generator" could simply show that the insignificance of its contribution to the site harm constituted a reasonable basis for apportionment of the harm, thus avoiding any possibility of joint and several liability.

Frequently, however, the records of the facility or of the waste generator are very poor or nonexistent, and wastes have been mixed together in a toxic chemical "soup" or moved around in an untraceable fashion after reaching the site. In such cases, there may not be a reasonable basis for the apportionment of damages. In such circumstances, when the entirety of that toxic soup must be cleaned up, the government would be unable effectively to enforce if it were

required to prove the portion of the harm caused by each responsible party. This is the basic problem that the common law theory of joint and several liability was created to address.

As I have explained, the government takes care to ensure that a fair and appropriate number of responsible parties are named in any action that the Justice Department files. Our policies, and the great care taken by courts to apply joint and several liability only under appropriate circumstances, will ensure that the principle of joint and several liability will not be abused. Moreover, it is important to realize that most of our cases settle prior to trial, with the parties apportioning the cleanup or costs among themselves as they see fit. A review of the results of enforcement show that the resolved cases have not resulted in one party bearing a share of the cost significantly disproportionate to its contribution to the problem. One of the key reasons that parties settle is that the potential for joint and several liability encourages them to negotiate and cooperate and develop consensus settlement proposals. Without joint and several liability, the government would rarely be able to achieve settlements in the public interest in cases where large numbers of responsible parties were involved with a particular site, because each party would have the ability and the incentive to litigate its own separate share of liability against the government. Indeed, our clear goal is to reach resolutions without litigation in which defendants pay roughly in proportion to their share, to the extent such a number can ever be precisely determined.

The rules of liability I have just summarized have been established in numerous judicial decisions during the past three years. These standards comprise a potent but limited enforcement tool to discourage recalcitrance and unncessary litigation. We would prefer to proceed, however, by offering positive incentives for parties to come forward early, and we hope and expect that we will actually have to apply the liability rules in few cases. As an integral part of the enforcement process, EPA and the Justice Department have adopted an interim CERCLA settlement policy that, when implemented along with the amendments we have suggested, will ensure the fairness of the process by providing many positive inducements to settle voluntarily with the government. The policy applies both to administrative settlements by EPA and to the settlement of civil litigation by the Justice Department.

The Interim CERCLA Settlement Policy

The settlement policy broadly addresses what we believe are the prerequisites to obtaining negotiated private party cleanups. Three such prerequisites are: (1) an opportunity for responsible parties to participate in formulation of the proposed remedy; (2) the perception on the part of each responsible party that its share of a proposed settlement will approximately reflect its share of the responsibility for the site; and (3) some measure of finality to the settlement.

EPA has addressed the first prerequisite largely through its procedures for involving potentially responsible

parties in the remedial investigation and feasibility study process. By allowing private parties to perform the RI/FS in accordance with EPA technical guidance, or at a minimum to comment extensively on the RI/FS and provide information to those conducting it, EPA has given such parties a substantial opportunity to comprehend and influence the form of the remedy selected for the site.

The settlement policy contains multiple elements to assure that parties can fairly and effectively allocate costs among themselves and avoid paying more than an appropriate share of liability. For example, EPA is making a special effort to identify as many potentially responsible parties at a site as possible. In an effort to encourage collective action, the policy authorizes the release of information to all such parties, including the identity of all notice letter recipients and the volume and nature of the wastes identified as having been sent to the site by particular parties. This information will help responsible parties group together and apportion liability among themselves according to whatever criteria they believe are appropriate, and we want to facilitate this process as much as our resources permit.

In addition, recognizing that not all parties may agree to participate in a settlement and that fewer than all may be known or solvent, the settlement policy also provides for partial settlements. A partial settlement is one for less than 100 percent of the cleanup or its costs. The policy authorizes partial settlements in several circumstances, such

as when responsible parties have offered to perform or pay for one phase of a site cleanup and it is important or useful to complete that phase before proceeding with the remainder of the cleanup. A settlement for surface cleanup while subsurface contamination is being investigated is an example of a partial settlement. Partial settlements may also be allowed when they involve a substantial portion of the remedy or costs and the recalcitrance or absence of a relatively small group of parties is preventing complete settlement. In appropriate cases of this type, the government will pursue non-settling parties for the remainder of the cleanup costs.

Perhaps the most noteworthy aspect of the policy is EPA's new approach to the melding of private financing and Fund financing for remedial actions. The settlement policy acknowledges that, in certain circumstances, to encourage settlement, the government may be willing to pay a portion of the cleanup cost out of the Fund, such as where private parties have agreed to provide the lion's share of the costs and will conduct the cleanup themselves.

In addition, the settlement policy allows EPA to provide contribution protection to settling parties, to ensure that such parties are not ultimately held liable for additional costs through a later suit for reimbursement by a non-settling party who has been held liable to the government under CERCLA. As I will discuss in a moment, one of our proposed enforcement provisions would strengthen this kind of protection and thereby encourage settlement.

In a further effort to promote settlement, the policy allows responsible parties to "cash out" with the government in certain situations. For example, opportunities for cashing out may exist when the total cleanup costs are relatively small, or when the responsible party is deemed a "de minimis" contributor because the quantity of waste contributed to the site by that party is extremely small and of low hazard. We should avoid requiring such parties to litigate wherever appropriate.

Our goal in taking these steps is to increase our flexibility in evaluating private party proposals for less than 100 percent of the cleanup, where it is in the public interest to do so. By providing information, allowing for partial settlements and mixed funding, cashing out "de minimis" contributors, and providing contribution protection in appropriate circumstances, we believe that each responsible party can be assured that settlements will be fair in light of that party's share of responsibility for the site.

Finally, the settlement policy addresses the notion of finality. In addition to contribution protection, which I have already mentioned, the policy addresses covenants not to sue and releases from further liability. Expansive releases may be granted that have only limited "reopeners" for improper work or the occurrence of imminent and substantial endangerments. The scope of a release granted by the government will directly relate to the government's confidence in the ultimate effectiveness and reliability of the remedy provided by the settlement.

Where treatment or destruction remedies are employed, or where a party can demonstrate continued compliance with health and environmental performance standards at a site, more expansive releases may be available. The notion of finality is conceptually a difficult one in an area like this, where even the best remedies involve some technical uncertainty. However, the government must have the ability to grant a measure of finality to parties who are forthcoming with substantial settlement proposals.

We believe that aggressive and flexible implementation of our settlement policy will go a long way toward addressing the various concerns that have been raised in connection with the Superfund enforcement program, and we hope the Congress concurs in the need for that flexibility. Our proposals for CERCLA reauthorization, however, go even further in promoting the effectiveness of the program and its fairness to responsible parties. Several of these provisions were incorporated into S. 51, the Superfund reauthorization bill reported by the Environment and Public Works Committee. I would now like to turn to those provisions.

Proposals to Improve the Superfund Enforcement Program

By providing substantial benefits to those who settle and by codifying some of the procedures we have devised to conduct the program fairly and efficiently, the Administration's enforcement provisions are intended to encourage voluntary settlements and to reduce the need for the government to resort to litigation to achieve private party cleanups under

CERCLA. For this reason, we believe our amendments would significantly benefit the federal justice system. Not only would fewer cases have to be filed to achieve a given number of private party cleanups, but the courts would not be burdened with as many cases involving large numbers of parties and technically complex remedies. We are also open, as we have said, to additional amendments that increase the efficiency and fairness of the enforcement process.

SECTION 126

The fairness of a joint and several liability scheme depends upon the clear availability of contribution. Moreover, responsible parties need both the right of contribution and contribution protection to bring all other responsible parties to the settlement table.

Section 126 of S. 51, the contribution provision, was intended to clarify and confirm that a right of contribution exists under CERCLA and to establish a procedure for handling contribution claims in a rational and efficient manner that will promote settlements and prevent unnecessary litigation. This Committee has expressed a concern that, as drafted, section 126 would affect the procedural rights that responsible parties have under the Federal Rules of Civil Procedure. This was not the Administration's intent. It is our understanding that the Committee now has the redrafted version of the contribution provision that is attached to this statement. The redrafted version both accomplishes the

government's original purposes and addresses the Committee's procedural concerns. For the sake of simplicity, I will focus on the provision as redrafted.

Section 126 confirms the recognition of several courts that a right of contribution against other potentially liable parties is available under CERCLA. See, e.g., United States v. Ward, 8 Chem. & Rad. Waste Litig. Rep. 484, 487 (D.N.C. May 14, 1984); United States v. SCRDI, 20 Env't Rep. Cas. (BNA) 1753, 1759 & n.8 (D.S.C. Feb. 23, 1984). Section 126 also provides that parties who enter into a judicially approved good faith settlement with the government are protected from the contribution claims of other liable parties. Along with the settlement policy, this section gives finality to settlements with the government, by protecting parties from any additional liability for the cleanup in issue.

Section 126, as revised, also establishes an orderly procedure for resolving contribution claims in the context of enforcement litigation. It provides that the hearing of issues relating to contribution and indemnification would be stayed until after resolution of the government's case through judgment or settlement, but allows defendants to file claims for contribution against other defendants and third parties as soon as the enforcement action has been brought. In this way, all relevant parties will be informed that they at some point will have to resolve their potential liability under Superfund, and all parties will be encouraged to come forward and join in settlement discussions. The parties that are

brought into the government action will also be able to challenge whether there has been a release at the site and whether the selected remedy is appropriate; the only issue postponed for judicial consideration by section 126 would be the allocation of damages among the defendants and third parties.

The procedure provided by section 126 promotes the public's interest in obtaining prompt cleanup from the parties who are responsible for the bulk of the waste and the most troublesome wastes at the site, while preserving the ability of such parties under the Federal Rules of Civil Procedure to bring other potentially responsible parties into the enforcement action.

Even though under existing law a joint tortfeasor cannot compel joinder of other alleged responsible parties under F.R.C.P. 19, we support the ability of principal defendants formally to join third party defendants in the case in chief under F.R.C.P. 14(a). However, there are several reasons for postponing the hearing of the defendants' contribution and indemnification claims until after the government's claims are resolved, as section 126 would provide.

First, unless a court determines, in the first instance, that the named defendants are jointly and severally liable for the cleanup, there is no basis for a third party contribution claim. If the court concludes that the harm is divisible, neither joint and several liability nor contribution comes into play, and the government will have to decide whether it wishes to seek relief from all of the known responsible parties. If the court concludes, however, that the defendants are jointly and severally

liable, the court will need to resolve the scope of the remedy and the inevitable challenges to the remedy before it can apportion the remedial costs. Our experience has shown that until the remedy and costs are fixed, neither the court nor the parties can divide up the costs in a satisfactory manner. Moreover, fixing costs is necessary to achieve settlement, because parties are understandably hesitant to sign a blank check.

Once the issue of remedy is resolved, however, the public interest requires that the cleanup get underway promptly. Discovery of evidence, trial preparation, and trial in a case involving apportionment among several hundred parties could be an extremely lengthy process. Thus, resolution of apportionment issues could well take several years if the matter goes to trial. Additional peripheral issues related to indemnification would also be time-consuming to resolve. For this reason, section 126 ensures that the cleanup operation will commence while the action among the defendants proceeds. Under this approach, the public interest is served by allowing the cleanup to go forward. The defendants' interests are protected by enabling them to obtain immediate reimbursement from the other responsible parties in the same action, before the same judge. Fortunately, we have been successful in avoiding trials in most of our cases, and the parties have apportioned the costs of settlements among themselves. This is precisely what we wish to encourage. Thus, as modified, section 126 does not adversely affect the procedural rights of litigants. Rather, it simply establishes

a mechanism for the speedy and efficient resolution of the government's and the defendants' claims in government enforcement actions that are filed to protect public health, welfare, and the environment.

SECTION 133

Other provisions of the Administration's proposal that were incorporated into S. 51 will similarly reduce litigation costs and encourage settlement. For example, like section 126, section 133, the pre-enforcement review section, is intended to clarify and improve upon rules which are already reflected in the case law and to grant certain additional procedures for assuring the efficacy and fairness of Superfund enforcement.

Section 133 embodies several goals. It contemplates more regular and formal participation by responsible parties and the public in the remedy selection process, to be reflected in an administrative record, which will enhance consistency in approach and the quality of the remedy and will facilitate judicial review when it occurs. It also enables potentially responsible parties to have a full and fair day in court -- in addition to their opportunities to participate in the remedy selection process -- before their monetary liability becomes fixed. Finally, it confirms the uniform judicial holdings that have strongly disfavored court challenges which stay or otherwise delay implementation of the cleanup remedy.

Specifically, section 133 is made up of three separate but interlocking elements. First, section 133

provides that judicial review of EPA response actions or administrative orders is not available until EPA seeks to recover its response costs or to enforce an order to undertake a response action. Second, section 133 provides that judicial review of Agency decisions to take response actions will be on the basis of the administrative record. EPA's remedial decisions may be overturned if they are arbitrary, capricious, or otherwise not in accordance with law. Finally, section 133 establishes a new claims procedure for parties that have incurred response costs pursuant to an administrative order issued under CERCLA section 106, when these parties wish to challenge their liability, the propriety of the response action, or both. Under this provision, parties will be fully compensated, with interest, for any costs incurred by them that a court finds were not proper or for which they were not liable.

I would like to emphasize that the portion of section 133 that limits pre-enforcement review simply codifies what the courts have uniformly held is the law under Superfund. See, e.g., Lone Pine Steering Committee v. EPA, 600 F. Supp. 1487 (D.N.J. 1985)(and cases cited therein). There are several reasons for this rule. The goal of a pre-enforcement challenge is ordinarily to prevent implementation of the remedy that EPA has selected. Accordingly, to be effective, such challenges generally request an injunction halting further remedial action pending litigation of the appropriateness of the remedy. Pre-enforcement review therefore would delay response action and exacerbate already serious health and environmental

threats. Indeed, as we have seen in litigation under the National Environmental Policy Act of 1970, challenges to agency decisions on environmental issues can take years to resolve.

Although concerns have been raised that postponing judicial review might interfere with the due process rights of potentially responsible parties, this is not the case. The basic requirement of due process is that the government must provide a party with a meaningful hearing at a meaningful time. Parratt v. Taylor, 451 U.S. 52, 540 (1981). Such a hearing, however, need not occur at the earliest possible time. It is clear under the factors enunciated by the United States Supreme Court that section 133 fully comports with due process. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (court must balance private property interest, risk of erroneous deprivation, and government interest to determine whether procedures satisfy due process). The governmental and public interest in prompt response action clearly outweighs a responsible party's interest in the timing of review and potentially protracted litigation prior to implementation of the remedy, especially when the government's interest is coupled with the available defenses to litigation and the procedures both for participating in the remedy selection process and for obtaining reimbursement from the government in the event that the party is not liable or the remedy is inconsistent with the National Contingency Plan.

We recognize the desire of potentially responsible parties to be able to test and to discipline the remedy selection process to ensure that selected remedies are adequate but not excessive. This is an important goal, which should be met through the use of a regularized administrative process before the remedy is chosen in addition to judicial review before monetary liability becomes ultimately fixed.

In addition, the procedures contemplated and provided by section 133 are intended to be consistent with the requirements of the Administrative Procedure Act. Section 133 contemplates that EPA's remedial decisions will be made on the basis of an informal administrative record, and it incorporates the APA standard of review for such decisions. Although the APA's scope of review is deferential, it is based at least in part on the recognition that the challenging party has already had an opportunity to participate in the development of the record that is being reviewed. Certainly, if responsible parties have a different, cheaper, and better way to remedy the problems at a site, EPA should hear about it before the Agency embarks upon the remedy -- not afterward.

Moreover, the arbitrary and capricious standard applies only to review of the response decision. The issue of liability will be determined de novo -- that is, all parties will be able to introduce outside evidence on liability, and the court will decide the issue on the basis of a preponderance of the evidence.

There is no reason, however, for courts to review the remedial decision under more than an arbitrary and capricious standard. Congress and the courts have consistently determined that, after the kinds of opportunities for participation and comment that responsible parties and the public have in Superfund cases, judicial deference to the technical decisions rendered by the agency is appropriate. This is true even when the administrative decision will have a substantial economic impact on an affected person. Courts are not particularly well-suited for completely reweighing technical decisions on remedy, and for the court to do so would also waste judicial resources. Under our proposal, the court will have before it the competing views of the parties on the record, and the court will be able to resolve the controversy by ensuring that all parties' views were considered and rationally addressed in the record. Moreover, the standard will be applied in the context of the requirements of the National Contingency Plan. Thus, responsible parties will still be able to establish that the Plan was not followed or that specific costs were not proper.

Citizen Litigation (Section 138)

Both section 126 and section 133 attempt to strike a proper balance between the roles of the government, responsible parties, the public, and the courts. Our position on citizen suits under Superfund is consistent with our attempts to foster this proper balance.

Section 138 of S. 51, the citizen suit provision, would authorize a lawsuit by any person against persons alleged to be in violation of standards, regulations, requirements, or orders that have become effective under CERCLA. The section would also authorize lawsuits against the President -- meaning, for most Superfund activities, against EPA -- for failure to perform nondiscretionary acts or duties. Suits could not be commenced on the basis of statutory or regulatory violations if the President or a state were diligently prosecuting an enforcement action against the alleged violator.

In a highly emotional area such as this, it is to be presumed that citizens will avail themselves of any access to federal court granted by Congress. Such litigation will be costly and will certainly impose burdens on the courts and the government. We therefore urge that the Committee carefully examine section 138 and any other citizen suit provisions that may be proposed to determine whether there exists a need or a problem which can be addressed only by creating new rights of action. The actual impacts of such provisions will depend on their specific elements. The Department has expressed its concerns to this Committee in the past about citizen suits generally and section 138 in particular. I would like briefly to reiterate some of these important points.

In general, citizen suits can disrupt federal resource allocation and federal enforcement priorities, because the government must monitor or even intervene in such suits to reduce the risk of unfavorable precedents regarding

the application of statutory or regulatory requirements. Such suits may also greatly increase the docket burdens of particular federal district courts, thus delaying the hearing of all actions. Any ability of citizens to bring nonfederal claims through the pendent jurisdiction of federal courts would further aggravate this docket crowding.

Section 138 raises additional problems. One problem is that it would reverse the burden of proof otherwise existing under Federal Rule of Civil Procedure 24 for intervention as of right, forcing the government to show that it is adequately representing the potential intervenor's interests before intervention could be refused. This greatly heightens the opportunity for intervenors to interfere with the government's control over its enforcement litigation. Not only may such intervention lead to delays from additional discovery and examination of witnesses, but intervenors who are local citizens are likely to have goals different from the government's. This divergence in goals may cause severe problems. For example, while the government wants to achieve prompt and cost-effective cleanup, intervenors may want a particular remedy such as excavation and removal, and may refuse to accept any settlement that does not incorporate their objectives. Intervenors may also bring up distracting and disruptive claims for personal injuries or economic loss, the ramifications of which I will discuss more in a moment. We

believe that citizens may adequately provide their views to the court through participation as amicus curiae, which would not have the disruptive effects I have just outlined. Moreover, permissive intervention, which the court may grant in its discretion under appropriate circumstances, is still available.

Many other problems with section 138 would arise through the interaction of the section with other provisions. It is clear that the impact of this section will expand dramatically every time additional requirements are added in the reauthorization process or elsewhere. In that sense, this is an open-ended provision. For example, citizen suits to enforce mandatory deadlines, such as the deadlines for federal facility cleanups in section 137 of S. 51, would significantly burden the federal government and the federal courts with wasteful litigation. To the extent that the pace of federal cleanup activity is determined by the time needed for planning and the availability of resources, such lawsuits would achieve nothing but higher litigation costs for all parties.

Any provision for mandatory cleanup standards would also lead to numerous inappropriate and burdensome citizen suits. We wholly agree that citizens living in the vicinity of a site should have some opportunity to participate in the response process to assure themselves that their interests in an appropriate remedy are being adequately protected, and we have provided for this. The most appropriate place

for this participation is in development of the administrative record leading to selection of the remedy. Citizens and litigation-oriented citizen groups should not be able to use the federal court system to challenge the propriety of a remedy or to compel adoption of the remedy of their choice once EPA has used available information, public input, and its own expertise to select a remedy. Not only would such lawsuits further clog the federal courts, but they would put the courts in the position of second-guessing the complex balancing of technical, scientific, and economic factors performed by EPA in the first instance. Therefore, the oversight role of the public under CERCLA should largely be limited to providing input on the remedial alternatives before the remedy is selected and to reviewing and commenting on any proposed consent decrees that are filed. I would like to note that, to the extent citizens want the ability to sue to reduce imminent public health hazards where the government has not yet acted, this ability is currently available under 1984 RCRA amendments.

As I mentioned, citizen suits could lead to the litigation in federal court of a broad array of nonfederal and non-Superfund issues, such as claims under state law for personal injuries and property damage. Our concerns with such a result would be greatly magnified in the context of a provision that gave citizens an independent right to pursue such claims in federal court.

The Department has consistently and strongly opposed putting any federal cause of action provision in Superfund, for several reasons. First and most importantly, Superfund is a statute for obtaining cleanups of the nation's hazardous waste sites. It must not be diluted and encumbered by complex questions of individual harm. Moreover, issues of remedy must not become linked with individual damage claims, which could slow the very cleanup process designed to prevent actual health problems from occurring. A federal cause of action for personal injuries allegedly caused by hazardous waste would also:

- Shift the focus of toxic tort litigation from state courts to federal courts, burdening the federal system with untold numbers of cases involving neither a federal question nor diversity of citizenship;

- Retard the careful and incremental evolution of state tort law in this area;

- Subject the United States to liability for personal injuries outside the framework of the Federal Tort Claims Act, stripping the federal goverment of its protections under that Act and opening the door to a flood of litigation concerning federal facilities;

- Be fundamentally inequitable in its operation, because it would provide benefits to a class of people suffering damages ostensibly related to a particular source and would not provide benefits to other people suffering identical damages resulting from other sources that are equally hard to trace (such as air pollution or chemical products or additives); and

- Erode further the willingness of private insurers to underwrite the risks of operating any facilities that handle hazardous substances, thus making fulfillment of financial responsibility requirements under the Resource Conservation and Recovery Act (RCRA) and CERCLA yet more difficult.

We therefore urge the members of this Committee to oppose strenuously the insertion of a federal cause of action into S. 51.

Finally, I would like to comment on the issue of federal facility cleanups and some of the ways that have been proposed to affect the pace and manner of such cleanups.

We all recognize that federal agencies must aggressively pursue the cleanup of federal facilities. However, any provision designed to affect federal facility cleanups must be based on a careful evaluation of the agencies' statutory missions and a full realization of the basic differences between federal agencies and private businesses. As this Committee is fully aware, federal agency programs must go through a series of detailed authorization, funding, and procurement processes intended to assure the proper expenditure of federal funds, and such processes take time. Mandatory schedules that seek to compress the time needed for planning and funding CERCLA cleanup actions will skew agency priorities that are designed, in light of all applicable environmental laws, to address the greatest health and environmental hazards first.

Moreover, citizen suits to enforce mandatory schedules may lead to ad hoc judicial decisions which will further disrupt the priorities and planning of agency environmental compliance programs. Cleanups cannot be carried out in a rational and comprehensive manner if the courts are able to inject themselves into agency decisions concerning the cleanup of individual federal facilities. Instead of mandatory schedules enforceable

through citizen suits, S. 51 should simply require that all studies and response actions be accomplished as rapidly as practicable.

For similar policy reasons, the Justice Department has consistently opposed any attempt to grant EPA the authority to sue other federal agencies for federal facility cleanups, and we appreciate greatly the absence of such a provision from S. 51. Disputes among Executive Branch agencies concerning federal facilities and programs are properly resolved by the President as Chief Executive -- not by the courts. I would also like to note that such a provision would raise substantial constitutional concerns.

In sum, we believe that our enforcement proposals will inspire considerably more private party activity than we have seen in the past, by enhancing the balance of incentives and disincentives needed to achieve prompt settlements in the public interest, and by making more streamlined, predictable, and fair the process already in place under the 1980 statute. In addition, our proposals will maintain a rational and sound allocation of responsibility among the government, responsible parties, citizens, and the courts. Nonetheless, as we carry out the Superfund enforcement program, we intend to keep very open minds about new methods of increasing private party participation in Superfund, and we look forward to working with the Committee and with the rest of Congress in reauthorizing this extremely important statute.

A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to assure adequate funding for the cleanup of abandoned hazardous waste sites, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND TABLE OF CONTENTS

Section 1. This Act, together with the following table of contents, may be cited as the "Comprehensive Environmental Response, Compensation, and Liability Act Amendments of 1985".

TABLE OF CONTENTS

TITLE II--PROVISIONS RELATING PRIMARILY TO ENFORCEMENT

TITLE III--AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1954

<Reserved>

TITLE IV--MISCELLANEOUS PROVISIONS

AMENDMENT OF CERCLA

Sec. 2. Except as otherwise expressly provided, whenever in Title I, II, or IV of this Act an amendment or repeal is expressed in terms of an amendment to or repeal of a section or other provision, the reference shall be considered to be a reference to a section or provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §9601 et seq.).

STATEMENT OF FINDINGS AND PURPOSES

Sec. 3.(a) The Congress hereby finds that --

(1) Releases and threats of releases of hazardous substances continue to pose a serious threat to public health and the environment; and

(2) A major source of such threat is uncontrolled hazardous waste facilities, where hazardous substances have been

disposed of in a manner that has resulted in, or that may in the future result in dangerous releases.

(b) In order to adequately protect human health and the environment from such releases, the Congress further finds it necessary to:

(1) continue a comprehensive Federal program focused on the cleanup of hazardous waste sites and releases or threatened releases of hazardous substances into the environment;

(2) strengthen existing enforcement authority so that responsible parties will bear responsibility for cleanup costs;

(3) create a viable and effective Federal-State partnership for cleanup efforts; and

(4) ensure that citizens be informed of and have an opportunity to comment on cleanup activities taking place within their community.

DEFINITIONS

Sec. 4. Section 101(14)(C) is amended by striking "hazardous waste" and inserting "substance" in lieu thereof, and by inserting "whether or not that substance would be considered a solid waste under the Act" after "Act" the first time that word appears.

TITLE I--PROVISIONS RELATING PRIMARILY TO RESPONSE

AUTHORITY TO RESPOND: SCOPE OF PROGRAM

Sec. 101.(a) Section 104(a)(1) is amended to read as follows:

"(a)(1) Whenever any hazardous substance is released or there is a substantial threat of such a release into the

environment which may present a risk to public health or the environment, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or the environment. The President shall give primary attention to those releases which he deems may present a public health threat. The President, in his discretion, may authorize the owner or operator of the vessel or facility from which the release or substantial threat of release emanates, or any other responsible party, to perform the response action if the President determines that such removal or remedial action will be done properly by the owner, operator, or other responsible party.".

(b) Section 104(a) is further amended by striking paragraph (2) and inserting in lieu thereof the following:

"(2) The President shall not respond under this Act to a release or threat of a release:

(A) resulting from the extraction, beneficiation, or processing of ores and minerials which are covered under the Surface Mine Control and Reclamation Act of 1977;

(B) resulting from the lawful application of a pesticide product registered under Section 3, permitted under section 5, or exempted under Section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act;

(C) to the extent it affects residential dwellings, business or community structures, or public or private domestic water supply wells, unless the release or threatened release emanates from a vessel or facility used for the deposition, storage, processing, treatment, transportation, or disposal of hazardous substances;

(D) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found; or

(E) covered by and in compliance with a permit, as that term is defined in section 101(10), if such hazardous substance was specifically identified, reviewed, and made part of the public record in issuing the permit and the permit was designed to limit such substance.

(3) Notwithstanding paragraph (2) of this subsection, the President may respond to any release or threat of release of a hazardous substance in any form if he determines, in his discretion, that the release or threat of release constitutes a major public health or environmental emergency and that no other person has the authority or capability to respond to the emergency in a timely manner.".

(c) Section 104(b) is amended by striking the phrases, ", pollutant, or contaminant" and ", pollutants or contaminants" whenever they appear.

(d) Section 105 is amended by striking ", pollutant and contaminants,".

STATUTORY LIMITS ON REMOVALS

Sec. 102. Section 104(c)(1) is amended by striking "six months" and inserting "one year" in lieu thereof and inserting before "obligations" the following: "or (C) continued response action is otherwise appropriate and consistent with permanent remedy,".

PERMANENT REMEDIES

Sec. 103.(a) Section 104(c)(4) is amended by adding at the end thereof the following sentence: "For determining whether a remedy is cost-effective, the President may consider the permanence of such remedy.".

(b) Section 105(3) is amended by inserting before the semicolon at the end thereof the following: ", taking into account the permanence of any remedial measures".

OFFSITE REMEDIAL ACTION

Sec. 104. Section 101(24) is amended by striking the last sentence of the paragraph; striking the period after "welfare" the third time that word appears, and inserting a semicolon in lieu thereof, striking "or" before "contaminated materials" and inserting "and associated" in lieu thereof; and inserting before the period after "environment" the third time that word appears, the following: ", as well as the

offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.".

NATIONAL CONTINGENCY PLAN

Sec. 105.(a) Section 105(8)(B), is amended by striking "at least four hundred of" when it appears.

(b) Section 105(8)(B) is further amended by striking the phrase "at least" following the word "facilities" the second time it appears and by inserting "A State shall be allowed to designate its highest priority facility only once." after the third full sentence thereof.

COOPERATIVE AGREEMENTS

Sec. 106.(a) Section 104(d)(1) is amended to read as follows:

"(d)(1) Where the President determines that a State or political subdivision thereof has the capability to carry out any or all of the actions authorized in this section, the President, in his discretion and subject to such terms as he may prescribe, may enter into a contract or cooperative agreement covering a specific facility or facilities with such State or political subdivision to take such actions in accordance with criteria and priorities established pursuant to section 105(8) of this title and to be reimbursed from the Fund for reasonable response costs incurred pursuant to such contract or cooperative agreement. Any contract or cooperative agreement made hereunder is subject to the cost-sharing provisions of subsection (c) of this section.".

(b) Section 101(25) is amended by striking "and" and by inserting before the semicolon at the end thereof the following: ", and enforcement activities related thereto".

PUBLICLY OPERATED FACILITIES

Sec. 107. Section 104(c)(3)(C)(ii) is amended to read as follows:

"(ii) at least 75 per centum or such greater amount as the President may deem appropriate, taking into account the degree of responsibility of the State or political subdivision, of any sums expended in response to a release from a facility, that was operated by the State or a political subdivision thereof, either directly or through a contractual relationship or otherwise, at the time of any disposal of hazardous substances therein. For purposes of this clause only, "facility" does not include navigable waters or the beds underlying those waters.".

SITING OF HAZARDOUS WASTE FACILITIES

Sec. 108. Section 104(c) is amended by adding at the end thereof the following new paragraph:

"(5)(A) Effective two years after the date of enactment of this paragraph, the President shall not initiate any response actions pursuant to this section, except for the provision of alternative drinking water supplies or the temporary relocation of affected individuals from their residential dwellings, neither to exceed one year, unless the State in which the release occurs first provides assurances deemed adequate by

the President that the State will assure the availability of hazardous waste treatment or disposal facilities, either within that State or pursuant to a regional agreement, acceptable to the President with adequate capacity for the treatment, or disposal of all hazardous wastes that are reasonably expected to be generated within that State during a period of time specified by the President by regulation.

(B)(i) Notwithstanding subparagraph (A) of this paragraph, the President may take response action under this section if he determines, in his discretion, that a major public health or environmental emergency exists.

(ii) Notwithstanding subsection (c) of this section, the President shall not provide alternative drinking water supplies or the temporary relocation of affected individuals from their residential dwellings pursuant to subparagraph (A) of this paragraph or response pursuant to subparagraph (B)(1) of this paragraph, unless the State in which the release occurs provides assurances that the State will pay or assure payment of 40 percent of those costs, or at least 80 percent of those costs for actions related to facilities operated by the State or a political subdivision thereof, either directly or through a contractual relationship or otherwise, at the time of any disposal of hazardous substances therein.

(C) Effective on the date of enactment of this paragraph, in addition to the cost share required by paragraph (3) of this subsection, the State shall pay all additional costs associated with any out-of-State or, if the State is party to a regional

agreement for the treatment or disposal of hazardous substances, out-of-region transportation of hazardous substances resulting from response actions taken pursuant to this section.".

COMMUNITY INVOLVEMENT

Sec. 109. Section 104(c) is amended by adding after new paragraph (5) the following new paragraph:

"(6) Before selection or approval of any remedial action to be undertaken by the United States or a State or any other person under this section or section 106 of this Act, notice of and an opportunity to comment on the proposed action shall be afforded to the public.".

HEALTH RELATED AUTHORITIES

Section 110.(a) Section 104(i) is amended by inserting "(1)" after "(i)"; striking the remaining part of the sentence following "Registry", and inserting a period in lieu thereof; inserting "(A)" before the second sentence of subsection (i); and adding the following:

": (i) in support of response actions and because of the immediate need to protect public health in the event of a release or threatened release of a hazardous substance, and upon request of the Administrator of the Environmental Protection Agency, State officials, or local officials, may provide health consultations, health assessments, and other technical assistance relating to the health effects of exposure to hazardous substances; and

(ii) to improve the ability to render future public health judgments and recommendations, and to further scientific knowledge of the health effects of hazardous substances, develop and conduct epidemiological studies, including pilot studies.".

(b) Section 104(i) is further amended by inserting "(B)" before the third sentence thereof, striking "In addition," capitalizing "said", and striking all of paragraph (1) and inserting in lieu thereof the following:

"(i) in cooperation with the States, Indian tribes, and with other Federal and local officials, establish and maintain appropriate registries of serious diseases and illnesses or registries of persons exposed to hazardous substances through the environment, whenever their inclusion in such registries would be scientifically appropriate or valuable for specific scientific studies or for long-term follow-up;".

(c) Section 104(i) is further amended by striking "(2)" and inserting "(ii)" in lieu thereof, striking "(3)" and inserting "(iii)" in lieu thereof, and striking all of paragraph (4) and inserting in lieu thereof the following:

"(iv) in cases of public health emergencies caused or believed to be caused by exposure to toxic substances, assist, and consult with private or public health care providers in the provision of medical care and testing of exposed individuals, including the collection and laboratory analysis of specimens as may be indicated by the specific exposure incident or any other assistance appropriate under the circumstances; and ".

(d) Section 104(i) is further amended by striking "(5)" and inserting "(v)" in lieu thereof and striking the last sentence of the paragraph.

(e) Section 104(i) is further amended by adding the following new paragraph:

"(vi) All results of studies conducted under this subsection (other than health assessments) shall be reported or adopted only after appropriate peer review established by the Administrator of the Agency. Existing peer review systems may be used where appropriate.

(f) Section 104(i) is further amended by adding the following new paragraph at the end thereof:

"(2) The Administrator of the Environmental Protection Agency, or the head of the Agency to which response authority has been delegated, in his discretion, may perform exposure and risk assessments at a release for the purpose of determining appropriate action adequate to mitigate the public health threat. For purposes of this paragraph, "exposure and risk assessment" means the process for characterizing the potential risk from exposure to hazardous or toxic substances at a specific site, based upon hazard identification, dose-response assessment, exposure assessment, and risk characterization."

COMPLIANCE WITH OTHER ENVIRONMENTAL LAWS

Sec. 111. Section 104(c)(4), as amended by section 103(a) of this Act, is amended by inserting "(A)" after "(4)" and adding the following new subparagraph at the end thereof:

"(B)(i) When revising the national contingency plan pursuant to section 105, the President shall specify the extent to which removal or remedial actions selected under this section or secured under section 106(a) should comply with applicable or relevant standards and criteria of other Federal, State, or local environmental and public health laws. When making this determination, the President shall consider, among other factors, the following: the level of health or environmental protection provided by applicable or relevant standards and criteria; the technical feasibility of achieving such standards and criteria for different types of releases; the interim or permanent nature of particular response actions; the need for expeditious action; and the need to maintain availability of amounts from the Fund to respond to other releases which present or may present a threat to public health or the environment.

(ii) No permit shall be required under Federal, State, or local law for removal or remedial action selected under this section or secured under section 106(a).

(iii) Removal or remedial actions selected or taken under this section or secured under section 106(a) that have voluntarily met the provisions of section 102 of the National Environmental Policy Act of 1969 (Public Law 91-190, 83 Stat. 852) need not comply with any further public participation requirements which may be provided under this Act.

ACTIONS UNDER THE NATIONAL CONTINGENCY PLAN

Sec. 112. Section 107(d) is amended by inserting "response costs or" before "damages" both times that word appears and by inserting after "person" the second time that word appears the following: "and shall not alter the liability of any person who is liable or potentially liable under subsection (a) of this section who subsequently undertakes a response action.".

NATURAL RESOURCE DAMAGE CLAIMS

Sec. 113.(a) Section 107(f) is amended by inserting "(1)" after "(f)" and by adding at the end thereof the following new paragraphs:

"(2)(A) The President shall designate in the national contingency plan published under section 105 of this Act the Federal officials who shall act on behalf of the public as trustees for natural resources under this Act and section 311 of the Clean Water Act. Such officials shall assess damages to natural resources for the purposes of this Act and section 311 of the Clean Water Act for those resources under their trusteeship, and may upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under a State's trusteeship.

(B) The Governor of each State shall designate the State officials who may act on behalf of the public as trustees for natural resources under this Act and section 311 of the Clean Water Act and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this Act and section

311 of the Clean Water Act for those resources under their trusteeship.

(C) Any determination or assessment of damages to natural resources for the purposes of this Act and section 311 of the Clean Water Act made by a Federal or State trustee in accordance with the regulations promulgated under section 301(c) of this Act shall have the force and effect of a rebuttable presumption on behalf of the trustee in any judicial proceeding under this Act or section 311 of the Clean Water Act."

(3) With respect to Federal facilities, Federal agencies with custody and accountability for those facilities shall be the only trustees of natural resources on, under, or above these facilities for purposes of the Act.".

(b) Section 111(b) is amended by inserting a period after "title" the first time that word appears and striking all that follows.

(c) Section 111(c) is amended by striking paragraphs (1) and (2) and renumbering the following paragraphs accordingly.

(d) Section 111(e)(1) is amended by inserting "pursuant to subsection 111(a)(2)" after the word "Fund" the first time it appears.

(e) Section 111 is amended by striking subsections (d), (h), and (i) and relettering the remaining subsections accordingly.

(f) Section 111(a) is amended by striking paragraph (3) and renumbering the following paragraph.

(g) Section 111(e)(4) is amended by striking "Paragraphs (1) and (4) of subsection (a) of" and by replacing "t" with "T" in "this" when it appears.

RESPONSE CLAIMS

Sec. 114.(a) Section 111(a)(2) is amended to read as follows:

"(2) payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 311(c) of the Clean Water Act and amended by section 105 of this title: Provided, however, that such costs must be approved under said plan and certified by the responsible Federal official prior to the taking of any action for which costs may be sought; and".

(b) Section 112 is amended by striking subsection (a) and inserting in lieu thereof the following:

"(a) No claims may be asserted against the Fund pursuant to section 111(a)(2) of this title unless such claim is presented in the first instance to the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, and to any other person known to the claimant who may be liable under section 107 of this title. In any case where the claim has not been satisfied within sixty days of presentation in accordance with this subsection, the claimant may present the claim to the Fund for payment; provided, that no claim against the Fund may be considered during the pendency of an action in court to recover costs which are the subject of the claim.".

(c) Section 112(b) is amended by striking "$5,000" in paragraph (1) and inserting "$25,000" in lieu thereof; and by striking all of paragraphs (2), (3) and (4) and inserting in lieu thereof the following:

"(2) The President may, if he is satisfied that the information developed during the processing of the claim warrants it, make and pay an award of the claim; provided, no claim may be awarded to the extent that a judicial judgment has been made on the costs that are the subject of the claim. If the President declines to pay all or part of the claim, the claimant may, within thirty days after receiving notice of the President's decision, request an administrative hearing.

(3) In any proceeding under this subsection, the claimant shall bear the burden of proving his claim.

(4) All administrative decisions made hereunder shall be in writing, with notification to all appropriate parties, and shall be rendered within ninety days of submission of a claim to an administrative law judge, unless all the parties to the claim agree in writing to an extension or unless the President, in his discretion, extends the time limit for a period not to exceed 60 days.

(5) All administrative decisions hereunder shall be final, and any party to the proceeding may appeal a decision within thirty days of notification of the award or decision. Any such appeal shall be made to the Federal district court for the district where the release or threat of release took place. In any such appeal, the decision shall be considered binding and conclusive, and shall not be overturned except for arbitrary or capricious abuse of discretion.

(6) Within twenty days after the expiration of the appeal period for any administrative decision concerning an award, or within twenty days after the final judicial determination of any appeal taken pursuant to this subsection, the President shall pay any such award from the Fund. The President shall determine the method, terms, and time of payment.".

(d) Section 112 is amended by striking subsection (d) and relettering the following subsection.

INDIAN TRIBES

Sec. 115. (a) Section 101 is amended by striking "and" at the end of paragraph (31), striking the period at the end of paragraph (32) and inserting a semicolon in lieu thereof, and adding the following new paragraphs:

"(33) "Indian tribe" means any Indian tribe, band, nation, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust; and

(34) "Indian lands" means lands, title to which is held by the United States in trust for an Indian or an Indian tribe or lands title to which is held by an Indian or an Indian tribe subject to a restriction against alienation.".

(b) Section 104(c)(3), as amended by section 107 of this Act, is amended by inserting "or Indian tribe" after the word "State" the first four times that word appears and after phrase appears, and by adding a new sentence at the end thereof to read as follows: "The assurances required by this paragraph with respect to Indian lands may be made by the Department of the Interior if the Secretary of the Interior determines that an Indian tribe cannot provide those assurances.".

(c) Section 104(d), as amended by section 106(a) of this Act, is amended by inserting "or Indian tribe" after the phrase "political subdivision thereof" wherever that phrase occurs, and by inserting "or Indian tribe" after the phrase "political subdivision.".

(d) Section 103(a) is amended by striking the period at the end threreof and inserting, ", or to any affected Indian tribe."

(e) "Section 104(c)(2) is amended by adding, "or Indian tribe" after "States."

(f) Section 105(8)(B), as amended by section 105 of this Act, is further amended by inserting "or Indian tribe" after "State" the first time that word appears and after the phrase "established by the States"; and inserting "or Indian lands" after "State" the second time that word appears.

PREEMPTION

Sec. 116. Section 114 is amended by striking subsection (c) and relettering the following subsection accordingly.

STATE COST SHARE

Sec. 117. Section 104(c)(3)(C)(i) is amended by striking "10" and inserting "20" in lieu thereof.

TITLE II--PROVISIONS RELATING PRIMARILY TO ENFORCEMENT

CIVIL PENALTIES FOR NON-REPORTING

Sec. 201. Section 103(b)(3) is amended by striking "$10,000", inserting "$25,000" in lieu thereof, and inserting before the last sentence the following: "Any such person also shall be liable to the United States for a civil penalty of not more than $10,000 for each violation of this subsection.

Any civil penalty for violations of this subsection in excess of $25,000 may be assessed in an action brought by the Attorney General in a United States district court pursuant to section 113. The Administrator may assess any penalty under this subsection for less than $25,000, and such assessment shall become final unless, no later than 30 days after notice of the penalty is served, the person or persons named in the notice request a public hearing. Upon such request, the Administrator shall promptly conduct a public hearing. In connection with any proceeding under this section the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents and may promulgate rules for discovery procedures.".

CONTRIBUTION AND PARTIES TO LITIGATION

Sec. 202. Section 107, as amended by section 205 and Title III of this Act, is amended by adding a new subsection to read as follows:

"(k)(1) In any civil or administrative action under this section or section 106, any claims for contribution or indemnification shall be brought only after entry of judgment or date of settlement in good faith.

(2) After judgment in any civil action under section 106 or under subsection (a) of this section, any defendant held liable in the action may bring a separate action for contribution against any other person liable or potentially liable under subsection (a). Such action shall be brought in accordance with section 113 and shall be governed by Federal law. Except as provided in paragraph (4) of the subsection, this subsection shall not impair any right of indemnity under existing law.

(3) When a person has resolved its liability to the United States or a State in a judicially approved good faith settlement, such person shall not be liable for claims for contribution under paragraph (2) of this subsection regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the settlement.

(4) Nothing in this subsection shall affect or modify in any way the rights of the United States, a State, or any person that has resolved its liability to the United States or a State in a good faith settlement to seek contribution or indemnification against any persons who are not party to the settlement. In any such contribution or indemnification action, the rights of a State or any person that has so resolved its liability shall be subordinate to the rights of the United States. Any contribution action brought under this paragraph shall be brought in accordance with section 113 and shall be governed by Federal law.".

ACCESS AND INFORMATION GATHERING

Sec. 203. Section 104(e) is amended by striking "(2)" and inserting "(3)" in lieu thereof and by striking all of existing paragraph (1) and inserting in lieu thereof the following:

"(1) For the purposes of determining the need for response, or choosing or taking any response action under this title, or otherwise enforcing the provisions of this

title, any officer, employee, or representative of the President, duly designated by the President, or any duly designated officer, employee, or representative of a State under a contract or cooperative agreement, is authorized where there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance --

(A) to require any person who has or may have information relevant to (i) the identification or nature of materials generated, treated, stored, transported to, or disposed of at a facility, or (ii) the nature or extent of a release or threatened release of a hazardous substance at or from a facility, to furnish, upon reasonable notice, information or documents relating to such matters. In addition, upon reasonable notice, such person either shall grant to appropriate representatives access at all reasonable times to inspect all documents or records relating to such matters or shall copy and furnish to the representatives all such documents or records, at the option of such person;

(B) to enter at reasonable times any establishment or other place or property (i) where hazardous substances are, may be, or have been generated, stored, treated, disposed of, or transported from, (ii) from which or to which hazardous substances have been or may have been released, (iii) where such release is or may be threatened, or (iv) where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this title; and

(C) to inspect and obtain samples from such establishment or other place or property or location of any suspected hazardous substance and to inspect and obtain samples of any

containers or labeling for suspected hazardous substances. Each such inspection shall be completed with reasonable promptness. If the officer, employee, or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, tenant, or other person in charge of the place from which the samples were obtained a receipt describing the sample obtained and, if requested, a portion of each such sample. If any analysis is made of such samples, a copy of the results of the analysis shall be furnished promptly to the owner, operator, tenant, or other person in charge, if such person can be located.

(2)(A) If consent is not granted regarding a request made by a duly designated officer, employee, or representative under paragraph (1), the President, upon such notice and an opportunity for consultation as is reasonably appropriate under the circumstances, may issue an order to such person directing compliance with the request, and the President may ask the Attorney General to commence a civil action to compel compliance.

(B) In any civil action brought to obtain compliance with the order, the court shall, where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance: (i) in the case of interference with entry or inspection, enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection, unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or not in accordance

with law; and (ii) in the case of information or document requests, enjoin interference with such information or document requests or direct compliance with orders to provide such information or documents, unless under the circumstances of the case the demand for information or documents is arbitrary and capricious, an abuse of discretion, or not in accordance with law. The court may assess a civil penalty not to exceed $10,000 against any person who unreasonably fails to comply with the provisions of paragraph (1) or an order issued pursuant to paragraph (2).".

(3) Nothing in this subsection shall preclude the President from securing access or obtaining information in any other lawful manner.

(4) Notwithstanding this subsection, entry to locations and access to information properly classified to protect the national security may be granted only to any officer, employee, or representative of the President who is properly cleared.".

ADMINISTRATIVE ORDERS FOR SECTION 104(b) ACTIONS

Sec. 204.(a) Section 104 is amended by adding a new subsection at the end thereof to read as follows:

"(j)(1) If the President determines that one or more responsible parties will properly carry out action under subsection (b) of this section, the President may enter into a consent administrative order with such party or parties for that purpose.

(2) The United States district court for the district in which the release has occurred or threatens to occur shall have jurisdiction to enforce the order, and any person who violates

or fails to obey such an order shall be liable to the United States for a civil penalty of not more than $10,000 for each day in which such violation occurs or such failure to comply continues.".

(b) Section 107(c)(3) is amended by striking "104 or".

NON-TRUST FUND AND PRE-TRUST FUND EXPENDITURES

Sec. 205. Section 107(a)(4) is amended by striking "and" from the end of subparagraph (B), striking the period from the end of subparagraph (C) and inserting "; and" in lieu thereof, and adding a new subparagraph at the end thereof to read as follows:

"(D) All other costs incurred by the United States Government subsequent to the enactment of the Resource Conservation and Recovery Act of 1976, in response to a release or threatened release of a hazardous substance from a facility used for the storage, treatment, or disposal of hazardous substances, where such person knew or should have known of the response action and the costs are not inconsistent with the response actions provided for in subsections 101(23) and (24) of this Act.".

STATUTE OF LIMITATIONS

Sec. 206. Section 113, as amended by sections 207 and 208 of this Act, is amended by adding at the end thereof the following new subsection:

"(h)(1) No claim may be presented nor may an action be commenced under this title for recovery of the costs referred to in subsection (a) of section 107 more than six years after the date of completion of the response action. Provided, however, that within the limitation period set out herein a

State or the United States may commence an action under this title for recovery of any cost or costs at any time after such cost or costs have been incurred.

(2) No action may be commenced for damages under this title more than three years from the date of discovery of the loss.

(3) No action for contribution may be commenced under section 107 more than three years after the date of judgment or the date of the good faith settlement.

(4) No action based on rights subrogated pursuant to section 112 by reason of payment of a claim may be commenced under this title more than three years after the date of payment of such claim.".

PRE-ENFORCEMENT REVIEW

Sec. 207(a). Section 113(b) is amended by adding "s" to the word "subsection" and inserting "and (e)" after "(a)".

(b) Section 113 is further amended by adding at the end thereof the following new subsections:

"(e) No court shall have jurisdiction to review any challenges to response action selected under section 104 or any order issued under section 104, or to review any order issued under section 106(a), in any action other than (1) an action under section 107 to recover response costs or damages or for contribution or indemnification; (2) an action to enforce an order issued under section 106(a) or to recover a penalty for violation of such order; or (3) an action for reimbursement under section 106(b)(2).

(f) In any judicial action under section 106 or 107, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. The only objection which may be raised in any such judicial action under sections 106 or 107 is an objection to the response action which was raised with reasonable specificity to the President during the applicable period for public comment. In considering such objections, the court shall uphold the President's decision in selecting the response action unless the decision was arbitrary and capricious or otherwise not in accordance with law. If the court finds that the President's decision in selecting the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award the response costs or damages or other relief being sought to the extent that such relief is not inconsistent with the national contingency plan. In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.".

(c) Section 106(b) is amended by inserting "(1)" after "(b)" and adding a new paragraph at the end thereof to read as follows:

"(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) may, within sixty days of completion of the required action, petition the

President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate that applies to investments of the Fund under section 223(b) of this Act.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within thirty days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund. To obtain reimbursement, the petitioner must establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order. Provided, however, that a petitioner who is liable for response costs under section 107(a) may recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in issuing the order was arbitrary and capricious or otherwise not in accordance with law. In any such case, the court may award to petitioner all reasonable response costs incurred pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.".

NATIONWIDE SERVICE OF PROCESS

Sec. 208. Section 113, as amended by section 207 of this Act, is amended by adding after new subsection (f) the following new subsection:

"(g) In any action by the United States under sections 104, 106, or 107, process may be served in any district where the defendant is found, or resides, or transacts business, or has appointed an agent for the service of process.".

ABATEMENT ACTION

Sec. 209. Section 106(a) is amended by striking the phrases "or welfare" and "and welfare".

FEDERAL LIEN

Sec. 210. Section 107 is amended by adding after new subsection (l) the following new subsection:

"(l)(1) All costs and damages for which a person is liable to the United States under subsection (a) of this section shall constitute a lien in favor of the United States upon all real property and rights to such property belonging to such person that are subject to or affected by a removal or remedial action.

(2) The lien imposed by this subsection shall arise at the time costs are first incurred by the United States with respect to a response action under this Act and shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113(h).

(3) The lien imposed by this subsection shall not be valid as against any purchaser, holder of a security interest, or judgment lien creditor until notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law,

in which the real property subject to the lien is physically located. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is physically located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided in 26 U.S.C. §6323(h). This paragraph does not apply with respect to any person who has or reasonably should have actual notice or knowledge that the United States has incurred costs giving rise to a lien under paragraph (1) of this subsection.

(4) The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.".

PENALTIES

Sec. 211.(a). Section 103(d)(2) is amended by striking $20,000" and inserting "$25,000" in lieu thereof.

(b) Section 106(b) is amended by striking "$5,000" and inserting "$10,000" in lieu thereof.

FEDERAL AGENCY SETTLEMENTS

Section 212(a). Section 107(g) is amended by inserting "(1)" after "(g)" and by adding the following new paragraph at the end thereof:

"(2) The head of each such department, agency, or instrumentality or his designee may consider, compromise, and settle any claim or demand under this Act arising out of activities of his agency, in accordance with regulations prescribed by the Attorney General: Provided, that any award, compromise, or settlement in excess of $2,500 shall be made only with the prior written approval of the Attorney General or his designee. Any such award, compromise, or settlement shall be paid by the agency concerned out of appropriations available to that agency. The acceptance of any payment under this paragraph shall be final and conclusive, and shall constitute a complete release of any claim against the United States and against the employees of the United States whose acts or omissions gave rise to the claim or demand, by reason of the same subject matter.

FOREIGN VESSELS

Section 213. Section 107(a)(1) is amended by striking "(otherwise subject to the jurisdiction of the United States).".

TITLE III--ADMENDMENTS TO THE INTERNAL REVENUE CODE OF 1954

<<Reserved>>

APPLICABILITY OF AMENDMENTS

Sec. 401. The amendments made by this Act to section 104(a) and (b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 shall not apply to releases listed as of January 1, 1985, in the national hazardous substance response plan published pursuant to section 105(8)(B) of that Act.

(4) Nothing in this subsection shall affect or modify in any way the rights of the United States, a State, or any person that has resolved its liability to the United States or a State in a good faith settlement to seek contribution or indemnification against any persons who are not party to the settlement. In any such contribution or indemnification action, the rights of a State or any person that has so resolved its liability shall be subordinate to the rights of the United States. Any contribution action brought under this paragraph shall be brought in accordance with section 113 and shall be governed by Federal law.".

ACCESS AND INFORMATION GATHERING

Sec. 203. Section 104(e) is amended by striking "(2)" and inserting "(3)" in lieu thereof and by striking all of existing paragraph (1) and inserting in lieu thereof the following:

"(1) For the purposes of determining the need for response, or choosing or taking any response action under this title, or otherwise enforcing the provisions of this title, any officer, employee, or representative of the President, duly designated by the President, or, in connection with a cooperative agreement or contract, any duly designated officer, employee, or representative of a State is authorized --

(A) to require any person who has or may have information relevant to (i) the identification or nature of materials generated, treated, stored, transported to, or disposed of at a facility, or (ii) the nature or extent of a release or

threatened release of a hazardous substance at or from a facility, to furnish, upon reasonable notice, in a written report or as otherwise requested, information or documents relating to such matters. In addition, upon reasonable notice, such person shall grant to appropriate representatives access at all reasonable times to inspect and copy all documents or records relating to such matters;

(B) to enter at reasonable times any establishment or other place or property (i) where hazardous substances are, may be, or have been generated, stored, treated, disposed of, or transported from, (ii) from which or to which hazardous substances have been or may have been released, (iii) where such release is or may be threatened, or (iv) where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this title; and

(C) to inspect and obtain samples from such establishment or other place or property or location of any suspected hazardous substance and to inspect and obtain samples of any containers or labeling for suspected hazardous substances. Each such inspection shall be completed with reasonable promptness. If the officer, employee, or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, tenant, or other person in charge of the place from which the samples were obtained, if present, a receipt describing the sample obtained and, if requested, a portion of each such sample. If any analysis is

made of such samples, a copy of the results of the analysis shall be furnished promptly to the owner, operator, tenant, or other person in charge, if such person can be located.

(2)(A) If consent is not granted regarding a request under paragraph (1), the President, upon notice and an opportunity for consultation, may issue an order to such person directing compliance with the provisions of the paragraph, or the President may request the Attorney General to commence a civil action to compel compliance with any such request.

(B) In any civil action brought to obtain compliance with the request or order, the court shall: (i) in the case of interference with entry or inspection, summarily enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection, unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or not in accordance with this Act; and (ii) in the case of information or document requests, summarily enjoin interference with such information or document requests or direct compliance with orders to provide such information or documents, unless under the circumstances of the case the demand for information or documents is arbitrary and capricious, an abuse of discretion, or not in accordance with this Act. The court may assess a civil penalty not to exceed $10,000 per day against any person who fails to comply with the provisions of paragraph (1) or an order issued pursuant to paragraph (2).".

(3) Nothing in this subsection shall preclude the President from securing access or obtaining information in any other lawful manner.

(4) Notwithstanding this subsection, entry to locations and access to information properly classified to protect the national security may be denied to any officer, employee, or representative of the President who are not properly cleared.".

ADMINISTRATIVE ORDERS FOR SECTION 104(b) ACTIONS

Sec. 204.(a) Section 104 is amended by adding a new subsection at the end thereof to read as follows:

"(j)(1) If the President determines that one or more responsible parties will properly carry out action under subsection (b) of this section, the President may enter into a consent administrative order with such party or parties for that purpose.

(2) The United States district court for the district in which the release has occurred or threatens to occur shall have jurisdiction to enforce the order, and any person who violates or fails to obey such an order shall be liable to the United States for a civil penalty of not more than $10,000 for each day in which such violation occurs or such failure to comply continues.".

(b) Section 107(c)(3) is amended by striking "104 or".

PRESUMPTION FOR LABORATORY SAMPLES

Sec. 205. Section 107, as amended by title III of this Act, is amended by adding a new subsection at the end thereof to read as follows:

"(k)(1) In any action under this title brought by the United States or a State information related to sampling, chain of custody, and sample analysis gathered, generated, or evaluated by an officer, employee, or representative of the United States, or any officer, employee, or representative of a State, pursuant to a contract or cooperative agreement, may be introduced into evidence by the United States or a State, and shall be presumed to be accurate and valid.

(2) The presumption created by paragraph (1) shall be overcome with respect to any specific item of evidence if the defendant establishes by a preponderance of the evidence that such item was not gathered, generated, or evaluated in accordance with procedures approved or designated by the President.".

NON-TRUST FUND AND PRE-TRUST FUND EXPENDITURES

Sec. 206. Section 107(a)(4) is amended by striking "and" from the end of subparagraph (B), striking the period from the end of subparagraph (C) and inserting "; and" in lieu thereof, and adding a new subparagraph at the end thereof to read as follows:

"(D) All other costs incurred by the United States Government subsequent to the enactment of the Resource Conservation and Recovery Act of 1976, in response to a release or threatened release of a hazardous substance from a facility used for the storage, treatment, or disposal of hazardous substances where such person knew or should have known of the response action and, that are not inconsistent with the response actions provided for in subsections 101(23) and (24) of this Act.".

STATUTE OF LIMITATIONS

Sec. 207. Section 113, as amended by sections 208 and 209 of this Act, is amended by adding at the end thereof the following new subsection:

"(h)(1) No claim may be presented nor may an action be commenced under this title for recovery of the costs referred to in subsection (a) of section 107 more than six years after the date of completion of the response action. Provided, however, that within the limitation period set out herein a State or the United States may commence an action under this title for recovery of any cost or costs at any time after such cost or costs have been incurred.

(2) No action may be commenced for damages under this title more than three years from the date of discovery of the loss.

(3) No action for contribution may be commenced under section 107 more than three years after the date of judgment, of the date of the good faith settlement.

(4) No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this title more than three years after the date of payment of such claim.".

PRE-ENFORCEMENT REVIEW

Sec. 208(a). Section 113(b) is amended by adding "s" to the word "subsection" and inserting "and (e)" after "(a)".

(b) Section 113 is further amended by adding at the end thereof the following new subsections:

"(e) No court shall have jurisdiction to review any challenges to response action selected under section 104 or any order issued under section 104, or to review any order issued under section 106(a), in any action other than (1) an action under section 107 to recover response costs or damages or for contribution or indemnification; (2) an action to enforce an order issued under section 106(a) or to recover a penalty for violation of such order; or (3) an action for reimbursement under section 106(b)(2).

(f) In any judicial action under section 106 or 107, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. The only objection which may be raised in any such judicial action under sections 106 or 107 is an objection to the response action which was raised with reasonable specificity to the President during the applicable period for public comment. In considering such objections, the ~~cost~~ court shall uphold the President's decision in selecting the response action unless the decision was arbitrary and capricious or otherwise not in accordance with law. If the court finds that the President's decision in selecting the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award the response costs or damages or other relief being sought to the extent that such relief is not inconsistent with the national contingency plan. In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious

and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.".

(c) Section 106(b) is amended by inserting "(1)" after "(b)" and adding a new paragraph at the end thereof to read as follows:

"(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) may, within sixty days of completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate that applies to investments of the Fund under section 223(b) of this Act.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within thirty days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund. To obtain reimbursement, the petitioner must establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order. Provided, however, that a petitioner who is liable for response costs under section 107(a) may recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision

in issuing the order was arbitrary and capricious or otherwise not in accordance with law. In any such case, the court may award to petitioner all reasonable response costs incurred pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.".

NATIONWIDE SERVICE OF PROCESS

Sec. 209. Section 113, as amended by section 208 of this Act, is amended by adding after new subsection (f) the following new subsection:

"(g) In any action by the United States under sections 104, 106, or 107, process may be served in any district where the defendant is found, or resides, or transacts business or has appointed an agent for the service of process.".

ABATEMENT ACTION

Sec. 210. Section 106(a) is amended by striking the phrases "or welfare" and "and welfare".

FEDERAL LIEN

Sec. 211. Section 107 is amended by adding after new subsection (l) the following new subsection:

"(m)(1) All costs and damages for which a person is liable to the United States under subsection (a) of this section shall constitute a lien in favor of the United States upon all real property and rights to such property belonging to such person that are subject to or affected by a removal or remedial action.