

The Truth About Superfund Taxes

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The federal Superfund² program has always suffered from a split personality. In creating a system for cleaning up old and new hazardous substance sites and for allocating money to fund the program, was Superfund supposed to be a harsh punishment regime directed against “evil corporate polluters” who caused the contamination? Is this so even if many parties with Superfund liability did nothing wrong and followed existing law, best practices, and even government direction at the time of their past waste disposal activities? Or was Superfund supposed to be an emotion-free economic scheme to raise the funds needed for the massive historical cleanup job confronted by the nation in 1980 and thereafter? Is this so even if it means assessing the costs to certain companies just because they or others like them may have benefited in years past from cheap disposal options and a lack of environmental regulation (whether they knew it or not)? Did it also intend to spread the costs to all taxpayers because we all have an interest in repair of the environment and protection of

public health by acting now to make up for society’s past legal and scientific oversights?

The answer is ... *all of the above*. Superfund is paid for by asserting pervasive and often unfair liability against private parties connected to its sites, together with and supplemented by an actual trust “Fund” supported by taxes and other general sources of revenue. From this combination of mechanisms and cross-purposes, EPA and American business (and state governments too) have been tackling the job of Superfund site remediation for over 25 years with the full legacy of litigation, politics, and controversy that has come along with it.

Under the original CERCLA statute of 1980 the Fund itself was supported by taxes on crude oil and on certain chemical feedstocks, plus general revenues as a public share of responsibility even from the beginning, at a total initial target level of \$1.6 billion over five years. That level was acknowledged at the time as likely to be inadequate to accomplish the widening goals of the cleanup program. In the later debate on Superfund reauthorization and amendment, many ideas were put forth and argued as to necessary appropriation levels and proper mechanisms for funding beyond the original sources and as supplemented by cost recoveries, penalties, and reimbursements obtained from responsible/liable parties. The final choices made in the [SARA enactment of 1986](#) were to increase CERCLA appropriation levels, and also to establish a separate federal Leaking Underground Storage Tank account, by increasing the existing tax on crude oil and imported petroleum products. In addition, the existing chemical feedstocks tax was

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² [Comprehensive Environmental Response, Compensation, and Liability Act](#), 42 U.S.C. §§ 9601 *et seq.*, (“CERCLA” or “Superfund”), first enacted in 1980 and as subsequently amended over the years.

continued, a new tax on certain imported chemicals was created, and a new “corporate environmental income tax” was imposed on a wider range of companies – all together to raise approximately \$7 billion over 5 years. Moreover, general tax revenues of \$1.25 billion over that same 5 years were also allocated, to join cost recoveries from private parties plus interest to make an \$8.5 billion Superfund resource for the 1986 to 1991 period. From 1991 to 1995, the special taxes supplied 66% of the trust Fund’s dollars, general tax revenues accounted for 17%, and other sources also 17%.³

After 1986, Superfund entered its busiest period with billions of dollars applied by potentially liable parties and by EPA to actions at thousands of listed and non-listed sites. However, all of the special Superfund taxes terminated on December 31, 1995 and have not been renewed since then. As the unobligated balance of the Fund has been used up and not replenished by these special taxes in the last decade, increased general tax revenues have instead been appropriated by Congress to meet EPA’s Superfund needs. But total program funding levels have fallen over this time too. In this circumstance and especially after the Bush Administration took office in 2001, efforts in Congress to reinstate the Superfund taxes began in earnest. In each session bills not supported by EPA have been proposed or introduced, sometimes stand-alone and sometimes coupled with CERCLA reforms or amendments, to resume taxing oil and chemical companies as well as many other industries for this purpose. These efforts have been accompanied by much fevered rhetoric about overall site cleanups slowing

³ See CRS Report for Congress, [“Superfund Taxes or General Revenues: Future Funding Options for the Superfund Program,”](#) as updated March 7, 2005 and March 15, 2006. Certain other data referenced in this article is also taken from this CRS Report.

down, about work starts and finishes being delayed by EPA, about the so-called “polluter pays” principle, and about allegedly burdening the taxpayers with cleanup liabilities that private wrongdoers used to bear in full. The average member of the public reading press reports may be led to believe that Superfund has been entirely a government-works, EPA-performed and Fund-led site cleanup program that was funded entirely by culpable “polluters” through these special taxes, and now those big corporations are not paying anything while the innocent general public must pick up the tab.

What is the truth behind the often misleading statements and attempts at partisan political gain and gamesmanship? While a full or detailed analysis of Superfund dollars, milestones, and site numbers is far beyond the scope of this article, what are some key facts to consider when looking at the current Superfund funding debate?

First, as recognized by EPA and the Congressional Research Service, regardless of the taxes, at a majority of sites Superfund cleanups *are* paid for directly by the liable parties. That percentage of sites and costs has always been substantial after 1986 and lately it has remained over 70%. That is the result of Superfund’s stated or interpreted strict, retroactive, joint and several liability for site owners, operators, transporters, and arrangers for disposal, regardless of compliance or fault. These parties are still doing vast investigation and cleanup work up front rather than EPA doing it and the parties then reimbursing EPA later on (the higher-cost scenario). These parties still have to pay EPA oversight costs. Often these parties also have to bear the burden of finding and obtaining contribution from other liable parties that EPA has not contacted or pursued. Where such sites have “orphan shares” attributed to bankrupt,

defunct, missing, or legally excluded companies, these parties doing the work and bearing the costs often are paying for these missing shares as well (unless EPA forgives or contributes some of that total). Thus, even without the Superfund taxes, the “polluters,” and many others who should not be called polluters but are caught in CERCLA’s no-fault liability web, and not the Fund itself, are already paying for the sites where they are or arguably may be liable.

At the minority of sites where there are no identifiable, solvent, or viable private parties with liability, EPA can proceed with response and cleanup using the Fund’s resources with or without later cost recovery from anyone. These sites, together with much of EPA’s costs of management, support, administration, and enforcement of the Superfund program, are indeed paid for from the hazardous substances Superfund. Without the special taxes, its sources of funding have included reimbursements, penalties, damages, interest, and general revenue appropriations made and increased by Congress now to reach over \$1 billion annually. Also, it seems true that these resources and funding levels have only barely kept up with unmet program needs especially as the number of “mega-sites” taking longer and costing more, and sometimes without private liable parties available, continue to take up more of EPA’s Fund dollars.

Despite its many well-known problems and inefficiencies, and despite the more recent preeminence of state cleanup programs including brownfields and voluntary site variations, Superfund as a federal program deserves continued existence and adequate funding for many good reasons. An unobligated Fund balance and sufficient appropriations allow EPA to take necessary response actions and help to leverage the touted private party site

performance levels. Superfund should also be supported despite competing interests under tight federal budgets. But setting its annual budget level, and the sources of its appropriations, are *two separate issues*.

So why not reinstate the prior special Superfund taxes to pay for the continued needs of the program? The primary reason is that instead of upholding a “polluter pays” principle, such a move would in fact be more of a “*polluter pays twice*” decision. The companies that bore those taxes before and would likely bear them again have already stepped up to the plate (whether voluntarily or under compulsion) at most if not all CERCLA sites where factual evidence connects them to the sites and their liability is established under the law’s very broad reach. These companies have paid many hundreds of millions of dollars to reclaim the environment from the legacies of the industrial revolution and Cold War when society had not yet understood about environmental damage or chosen to enact controls or to elevate environmental values to a higher level as in current times. These same parties also bear the transaction costs, orphan shares, and natural resource damages of “their” sites, often far out of proportion to their respective “fair shares” or any arguable level of culpability for their actions.

Now as a policy choice are we going to have these same existing viable companies be penalized again and pay also for all of the other sites *not* associated with them (or else they would have been named as liable parties there too), based on some vague idea of collective profit or collective “guilt” in that companies like them typically handled these chemicals and must have wrongly created these sites? If so, why go to all of the trouble of developing facts and proof of connection and allocations for specific parties at most Superfund sites under the law’s strict liability system? Are these

companies now to pay for it when a competitor goes bankrupt and leaves the competitor's Superfund liability in the hands of EPA at sites unconnected to them? Are these companies to be made to pay again when Superfund contains a petroleum exclusion such that fuel and petroleum product releases (absent added hazardous substances and wastes) are not even eligible to be Superfund sites in the first place? Are these companies to pay extra while facing foreign competition often without such burdens, and thus have limited ability to spread the costs to the companies' customers and the general economy by increasing the prices of their goods and services? Or are the continuing but evolving needs of the Superfund – beyond the 70% already paid up front by these companies, plus EPA's other recoveries, damages, and reimbursements mostly from them as well – better funded by spreading the remaining cost over the larger body of benefiting citizens as with most governmental programs for the public good and that seek to correct past regulatory failures? Such taxpayer program examples arguably include federal budgets covering the savings and loan crisis of the 1980's, appropriations for disaster recoveries, and the general tax-derived billions being spent to clean up Department of Defense and Department of Energy facilities with historic environmental problems.

No doubt there are some reasonable policy arguments that can be made for reinstatement of the expired Superfund special taxes, despite their targeted nature or “doubling” of the Superfund burden on its recipients. Perhaps the best have to do with dedicating sources only to Superfund to help fend off other federal appropriation priorities, while the worst may be simple anti-business, anti-capitalism bias. But most such arguments – such as the need to have enough money there to threaten Fund cleanup first or otherwise enforce private

parties' response actions – have more to do with maintaining adequate Fund size rather than the appropriateness of the special taxes mechanism as the best way to do that. Perhaps in the prevailing mood of 2006, sincere proponents of special taxes could try to make a case for selective taxation to capture alleged energy company windfall profits, with those revenues then dedicated to the Fund and other purposes albeit unrelated to oil or responsibility for Superfund sites. That, too, may be fraught with peril and unfairness. But if any such action is considered, it should be discussed and weighed in an honest manner perhaps accompanied by an abolition of CERCLA's private party liability scheme altogether if targeted industry taxes are to become the norm for future remaining Superfund program funding. Any debate over what policies are the most sound, and what choices are fair or make sense in a macroeconomic view, should not be obscured by false rhetoric and political posturing over how tax reinstatement is required by the “polluter pays” principle and how that concept is now somehow lost without these taxes.⁴

Under current law, where there is an identifiable and viable responsible party and liability is shown, that party already pays – even if it is not a “polluter” in that word's commonly understood and morally tinged meaning. These companies also paid the special taxes before but were not the only types of persons and institutions that contributed to historical Superfund sites, nor

⁴BNA *Environment Reporter*, Current Developments, Vol. 36, No. 49, p. 2580, quoting only one example of many: “...without polluter fees [Superfund] is being short-changed and important cleanups that will improve the health and safety of millions of Americans are being ignored.” Rep. Hinchey (D-N.Y.) 12/16/05. Even if reinstated, Congress must still appropriate the revenues of these taxes to Superfund annually.

did they even contribute the most wastes or contamination at many sites. The rest of the cost of Superfund should arguably be everyone's responsibility.⁵

Instead of red herrings, let us have a serious debate over how best to fund that minority portion of the total Superfund program price tag that is not already being paid for by industry and other private parties, what total program funding levels are truly needed now and going forward, and how best to implement these choices to protect health and the environment while distributing the additional incremental burden equitably within the economy. Only when that honest discussion is held and acted upon can Superfund's financial future be secured by well-informed decisions while not mistakenly increasing its longstanding impact on American business.

⁵ A recent and much more in-depth look at the evolution of the so-called "polluter pays" principle and CERCLA legislative history may be found in P. Bohannon, "Superfund Mega-Sites: Is the Polluter Pays Principle All There is to Allocating Environmental Liability?," *BNA Environment Reporter*, Vol. 37, No. 35, p. 1870, 9/8/06.