

SUPERFUND SETTLEMENTS PROJECT

Why the Superfund Taxes Should Not Be Reimposed

Before the Subcommittee on Superfund, Toxics and Environmental Health
of the Senate Committee on Environment & Public Works

July 6, 2010

Table of Contents

Executive Summary	2
Overview	3
Introduction.....	4
Appropriations – Not Taxes – Control the Level of EPA Activity.....	6
<i>Why Fewer “Construction Completions”?</i>	6
<i>Manpower and Funding Have Remained Stable</i>	9
No Persuasive Rationale Exists for Reimposing the Superfund Taxes	11
<i>The Original Expectation That EPA Would Perform Most Cleanups is No Longer Valid</i>	11
<i>Companies Responsible for Contamination are Paying for Remediation Site by Site</i>	14
<i>The Superfund Taxes Are Not Required to Implement the “Polluter Pays” Principle</i>	16
<i>Most of the Money that Congress Appropriates for Superfund Is Not Used to Clean Up NPL Sites</i>	17
Superfund Should Run on Appropriations from General Revenues	21
<i>Superfund Has Accomplished Most of its Original Mission</i>	21
<i>Superfund Has Been an Extremely Costly Program</i>	22
<i>Most Superfund Sites No Longer Present Any Immediate Risk to Human Health or the Environment</i>	23
<i>State Programs Now Normally Provide a Viable Alternative</i>	24
Conclusion	25

To the Members of the Subcommittee:

The Superfund Settlements Project (“the Project”) appreciates the opportunity to share its perspective on the idea of reimposing the Superfund taxes. The Project is a not-for-profit association of major companies from various sectors of American industry. It was organized in 1987 in order to help improve the effectiveness of the Superfund program by encouraging settlements, streamlining the settlement process, and reducing transaction costs.

The Project's members share an extraordinary degree of practical, hands-on experience with the Superfund program. They have been involved at literally hundreds of Superfund sites across the country over the last 25 years. Representatives of the Project have testified before Congress on many occasions regarding various aspects of the Superfund program. The Project has also played a leadership role in the national policy debate over many Superfund issues, and has been a strong supporter of EPA's Superfund Administrative Reforms since they were announced in 1995.

Collectively, the Project's members have spent well over six billion dollars on site cleanups and site studies since 1980. That spending covered not only the companies' own shares of liability, but also sizeable "orphan" shares attributable to other parties that were defunct, insolvent, or otherwise unable to pay their fair shares. On top of that, these companies also paid hundreds of millions of dollars in Superfund taxes during the first 15 years of the program's life. All told, these companies have already paid far more than their actual responsibility for the contamination at these sites. Reimposing the taxes now would be unjust, as well as unnecessary.

Why the Superfund Taxes Should Not Be Reimposed

Executive Summary

- Taxes do not control the Superfund budget or the pace of EPA activity. On the contrary, the Superfund budget, which is set by Congress each year through the appropriations process, determines the pace of EPA activity.
- Most cleanups at NPL sites – roughly 70% – are performed by PRPs, not by EPA.
- The Superfund taxes are not needed to maintain the “polluter pays” principle, because the companies formerly targeted by those taxes have already paid their full share of cleanup costs.
- The companies formerly targeted by the Superfund taxes paid for Superfund not once, not twice, but three times. As PRPs, they paid directly to study, clean up and reimburse federal and state government for overseeing cleanup at the sites they contaminated. As relatively deep pockets, they paid again by absorbing the "orphan" shares of many exempt, defunct, and unknown parties at these same sites. And as corporate taxpayers from 1986 to 1995, they paid yet again.
- Only about one-fourth of EPA’s Superfund appropriation is spent on cleaning up NPL sites.
- EPA spends its Superfund budget on many other things, such as administration; management; interagency and intra-agency coordination; research; grants to other agencies; public outreach and education; worker training; policy development, review and publication; and other support functions. Comparable functions in most other federal agency programs are paid for by appropriations from general revenues.
- Funding decisions on the future needs of Superfund should be made by Congress through the normal appropriations process, with funding coming from general revenues. There is no persuasive reason why Superfund today should be treated differently than other EPA programs, or those of other federal agencies.

Overview

It has been suggested in recent years that the Superfund taxes¹ that expired in 1995 should now be reimposed. The two rationales most frequently offered for this suggestion are (1) the need to increase the pace of Superfund cleanups and (2) the need to maintain the “polluter pays” principle.

Neither rationale is persuasive. The Superfund taxes do not control the pace of the cleanup program, so reimposing them would not mean faster cleanups. And Superfund is already a “polluter pays” program to an overwhelming extent, with or without the taxes, so reimposing them would not advance this principle either.

This written statement explains why reimposing the Superfund taxes would not be sound public policy.

¹ There were actually three separate Superfund taxes that expired in 1995: (1) an excise tax on petroleum, (2) an excise tax on certain feedstock chemicals, and (3) a surtax on certain corporate income. Each tax was described separately in the Internal Revenue Code. Some who favor reimposing these three taxes call them the “polluter pays fees.” U.S. PIRG, “Empty Pockets” 5, 12 (December 2005). But in truth, they are taxes, not merely “fees.” See Robert M. Steele, *The Truth About Superfund Taxes*, *Envtl. & Energy Bus. L. Rep.* 4 (Dec. 2006) (ABA), available at <http://www.abanet.org/buslaw/committees/CL400000pub/newsletter/200612/steele.pdf>

Introduction

The most fundamental point, and surely the one most subject to widespread confusion, is the relationship between the three Superfund taxes and the EPA cleanup program. On the one hand, those taxes formerly raised some of the money that was deposited into the Superfund Trust Fund.² On the other hand, the Superfund taxes did *not* control the amount of EPA spending for the Superfund program, and they did *not* control the pace of cleanup.

Specifically, the amount of EPA spending for the Superfund program is determined by Congress each year through the appropriations process. EPA receives a fixed amount of money for the Superfund program, usually something on the order of \$1.3 billion per year. *This annual appropriation is what determines the level of EPA activity.* The Superfund taxes, on the other hand, do not.

Moreover, the original rationale for the Superfund taxes has essentially evaporated as the program has evolved over the past quarter-century. In 1980, the Superfund taxes could be viewed as an aspect of the “polluter pays” principle. EPA would clean up contaminated sites, it was thought, using tax revenues collected from those industry sectors believed to have caused much of the contamination.

² The term “Trust Fund” is somewhat misleading, because it suggests that money in the U.S. Treasury is being set aside to pay for EPA’s Superfund program. But the reality is quite different. Off-budget trust funds, such as the Superfund, do not represent money that is actually “locked up” for a particular purpose. Congress “can raise or lower trust fund collections . . . or change the purposes for which the collections are used[,] by changing existing laws.” U.S. General Accounting Office, GAO-01-199SP, *Federal Trust and Other Earmarked Funds* 7 (2001).

Today, however, the companies that formerly paid the taxes are cleaning up most of the sites on the National Priority List (“NPL”)³ by themselves. EPA performs relatively few NPL cleanups. In fact, EPA spends only about a quarter of its annual Superfund appropriation on NPL cleanups.⁴

Like many other government programs, Superfund today faces a variety of questions regarding its future workload and its funding needs. These include questions as to the relative health risks being addressed by Superfund, the efficiency of the program, and even its importance relative to many other competing priorities.⁵ These questions should be addressed through the appropriations process, as is done with virtually every other federal program. The resulting appropriation for Superfund should be funded from general revenues, again just as is done with virtually every other federal program.

These points are addressed below in greater detail.

³ The NPL is EPA’s list of the contaminated sites that are the highest priority for cleanup. 40 C.F.R. Part 300, App. B (2009). To date, EPA has listed about 1,600 NPL sites. Some sites have been deleted from the NPL following cleanup. Approximately 1,269 sites remain on the list today.

⁴ In FY 2009, for example, EPA received \$1.285 billion for the Superfund program. Out of that total budget, EPA allocated just \$267 million – or 20.7% – for “remedial” activities, broadly defined. U.S. Gov’t Accountability Office, GAO-10-380, *Superfund – EPA’s Estimated Costs to Remediate Existing Sites Exceed Current Funding Levels* 10 (May 2010).

⁵ In FY 2006, for example, Congress appropriated just \$973 million for the Food Safety and Inspection Service, which protects the consumers of meat, poultry, and egg products from potentially fatal diseases that can result from salmonella and other forms of contamination, as compared to \$1,239 million for the Superfund program.

Appropriations – Not Taxes – Control the Level of EPA Activity

The current interest in the Superfund taxes stems from the recent reduction in the average number of NPL sites reaching the “Construction Complete” milestone each year. It is said that the pace of cleanups is slowing, that the real problem is a lack of funding, and that the root cause of this lack is the expiration of the taxes in 1995.

In order to assess this claim, two important facts must be appreciated. First, the reduced number of “Construction Completions” each year is likely attributable to several factors that are fundamental to the Superfund program. These factors have nothing to do with taxes, and they may also have little to do with funding. This first point is addressed below in some detail.

Second, even if funding is a factor, funding is controlled by appropriations – not by the collection of taxes, nor by the amount of money in the Trust Fund at any given time. As explained above, the funds available for use by EPA each year depend entirely on how much money Congress appropriates.

Why Fewer “Construction Completions”?

Turning now to the debate over “Construction Completions,” it is a reality that EPA's process for investigating and cleaning up an NPL site is exceedingly long. This process – referred to as the “remedial pipeline” – was described by Resources for the Future in its July 2001 report to Congress (hereinafter “the RFF Report”).⁶

⁶ Katherine N. Probst & David M. Konisky, *Superfund's Future – What Will It Cost?* (RFF 2001). The “remedial pipeline” includes remedial investigation, feasibility study, remedial design, and remedial action, as well as numerous intermediate steps, draft and final reports, and opportunities for public participation.

EPA has calculated that the *average* duration of this process from start to finish (not counting post-construction operation and maintenance) is *8.1 years*. RFF calculated that a more accurate average duration is *over 11 years*. And even when “Construction Complete” is achieved, long years of operation and maintenance still lie ahead.

Thus, the number of sites that reach “Construction Complete” in any given year is only one measure of progress, and frequently not even the most useful one. An exclusive focus on that single factor can be very misleading. It can actually obscure an accurate evaluation of total progress being made, including the full range of intermediate and ultimate milestones being reached, at all of the Superfund sites where work is underway.

Superfund in fact has made great progress in cleaning up the NPL. After many years of tedious efforts to move sites through the initial stages of the remedial pipeline, EPA has achieved “Construction Complete” at more than 1,080 NPL sites. *With over two-thirds of the NPL sites now having accomplished this objective*, it should come as no surprise that at some point there would be a reduced number of sites reaching that particular milestone each year. This reduction in no way suggests that there has been a decline in the overall level or pace of cleanup activity across the program.

Another factor, perhaps less obvious, helps to explain the reduced numbers of “Construction Completes.” EPA made a deliberate policy choice in the early 1990s to focus first on those NPL sites that could be completed relatively quickly – the “low-

hanging fruit” of the Superfund program – and to defer work on many of the larger, more complex NPL sites.

The payoff from this policy choice was record high numbers of “Construction Completes” throughout the 1990s. But in a way, EPA was robbing Peter to pay Paul. EPA now faces a portfolio of NPL sites that is dominated by larger and more complex sites -- and a public that has grown accustomed to those atypically high completion rates from the early years.

The numbers can be looked at in many ways. In the first 20 years of the program, 757 sites reached the point of “Construction Complete,” 411 of them in the five years from 1996 through 2000. Those statistics yield an average of *82 completions per year* for those five years, but an average of *38 completions per year* for the 20-year period as a whole. Neither “average” is very meaningful, however, because at any given point in time, so much work is being done at so many sites that is just not reflected in the number of sites that happen to reach any single milestone in any particular year.

Manpower and Funding Have Remained Stable

A far better indicator of the total amount of work occurring in any single year is the total level of EPA manpower and expenditures. Significantly, the number of EPA officials and staff working in the Superfund program has remained relatively constant for more than a decade. So too has the level of spending. This fact was confirmed in 2005 by the U.S. Government Accountability Office ("GAO"), which reported that total funding for the Superfund and Brownfields programs and the Superfund-related programs of the ATSDR and NIEHS, in current year dollars, remained relatively constant from fiscal year 1993 to fiscal year 2005 ⁷

In other words, *Congress appropriated roughly the same amount of money for Superfund in each of those 13 consecutive fiscal years.* Moreover, this trend has continued since the 2005 finding by GAO, with Superfund appropriations holding steady at roughly \$1.3 billion from FY 2000 through FY 2009.

Interestingly, Congress appropriated almost the same amount in FY 1995, the last year that the Superfund taxes were still in effect, as it did in FY 2009, nearly a decade and a half after the taxes expired. Those amounts were \$1.224 billion and \$1.285 billion, respectively.

⁷ U.S. Gov't Accountability Office, GAO-05-746R, *Hazardous Waste Programs: Information on Appropriations and Expenditures for Superfund, Brownfields, and Related Programs 2* (June 30, 2005).

There is also the matter of inflation. It is true that Superfund, like every other government program, is subject to inflation as the cost of goods and services rise over time. The FY 2009 Superfund appropriation of \$1.285 billion clearly cannot buy the same amount of goods and services as, say, the FY 2001 appropriation of \$1.270 billion. But whether inflation helps to explain the reduced average number of “Construction Completions” reported in recent years, or whether the reduced totals are due more to the greater challenges posted by the NPL sites remaining in the remedial pipeline, is a subject on which reasonable people may disagree.

The key point, however, is *that none of these issues is in any way related to the Superfund taxes*. As previously explained, EPA’s expenditures for Superfund are controlled by appropriations, and not by taxes. Appropriations, not taxes, are what give EPA money to spend for this program.

We turn now to a brief review of the rationale behind the three Superfund taxes and a summary of why that rationale no longer exists.

No Persuasive Rationale Exists for Reimposing the Superfund Taxes

The Original Expectation That EPA Would Perform Most Cleanups is No Longer Valid.

When Congress enacted Superfund in 1980, it was widely assumed that EPA would perform most of the cleanups, using public funds to pay for them. The prototype of a typical Superfund site was visualized as an abandoned dumpsite.

In that context, imposition of the Superfund taxes seemed a natural mechanism to shift financial responsibility for the cleanups back onto the sectors of society that were perceived to have largely caused the problem. In the early 1980s, EPA in fact did perform most of the investigation and remediation work at contaminated sites. For many companies, their tax payments in those years far exceeded their payments for work at sites, and EPA used its Superfund budget to clean up many sites that had been contaminated mainly by industry.

During the 1980s, however, EPA began to successfully use the law's Draconian liability provisions both to recover EPA's costs from Potentially Responsible Parties ("PRPs") and, more importantly, to require PRPs to perform cleanup work themselves. This evolution in EPA's enforcement approach yielded a much better understanding of the problems that gave rise to Superfund sites in the first place.

As EPA began to identify and confront the responsible parties at sites, it became evident that the original assumption that Superfund sites were created by oil, chemical, and large manufacturing and service companies was incorrect. In fact, the responsible parties include many medium and small businesses and many industrial sectors not subject to substantial – or any – Superfund taxation, as well as local and state

governments, defunct and unidentifiable parties, and, in a surprising number of cases, the federal government itself. Indeed, the federal government has been aptly described as the biggest polluter of them all.⁸

In 1989, a Senate committee report urged EPA simply to find a few deep-pocket PRPs at each site and force them to do the work, using the strong-arm liability power of Superfund. At about that same time, EPA issued its “Enforcement First” policy, which put the responsibility for investigation and cleanup on industry at every site where PRPS could be found, and to reserve the Superfund budget for sites where no PRPs existed.

EPA’s dramatic change in practice was documented in a table printed in the RFF Report.⁹ From 1980 to 1986, PRPs performed the key RI/FS studies at only 24% of the sites, and the cleanup remedy at only 33% of the sites. But from 1991 through 1999, when EPA’s “Enforcement First” policy was in effect, these figures roughly doubled. PRPs performed 46% of the RI/FSs, and 73% of the actual cleanups. EPA understood that this trend allowed it to leverage its Superfund budget far more effectively, and so EPA has worked hard to have PRPs do the work at every site where liable parties can be found.

⁸ The United States owns and manages half a billion acres of land containing more than 60,000 potentially contaminated sites. Federal Facilities Policy Group, *Improving Federal Facilities Cleanup* 17 (October 1995). The government estimates the total cleanup cost associated with these facilities to be between \$234 billion and \$388 billion. *Id.*

⁹ Table 3-2, Comparison of Leads for Remedial Pipeline Actions by Time Period (Percentage), RFF Report at 43.

A recent update of the RFF table is reprinted below:¹⁰

Period (FY)	Remedial Investigation/Feasibility Study		Remedial Design		Remedial Action	
	Fund-Lead	PRP-Lead	Fund-Lead	PRP-Lead	Fund-Lead	PRP-Lead
1980-1986	76%	24%	63%	37%	67%	33%
1987-1990	52%	48%	49%	51%	54%	46%
1991-1999	54%	46%	28%	72%	27%	73%
2000-2008	66%	34%	51%	49%	36%	64%

Table 1: Comparison of Leads for Remedial Pipeline Actions by Time Period (Percentage)

As a result of “Enforcement First,” nearly every existing large corporation whose operations generated contamination has been named as a liable party at nearly every NPL site to which it sent waste. At most of those sites, moreover, the PRPs have performed the cleanup themselves and have even reimbursed EPA for its oversight costs. In a smaller number of cases, most of which predate “Enforcement First,” the PRPs have reimbursed EPA for its expenditures, including its oversight costs and its indirect costs.

Today, virtually the only NPL cleanups that EPA actually pays for are those where no viable PRPs exist – the so-called “orphan” sites. These sites were not contaminated by the companies formerly targeted by the three Superfund taxes. Instead, these sites were contaminated by companies that are now defunct or insolvent, or by other types of generators, such as municipalities. EPA’s narrowly limited role in

¹⁰ Table adapted from Martha Judy & Kate Probst, *Superfund at 30*, 11 Vt. J. Env’tl. L. 191, 215 (2009) (available at <http://www.vjel.org/journal/pdf/VJEL10117.pdf>), and printed with permission of the Vermont Journal of Environmental Law.

paying for cleanups is a fundamental change from the original expectations. It has resulted from the tenacious and successful efforts of EPA to implement its “Enforcement First” policy. And it has eroded the basic rationale for levying the Superfund taxes in the first place.

***Companies Responsible for Contamination are
Paying for Remediation Site by Site.***

It is sound public policy for the government to place the costs for correcting a problem on those who caused it. This often requires discerning judgment to determine when it is possible to identify those who have caused a problem and what costs are attributable to the problems they have created.

Today, existing companies whose wastes contaminated sites are being held directly responsible for cleanup costs, one site at a time. Through their payments to investigate and remediate sites at which they are PRPs, such companies are paying their fair share to address the national problem. In fact, a good argument can be made that most of them are paying far more than their fair share. That result is due to the joint and several liability feature of Superfund.

At most sites it is impossible to identify the origin of much of the waste, so the PRPs that are identified must divide up the total costs among those whose waste was identified. This means that each viable PRP typically pays far more than its proportionate share of the costs to investigate and remediate the site.

Another factor that increases each PRP’s liability is that usually the allocations of responsibility are taking place 30 to 50 years after the waste disposal occurred, and a number of the PRPs that were identified no longer exist. The wastes generated by such

defunct parties are referred to as the “orphan” share. Under joint and several liability, the companies still in operation typically pay that share.

In 1995, EPA partially recognized the excessiveness of that result and agreed to absorb part of that cost, but subject to severe limitations. EPA now absorbs part of the orphan share in certain settlement agreements, but only up to 25% of the cost of the work to be performed under the settlements, and only if that amount can be written off against EPA’s claim for past costs at the same site. The Agency recognized that these constraints meant that responsible parties would still be asked to pay excessive shares.¹¹

At the same time, EPA also committed to join parties in an equitable manner rather than focus on a few of the deep-pocket contributors. But a chemical industry report documented that EPA enforcement efforts continued to be focused on the larger private sector parties alleged to be involved at sites.¹²

In a nutshell, existing large corporations responsible for past disposal of hazardous waste are typically required to pay the full costs of cleaning up the sites where their wastes were sent – including the “orphan” share of those costs. Under this approach, their obligations are discharged in full and then some. Requiring payment of

¹¹ U.S. EPA, “Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time-Critical Removals” (June 1996).

¹² Chemical Manufacturers Association, “A Chemical Industry Perspective on EPA’s Superfund Administrative Reforms” (April 1997).

Superfund taxes on top of that to pay for cleanups at sites contaminated by others would be unjust.

***The Superfund Taxes Are Not Required
to Implement the “Polluter Pays” Principle.***

From the earliest days of environmental regulation, a fundamental principle has been that the polluter should pay the costs of controlling pollution. Recently, this “polluter pays” rationale has been advanced to support an argument that the Superfund taxes should be reimposed. It does not fit.

The Superfund taxes are not needed to maintain the “polluter pays” principle because, as explained above, *Superfund is already overwhelmingly a “polluter pays” program*. At most NPL sites, responsible parties (private companies, DOD, DOE, etc.) pay virtually all the costs themselves. Even at the relatively few sites where EPA pays up front, the Department of Justice typically recovers those costs from any viable responsible parties.¹³ It is usually only at “orphan” sites, where no responsible parties exist, that EPA performs cleanups using general revenues.

As explained above, the companies formerly targeted by the Superfund taxes are already paying their share of the costs at the sites where they are responsible parties, and they are typically paying more than their fair share of costs at those sites. They also paid a large portion of the historic costs of the entire program (through the Superfund taxes) for the many years when the taxes were in effect. In other words,

¹³ As the Chief of DOJ’s Environmental Enforcement Section told a D.C. Bar Association symposium, “The funding issue will have no direct impact on enforcement of Superfund sites.” *24 Hazardous Waste/Superfund Week 151* (April 22, 2002).

these companies paid three times – once as PRPs to remediate their sites, again as the larger solvent parties forced to absorb the orphan shares, and yet again as corporate taxpayers to support the general program. They have more than paid their fair share.

Finally, it must also be recognized that there are other important limitations and exceptions to the “polluter pays” principle under Superfund. Notably, both Congress and EPA have elected to release certain groups of responsible parties from their full liability as PRPs, either by providing preferential settlements (as EPA has done in the case of municipalities and small private parties) or by granting full exemptions (as Congress has done in the case of scrap dealers, certain small businesses, and lenders). In many instances the liability of these parties has effectively been shifted to the remaining PRPs at the sites. These dynamics have distorted the “polluter pays” principle and substituted a “Deep Pocket-Easy Target” policy. It would be unjust to compound this distortion of “polluter pays” by reimposing the taxes on a group that has paid, and is paying, more than its fair share.

***Most of the Money that Congress Appropriates for Superfund
Is Not Used to Clean Up NPL Sites.***

The logic that might once have justified imposing the Superfund taxes is that the money would be used to remediate NPL sites contaminated by the companies, or at least the industry sectors, paying those taxes. As explained above, however, that rationale was overtaken by "Enforcement First."

With private parties performing most of the cleanups at NPL sites over the past 20 years, EPA performs relatively few of them. We would expect to find this long-

standing pattern reflected in EPA's budget, and in fact it is. *The majority of funds appropriated for the Superfund program are not being spent on cleaning up NPL sites.*

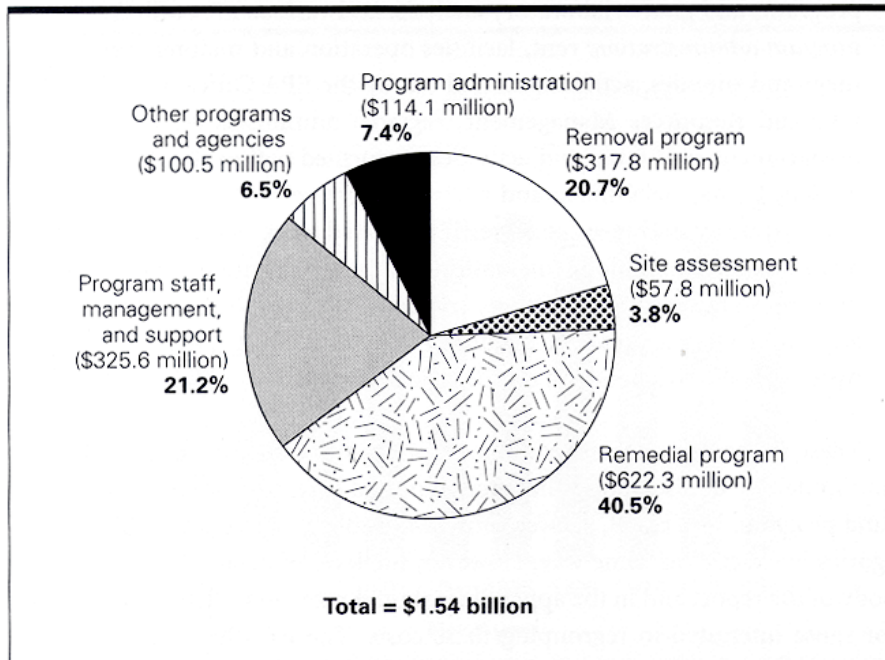
This reality has two key features.

First, the annual Superfund appropriation is immediately reduced each year by transfers from the Office of Solid Waste and Emergency Response ("OSWER"), which runs Superfund, to other EPA offices that provide indirect support, such as the Office of Inspector General, the Office of Research and Development, and the Office of Environmental Information. In FY 2003, for example, these transfers to non-OSWER components exceeded 30% of EPA's total Superfund appropriation.¹⁴ Thus, much of what Congress appropriates each year for Superfund is immediately diverted to EPA support offices that are not involved in cleaning up sites.

Second, of the money that remains within OSWER, only a limited amount is actually spent on NPL cleanups. This can easily be seen in the figure reprinted below from the RFF Report. In 1999, for example, EPA devoted 40.5% (\$622.3 million) of its Superfund appropriation to the NPL Remedial Program, most of it for orphan sites. In that same year, EPA spent 21.2% of the money (\$325.6 million) on program staff, management and support; 7.4% (\$114.1 million) on program administration, and 6.5% (\$100.5 million) on "other programs and agencies."

¹⁴ Final Report, Superfund Subcommittee of the National Advisory Council for Environmental Policy and Technology, at 21 (April 2004) (OSWER retained 68% of total amount appropriated by Congress for Superfund).

Figure 1-2. FY 1999 Expenditures for the Superfund Program



Note: Expenditures associated with federal facilities and brownfields are not included.

Source: RFF IFMS dataset.

The situation has not changed greatly over the last ten years. In FY 2002, for example, EPA spent even less of its Superfund appropriation – 31% (\$415 million) – on the NPL Remedial Program. In that same year, EPA spent 22% on program management and administration, and 10% on “other.”¹⁵ More recently, in FY 2009, EPA spent just 20% of its total Superfund budget on remedial activities, as previously noted.¹⁶

¹⁵ U.S. General Accounting Office, GAO-03-850, *Superfund Program – Current Status and Future Fiscal Challenges* (July 2003).

¹⁶ U.S. Gov’t Accountability Office, GAO-10-380, *Superfund – EPA’s Estimated Costs to Remediate Existing Sites Exceed Current Funding Levels 10* (May 2010).

Importantly, a sizeable share of the Superfund budget is also spent on removal actions – 20.7% (\$317.8 million) in 1999, for example, and 15% (\$200 million) in 2002. Like those NPL sites where EPA performs the cleanups, these removal action sites also tend to be classic “orphan sites”:

The most common source of sites requiring removal activities cited by the regional program managers was a category of “economically marginal” facilities, often mom-and-pop operations that cannot afford to meet regulatory requirements for handling, storage, and disposal of the hazardous materials with which they work. Examples included small electroplating shops, secondary lead smelters, and waste oil recycling facilities.

RFF Report, p. 29.

In sum, EPA uses its Superfund budget for a variety of purposes. Because most NPL cleanups are performed by responsible parties, EPA typically pays for cleanups only at “orphan sites,” and these costs account for about a quarter of the Superfund appropriation. Whether a larger appropriation would produce more cleanups, or faster cleanups, can certainly be debated. What cannot be debated, however, is that reimposing Superfund taxes would have no such impact because (as explained above) the taxes do not control EPA’s Superfund budget.

Superfund Should Run on Appropriations from General Revenues

Virtually every federal government program is funded from general revenues in the U.S. Treasury, with actual spending controlled by the congressional appropriations process. This mechanism can be cumbersome, but it provides the best opportunity for Congress to consider the competing priorities of many different national needs and then balance all expenditures against those priorities.

Whenever a special tax is proposed, one must examine the purpose for which the funds will be used, and the rationale for the special tax, to determine whether an exception to the general rule is justified. *There is no justification today for reimposing three special levies on selected categories of industry in order to raise money for Superfund.*

The federal Superfund program has been in effect for thirty years. Today, four key factors dominate the current state of the program and reinforce the wisdom of funding it through appropriations from general revenues.

Superfund Has Accomplished Most of its Original Mission.

Without question the biggest impact of Superfund was that its Draconian liability provisions focused widespread attention on the potential risks of uncontrolled disposal of hazardous waste. That impact drove a transformation of daily practices throughout industry, government agencies, and the rest of American society. Moreover, since 1980, stringent controls have been imposed under RCRA and other federal and state programs to prohibit improper disposal, so that new high-risk sites are rare – a dramatic contrast to the century before 1980, when there were no controls at all.

In sum, this national problem of hazardous waste disposal is no longer out of control. Superfund is well on its way to cleaning up the sites listed on the NPL, with over two-thirds of those sites already “Construction Complete.” Superfund has a variety of other continuing important functions, but it clearly has completed the biggest challenges assigned to it at its creation.

Superfund Has Been an Extremely Costly Program.

The total costs of administering the Superfund program have been huge. To date, Congress has appropriated some \$35 billion for Superfund, and responsible parties have spent many billions more.

From the outset Superfund has functioned with elaborate administrative procedures and costly standards. It soon became notorious for its enormous transaction costs. Despite numerous efforts at reform, it continues to be a very expensive and very inefficient mechanism for addressing contaminated sites. There are some sites where that approach may be needed, either because of the absence of alternatives or due to special circumstances, but serious questions are raised as to how many sites should be managed in the future through this exceedingly costly and slow program.

***Most Superfund Sites No Longer Present Any Immediate Risk
to Human Health or the Environment.***

The most fundamental question in evaluating the priority of contaminated sites today is whether they present any immediate risk. In overwhelming numbers, the answer to that question today is "no."¹⁷

“Potential risk” or “future risk” is another story. The contamination at many sites is sufficiently serious that, if neglected, it could cause problems at some point in the future.¹⁸ But in most cases those potential risks have already been brought under control through existing remedial measures, or can be with moderate activities and reasonable care. It is rare indeed today to “discover” a new site with risks that are truly imminent. These circumstances do not suggest that strong governmental programs will not be required for far into the future, but they do affect the scale and priority of those needed efforts.

¹⁷ As of September 30, 2009, EPA reported that 1,320 NPL sites (more than 83% of the total) had achieved the Environmental Indicator for "human exposure under control," meaning that no unacceptable human exposure pathways exist and EPA has determined that current conditions are under control sitewide. See <http://www.epa.gov/superfund/accomp/ei/ei.htm#sitewide>

¹⁸ The Sierra Club has claimed that “hundreds of Superfund sites pose threats to people’s health” because they have not yet achieved EPA’s Environmental Indicator for “human exposure under control.” See “Superfund’s 25th Anniversary” (December 2005.). But not achieving this Environmental Indicator does not necessarily equate to risk. Under EPA’s definition, even the mere “*possibility* . . . that humans *may* come into contact with the contaminated media” keeps a site from meeting this Indicator. So the sites that do not yet meet this Indicator may not “pose threats” to anyone.

State Programs Now Normally Provide a Viable Alternative.

During the past two decades, virtually all states have enacted legislation and have established programs to manage the cleanup of contaminated sites.¹⁹ *The overwhelming majority of America's contaminated sites are in fact now being managed by those state programs.* As the emphasis has recently increased on returning sites to productive use, states and local governments closer to the plans and needs of local communities may be better able to manage growing numbers of such sites in the future. The point here is not that states should pay for all, or even most, of these cleanups, but rather that states should manage the process through which the PRPs pay for them.

These four key factors affecting Superfund today implicate the same sorts of balancing questions that are raised by other federal programs and are routinely addressed through the annual appropriations cycle. These are questions of *relative* need and *relative* urgency. These are also questions that Congress deals with every single day. There is simply no reason to single out the Superfund program by levying additional taxes.

¹⁹ Environmental Law Institute, "An Analysis of State Superfund Programs: 50-State Study, 2001 Update" (2002).

Conclusion

In conclusion, several factors combine to reinforce the view that reimposing the three Superfund taxes would be bad public policy:

Taxes do not control the Superfund budget or the pace of EPA activity. On the contrary, the Superfund budget, which is set by Congress each year through the appropriations process, determines the pace of EPA activity.

Most cleanups at NPL sites – roughly 70% – are performed by PRPs, not by EPA.

The Superfund taxes are not needed to maintain the “polluter pays” principle, because the companies formerly targeted by those taxes have already paid more than their full share of cleanup costs. As PRPs, they paid directly to study, clean up and reimburse federal and state government for their costs to oversee cleanup at the sites they contaminated. As relatively deep pockets, they paid again by absorbing the "orphan" shares of many exempt, defunct, and unknown parties at these same sites. And as corporate taxpayers up until 1995, they paid yet again.

A small fraction of EPA’s Superfund appropriation is spent on cleaning up NPL sites. EPA spends its Superfund budget on many other things, such as administration; management; interagency and intra-agency coordination; research; grants to other agencies; public outreach and education; worker training; policy development, review and publication; and other support functions. Comparable functions in most other federal agency programs are paid for by appropriations from general revenues.

Funding decisions on the future needs of Superfund should be made by Congress through the normal appropriations process, with funding coming from general revenues. There is no persuasive reason why Superfund today should be treated differently than other EPA programs, or those of other federal agencies.