1-1-1993

Superfund Contractors and Agency Capture

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INTRODUCTION

Since the 1950s, commentators have been concerned about the "capture" of administrative agencies by the industries they regulate.[1] From the time the federal Environmental Protection Agency (EPA or the Agency) was created in 1970, there has been concern that regulated industries or even EPA's own bureaucracy would capture the Agency.[2] Today, there is considerable disagreement regarding whether EPA has been captured. Professors John P. Dwyer[3] and Richard J. Lazarus[4] each have argued that the tradi-

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[1] *See generally* MARVER BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 74-95, 169-71 (1955)(asserting initial public interest leads to creation of regulatory commissions, but after public interest dissipates, regulated industry tends to capture its regulators); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952)(discussing how railroad industry captured Interstate Commerce Commission); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS: JUDICIAL CONTROL OF ADMINISTRATION 65-66 (1988)(discussing pluralist political theory, social psychological, and economic explanations of regulatory capture); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 74-88 (1990)(discussing capture of regulatory agency by its regulated industry); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212-13 (1976)(same); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-86 (1975)(same). A leading administrative law treatise defines agency capture as follows: "An agency is captured when it favors the concerns of the industry it regulates, which is well-represented by its trade groups and lawyers, over the interests of the general public, which is often unrepresented." RICHARD J. PIERCE, JR., ET AL., ADMINISTRATIVE LAW AND PROCESS § 1.7.2 (2d ed. 1992). During the late 1960s and early 1970s, Ralph Nader and his associates popularized the notion of regulatory capture, convincing Congress to enact reform measures to prevent capture. *See* EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 44-45 (1982).

[2] *See* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 L. & CONTEMP. PROBS. 311, 315-17 (1991).

[3] *See* John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 309-10 (1990).

tional agency capture model does not apply to EPA. The congressional Office of Technology Assessment (OTA), however, in a study focusing on EPA's Superfund program rather than on EPA itself, essentially charged that certain EPA contractors have captured the Superfund program.[5]

Traditional agency capture theory focuses on the regulated industry's control of an entire agency. Yet, programs within agencies are subject to extrinsic control or influence. This Article explores the extent to which EPA's own contractors, along with the hazardous waste treatment industry and environmental groups, have captured the Superfund program and have pushed it to excessive spending. Additionally, this Article will examine the role of parties potentially responsible for cleanup costs in seeking to reduce those costs.

Generally, contractors hired to clean up waste sites reinforce EPA's tendency to adopt risk adverse, but often expensive, strategies for cleanup. This influence over EPA decisions is often abused. This Article will explore solutions designed to curb abuse and to reduce expenditures that do little to improve the public health or environment. Reform designed to minimize abuse is essential, particularly since Superfund contractors will likely continue to participate in many future cleanups.

Part I of this Article briefly reviews the history of Superfund contractors' involvement in the program and discusses how CERCLA[6] settlement procedures affect EPA's use of contractors. Part II introduces issues relating to agency capture theory. Part III examines whether Superfund contractors have captured or unduly influenced the program. Finally, Part IV discusses ways in which EPA can improve the management of its contractors.

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[4] Lazarus, *supra* note 2, at 364-66.

[5] *See generally* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, OTA-BP-ITE-51, ASSESSING CONTRACTOR USE IN SUPERFUND: A BACKGROUND PAPER OF OTA'S ASSESSMENT OF SUPERFUND IMPLEMENTATION 21 (1989)[hereinafter OTA ASSESSMENT]. *See also infra* notes 176-79 and accompanying text.

[6] CERCLA, discussed below, is the Comprehensive Environmental Response, Compensation, and Liability Act. 42 U.S.C. § 9601 (1988). It is a statutory scheme designed to remedy hazardous waste problems created by years of unregulated hazardous waste disposal. Alice T. Valder, Note, *The Erroneous Site Selection Requirement for Arranger and Transporter Liability Under CERCLA*, 91 COLUM. L. REV. 2074, 2075 (1991). CERCLA created a "Superfund" that EPA could draw on when in need of funds to clean up the worst hazardous waste dumps. 42 U.S.C. § 9631 (1988). See also *infra* note 7.

I

CERCLA AND ITS CONTRACTORS

Many commentators have discussed the statutory provisions of the Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA), but few have emphasized the critical role contractors play in implementing the Superfund program. This Article assumes the reader is familiar with CERCLA's statutory framework, and will focus on provisions relating to EPA contractors.

Under CERCLA,[7] EPA has the authority to recover from potentially responsible parties (PRPs)[8] "all costs of removal or remedial action not inconsistent with the national contingency plan (NCP)."[9] CERCLA instructs EPA to develop a national priority

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[7] In response to fears concerning abandoned toxic waste dumps, Congress, in 1980, hastily enacted CERCLA; the sparse legislative history, because it failed to indicate how the statute intended EPA to fulfill its comprehensive cleanup goals, sowed seeds for controversy. *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982). *See generally* H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 1, *reprinted in* 1980 U.S.C.C.A.N. 6119 (legislative history of CERCLA). For a discussion of CERCLA's statutory structure and history, see Bradford C. Mank, *The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster*, 19 B.C. ENVTL. AFF. L. REV. 239, 243-48 (1991).

[8] *See* 42 U.S.C. § 9607(a) (1988). While CERCLA did not set forth an explicit liability standard for PRPs, courts have generally adopted EPA's arguments favoring expansive PRP liability. *See* Mank, *supra* note 7, at 244. Courts have held that all PRPs at a site, including present and past owners or operators of the site, generators of hazardous substances who arranged for disposal at the site, and transporters who delivered these substances, are jointly and severally liable for the entire cost of the cleanup, even if some had made only a minimal contribution to the contamination. United States v. Monsanto Co., 858 F.2d 160, 171-72 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). *See also* Mank, *supra* note 7, at 244. A PRP may be liable for contamination that occurred before the enactment of the statute, even if it had followed commonly accepted, legal disposal methods. *See, e.g. Monsanto*, 858 F.2d at 173-74; United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732-34 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); Mank, *supra* note 7, at 244. EPA can sue a single PRP for the entire cost of a site's cleanup, requiring the PRP to bring contribution actions against other PRPs, some of whom may be bankrupt, unidentifiable, or dissolved. *See, e.g.*, United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1048 (D. Mass. 1989), *aff'd* 899 F.2d 79 (1st Cir. 1990); Mank, *supra* note 7, at 244. There are few viable defenses for PRPs. *See generally* Mank, *supra* note 7, at 246.

[9] 42 U.S.C. § 9607(a)(4)(A) (1988). CERCLA's legislative history suggests Congress intended that PRPs fund cleanups to the greatest extent possible; some congressional proponents of the legislation stated that the $1.6 billion Superfund would be inadequate to address the hazardous waste problem and that PRPs would have to fund much of the cost. *See* Michael P. Healy, *Direct Liability for Hazard-*

list (NPL) of sites which pose the greatest danger to public health and the environment.[10] At the time of enactment, Congress approved $1.6 billion in funding over five years for a special government trust fund (the Superfund) to help finance cleanups.[11]

EPA prefers that PRPs pay for, or actually implement, the cleanups themselves so that Superfund monies are available for emergencies and situations where no viable PRPs exist.[12] However,

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ous Substance Cleanups Under CERCLA: A Comprehensive Approach, 42 CASE W. RES. L. REV. 65, 72-76 (1992). In United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982), the court stated that Congress intended PRPs to bear the cleanup costs. *See also* Cadillac Fairview/Calif., Inc. v. Dow Chem. Co. 840 F.2d 691, 694 (9th Cir. 1988)(CERCLA promotes private cleanups); Solid State Circuits, Inc. v. United States Envtl. Protection Agency, 812 F.2d 383, 387-88 (8th Cir. 1987)("Since Superfund money is limited, Congress clearly intended private parties to assume clean-up responsibility."); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081-82 (1st Cir. 1986)(Superfund inadequate to address problem so PRP liability provisions essential). In 1986, Congress specifically authorized PRP-conducted cleanups. 42 U.S.C. § 9622(a) (1988). *See also* Healy, *supra*, at 76 n.36.

[10] EPA uses the Hazard Ranking System (HRS) to rank sites in cleanup priority and to consider their inclusion on the NPL. 42 U.S.C. § 9605 (1988); 40 C.F.R. pt. 300 app. A (1992). *See also* Ragna Henrichs, *Superfund's NPL: The Listing Process*, 63 ST. JOHN'S L. REV. 717, 729-37 (1989).

[11] 42 U.S.C. § 9631 (1982)(provision establishing Superfund); *id.* § 9611 (current provision regarding Superfund). *See also* Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, § 517(a), 100 Stat. 1613, 1772 (1986)(codified at 26 U.S.C. § 9507 (1988))(establishing the "Hazardous Substance Superfund"); 42 U.S.C. § 9611(a)(1) (1988)(authorizing the use of the Superfund to pay the cost of government response actions under 42 U.S.C. § 9604 (1988)); William W. Balcke, Note, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 123 (1988). Under the 1990 Superfund reauthorization, Congress added $5.1 billion for the 1991 through 1995 fiscal years, bringing the total funding for the program since 1980 to $15.2 billion. *Program Management by EPA Must Improve for Funding to Continue, Panel Chairman Warns*, 23 Env't Rep. (BNA) 678, 679 (1992)[hereinafter *Program Management*].

[12] The Agency seeks as much cleanup money as possible from PRP contributions. *See* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982); Mank, *supra* note 7, at 244 n.29; Owen T. Smith, *The Expansive Scope of Liable Parties Under CERCLA*, 63 ST. JOHN'S L. REV. 821, 821 (1989); *Enforcement Effort Has Been Inefficient, May Cause Cleanup Delay, Rand Report Finds*, 20 Env't Rep. (BNA) 826 (Sept. 15, 1989)[hereinafter *Enforcement Effort*]. EPA prefers to use Superfund monies only where it is unable to identify PRPs, when PRPs are unable to reach a private settlement under which they will conduct the response, or when PRPs refuse to comply with cleanup orders issued under § 9606 of CERCLA. *See* Eugene P. Brantly, Note, *Superfund Cost Recovery: May the Government Recover "All Costs" Incurred Under Response Contracts?*, 59 GEO. WASH. L. REV. 968, 973 (1991). In practice, however, EPA is flexible when compromising with PRPs over who will conduct the cleanup and who will contribute in funding the cleanup to settle litigation. Although EPA is usually successful at suing PRPs, litigation is costly and time-consuming. *See* THOMAS W. CHURCH ET

in reality the CERCLA process, which often entails lengthy site investigations and litigation, frequently leads the Agency to perform the cleanup itself and later bring legal action against PRPs for reimbursement.

A. *The History of Superfund Contracting*

At the time CERCLA was enacted, key actors in both Congress and EPA favored using private contractors, rather than a special agency bureaucracy, to implement the Superfund program.[13] Not only was it felt that private contractors could execute the Superfund program more quickly, but the program itself was expected to be short-lived.[14] Thus, from the beginning, EPA contractors have performed most of the cleanup work.[15]

When EPA studies and cleans up a Superfund site using government funds,[16] it usually employs a private engineering or envi-

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AL., WHAT WORKS? ALTERNATIVE STRATEGIES FOR SUPERFUND CLEANUPS 20, 38, 103 (1991)(study sponsored by Clean Sites); Balcke, *supra* note 11, at 130-31. Large sites often involve dozens or hundreds of PRPs. *See* CHURCH, *supra*, at 20 (600 PRPs at Laskin Poplar Oil Site in Jefferson, Ohio); Balcke, *supra* note 11, at 131 n.46 (nearly 400 PRPs at one site). The waves of cross-claims filed by numerous PRPs can result in lengthy delays and escalating costs for all concerned. *See* CHURCH, *supra*; Balcke, *supra* note 11, at 131. EPA has sought to minimize transaction costs by suing only the obvious or major, deep-pocket PRPs, but has often failed in resolving substantive remedial issues before defendants assert cross-claims against third-parties for contribution. *See* CHURCH, *supra*; Balcke, *supra* note 11, at 131.

[13] *See* OTA ASSESSMENT, *supra* note 5, at 21.

[14] *See generally id.* Professor Healy argues that Congress was aware in 1980 that $1.6 billion was inadequate to address the cleanup of all hazardous waste sites and that some members anticipated that the CERCLA liability system would need to replenish the Superfund. *See* Healy, *supra* note 9, at 74-75.

[15] *See* OTA ASSESSMENT, *supra* note 5, at 21.

[16] EPA may conduct a cleanup using Superfund monies and recover these costs from the PRPs. 42 U.S.C. § 9611(a)(1) (1988). *See also id.* §§ 9604 (government can clean up), 9607 (government can recover costs); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 731 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987)(CERCLA authorizes EPA to recover costs from responsible parties). CERCLA distinguishes between short-term removal actions to stop releases or threatened releases which pose an immediate threat to the public, and long-term remedial actions to clean up a site on a more or less permanent basis. 42 U.S.C. § 9604(a) (1988). Because removal actions are more likely than remedial actions to involve the expenditure of Superfund monies and require fewer studies to determine the best cleanup approaches, § 9604(c)(1) limits removal actions to $2,000,000 and a maximum of twelve months from the date of a release or threatened release of a hazardous substance unless there is an emergency posing an immediate risk to the public health or welfare that will not otherwise be addressed on a timely basis, the President has determined the appropriate remedial action pursuant to § 9604(c)(2) and a state has complied with § 9604(c)(3), or continued

ronmental firm (Superfund contractor) to evaluate site conditions and to select, design, and implement appropriate remedies.[17] Even when a PRP conducts the cleanup, a Superfund contractor often supervises the work.[18] However, as discussed below, this contractor involvement has not been without problems. Studies have identified excessive contractor costs, poor quality work, and poor EPA supervision of contractors.[19] Also, Superfund contractor cleanups are apparently much more expensive than PRP-conducted cleanups.[20]

By 1986, it was clear that the problem of abandoned hazardous waste sites was far greater than originally contemplated. There were estimates that 1500 to 10,000 sites existed and that the cleanups of these sites would cost between $10 to $100 billion.[21] In re-

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response action is otherwise appropriate and consistent with the remedial action to be taken. 42 U.S.C. § 9604(c)(1). *See also* 40 C.F.R. § 300.415(d) (1992)(listing types of removal actions). Pursuant to the Superfund Accelerated Cleanup Model (SACM), EPA is seeking to combine the removal and remedial programs into a single streamlined process in which both types of work can proceed simultaneously depending upon individual site conditions; under this process, the Agency would view the removal and remedial programs as separate legal authorities, but not as separate programs. Barnett Lawrence, *EPA's Superfund Accelerated Cleanup Model: A Paradigm for CERCLA Reauthorization*, 23 Env't Rep. (BNA) 2962, 2963 (Mar. 12, 1993). Under SACM, EPA has created a new intermediate category of "early action cleanups," which during a three to five year period would seek to combine the easier aspects of a remedial action with the initial removal action to facilitate faster cleanups, but would not attempt long-term remediation projects for sites requiring ground water restoration or other complicated work. *Id.* at 2964. The early action category would thus be an expansion of EPA's removal authority and therefore the Agency has relied upon the consistency exception in § 9604(c)(1)(C) for nontime-critical actions that exceed the $2,000,000 per twelve month limits. *Id.* at 2964-65. SACM's emphasis on expedited removal actions has the potential to conflict with the EPA's policy of getting responsible parties to peform cleanups whenever possible, instead of relying on fund-financed cleanups. *Id.* at 2965. Additionally, EPA may under certain conditions compel the private parties to perform cleanups. 42 U.S.C. § 9606(a). To abate "imminent and substantial endangerment" to the public health caused by an actual or threatened release of a hazardous substance, EPA can require PRPs to undertake the response action themselves. *Id.* Further, EPA can seek injunctive relief in a United States District Court or issue administrative orders against PRPs. *Id.*; Balcke, *supra* note 11, at 129. EPA can impose fines of up to $25,000 per day for failure to comply. 42 U.S.C. § 9606(b)(1). Noncomplying PRPs are subject to fines triple the amount EPA incurs in a site cleanup. 42 U.S.C. § 9607(c)(3).

[17] *See* Brantly, *supra* note 12, at 968.

[18] *See infra* notes 87-88 and accompanying text.

[19] *See* Brantly, *supra* note 12, at 969; *infra* notes 32-35, 44-47, 140-42, and accompanying text.

[20] *See* discussion *infra* section III.A.2.

[21] Balcke, *supra* note 11, at 124. By 1989, EPA had compiled an inventory of 27,000 sites, listing more than 1000 on the NPL. COUNCIL ON ENVIRONMENTAL QUALITY, TWENTIETH ANNUAL REPORT 162-63 (1989). *See also* Mank, *supra*

sponse to these estimates, the Superfund Amendments and Reauthorization Act (SARA),[22] passed in 1986, increased the Superfund to $8.5 billion and reauthorized the fund for an additional five years.[23]

After Congress enacted SARA, EPA realized that it had to improve its contracting for, and its management of, cleanup work.[24] Such reform was necessary because SARA required the Agency to clean up many more sites than it originally expected.[25] Accordingly, EPA took action. First, it sought to expand the number of contractors available to handle the increased amount of work and hopefully to lower cleanup costs.[26] Second, the Agency, through its regional offices, sought to decentralize the management of its Superfund contracts. The decentralization was supposed to accelerate cleanups and improve EPA oversight of Superfund contractors.[27]

Part of EPA's action to improve management of Superfund contractors was to establish, in 1988, the Alternative Remedial Contracting Strategy (ACRS).[28] ACRS was intended to improve EPA's contract management and award procedures by using more contractors to perform remedial operations and by employing EPA

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note 7, at 242 n.16. EPA has estimated a cost in excess of $30 billion to clean up just the NPL sites. *See Year-Long Study Set to Evaluate Alternative Superfund Financing*, 21 Env't Rep. (BNA) 2131 (Mar. 29, 1991); Mank, *supra* note 7, at 242. OTA estimated the total cost of cleaning up hazardous waste sites over the next fifty years could reach $500 billion, excluding the costs of cleaning up Department of Energy facilities. OTA ASSESSMENT, *supra* note 5, at 1. *See also* Healy, *supra* note 9, at 67 n.2, 73-74 n.29 (discussing OTA report).

[22] PUB. L. NO. 99-499, 100 Stat. 1613 (1986)(codified at 42 U.S.C. §§ 9601-9675 (1988)).

[23] *See* 42 U.S.C. § 9611 (1988). Although due for revision in 1991, Congress simply reauthorized CERCLA's existing statutory scheme until 1994. Mank, *supra* note 7, at 245; *Cleanup Program Extended for Three Years, Tax Authority for Four Years in Budget Bill*, 21 Env't Rep. (BNA) 1243 (Nov. 2, 1990) [hereinafter *Cleanup*]. Congress reauthorized the Superfund program without change until September 30, 1994, and the Superfund itself until December 31, 1995. Mank, *supra* note 7, at 245; *Cleanup*, *supra*. The new legislation funds the program at $5.1 billion from October 1, 1991, to September 30, 1994. Mank, *supra* note 7, at 245 n.40; *Cleanup*, *supra*.

[24] *See* ENVIRONMENTAL PROTECTION AGENCY, EXECUTIVE SUMMARY OF EPA ALTERNATIVE SUPERFUND CONTRACTING STRATEGY REPORT (Oct. 1, 1991)[hereinafter CONTRACTING REPORT], *reprinted in* 22 Env't Rep. (BNA) 1505, 1506 (Oct. 4, 1991).

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1506-07.

[28] *Id.* at 1507.

regional offices to exercise more continuous supervision of the remedial process.[29] Between January 1989 and June 1989, the Agency awarded forty-five long-term ACRS contracts, each lasting up to ten years, to twenty-three contracting firms; the contracts carried a potential full-term value of about $6.6 billion.[30] The forty-five contracts were distributed among EPA's ten regional offices based upon the regional offices' anticipated needs.[31] ACRS contracts are discussed more thoroughly below.

By 1988, the General Accounting Office (GAO) and the EPA Inspector General released findings indicating several problems with EPA's management of cost-reimbursement contracts with Superfund contractors.[32] For instance, the Agency often paid contractor invoices without reviewing them for reasonableness.[33] Many invoices paid by the Agency included markups of 143% to 321% on equipment usage, as well as excessive labor costs.[34] Additionally, the Agency frequently paid excessive award fees and bonuses under cost-plus-award-fee (CPAF) contracts and paid award fees for poor quality work.[35]

While EPA was establishing its ACRS program, critics blasted the Agency for spending too much Superfund money without PRP reimbursement.[36] A RAND report found that, from 1981 to 1989, EPA spent $2.6 billion of its $4.5 billion Superfund appropriation.[37] Although sixty-four percent was spent directly on cleanups, only $230 million was recovered from PRPs, despite EPA's expenditure of $261 million for its enforcement program.[38] This criticism

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29 Brantly, *supra* note 12, at 979 n.105.

30 *See* CONTRACTING REPORT, *supra* note 24, at 1507.

31 *See id.*

32 *See generally* Brantly, *supra* note 12, at 969, 975-80, 990-98.

33 *Id.* at 991-93. However, the Agency generally considers such payments as provisional and subject to revision after a final audit. *Id.*

34 *Id.* at 977.

35 *Id.* at 995-98.

36 *See* Healey, *supra* note 9, at 75-76 n.34; Roger J. Marzulla, *Superfund 1991: How Insurance Firms Can Help Clean Up the Nation's Hazardous Wastes*, 4 Toxics L. Rep. (BNA) 685, 688 (1989); Smith, *supra* note 12, at 821 n.4; *Enforcement Effort*, *supra* note 12, at 826.

37 *Enforcement Effort*, *supra* note 12, at 826.

38 *Id.* at 826. In June 1992, testimony before the House Ways and Means Subcommittee on Oversight asserted that EPA has recovered and deposited back into the Superfund only $450 million out of the $6.2 billion dispensed by the Treasury Department. *See Program Management By EPA Must Improve For Funding To Continue, Panel Chairman Warns*, 23 Env't Rep. (BNA) 678 (June 19, 1992)[hereinafter *Program Management*]. As a result, the Subcommittee warned that Congress might not provide additional appropriations for the Superfund unless EPA

prompted EPA to adopt an "Enforcement First" strategy for Superfund.[39] Under that strategy, PRPs, rather than Superfund contractors, would perform cleanups.[40] The intent is to relieve EPA of the need to initiate costly and time consuming lawsuits against PRPs for cost recovery. The Enforcement First strategy was a success. By 1991, PRPs were conducting cleanups at sixty percent of active sites.[41] However, this resulted in frequent shortages of work for ACRS contractors.[42] Furthermore, recent evidence suggests that PRPs are increasingly reluctant to assume cleanup responsibilities.[43]

By 1992, EPA's Superfund contract management problems had worsened.[44] According to the EPA Inspector General, the

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improved its record of recovering costs from private parties. *Id.* Note that the Agency has increased its recoveries from $46 million in Fiscal Year 1987 to over $300 million in Fiscal Year 1991. *See* Alex A. Beehler et al., *Contesting of CERCLA Costs by Responsible Parties - There is No Contest*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10,763, 10,764 (Dec. 1992).

[39] *See* CONTRACTING REPORT, *supra* note 24, at 1507.

[40] *Id.*

[41] *Id.* The sixty percent figure for PRP cleanups applies to remedial actions; PRPs perform only twenty-five to thirty percent of removal actions. Lawrence, *supra* note 16, at 2966 n.30. The Superfund Accelerated Cleanup Model's (SACM) emphasis on expedited removal actions may undermine the enforcement first strategy, although EPA contends that SACM can be consistent with the Agency's enforcement policies if PRP searches are expedited under SACM. *Id.* at 2965. Even with expedited PRP searches, EPA may not be able to raise PRP participation in early actions to the level of PRP participation in remedial actions. *Id.*

[42] *See* CONTRACTING REPORT, *supra* note 24, at 1507. ACRS contractors had already incurred large startup/administrative costs, representing a relatively high percentage of the total costs billed to EPA. However, these costs have declined from seventy percent of total ACRS contract outlays in Fiscal Year 1988 to an expected twenty percent in Fiscal Year 1991. *Id.* This Article later explores the extent to which these costs were justified and how EPA can improve its contract management.

[43] *See infra* notes 85-88 and accompanying text; CONTRACTING REPORT, *supra* note 24, at 1507. Because of EPA's onerous treatment of PRPs in its consent decrees and because PRPs must pay Superfund contractors to supervise their work, the Agency might have difficulty increasing or maintaining the sixty percent PRP share of cleanups. *See infra* note 87 and accompanying text. In addition, the Superfund Accelerated Cleanup Model's early action strategy for combining removal and remedial actions may reduce the percentage of PRP cleanups. *See* Lawrence, *supra* note 16; *supra* notes 16, 41, and accompanying text.

[44] *See generally The Collapse of Contract Management at the U.S. Environmental Protection Agency: Hearing of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 102d Cong., 2d Sess. 326 (July 8, 1992)[hereinafter *Collapse of Contract Management*](testimony of J. Dexter Peach, Assistant Comptroller General, GAO, and John C. Martin, EPA Inspector General); *Environment, Oversight Needed to Ensure That EPA Implements Contract Reform, IG Says*, 58 Fed. Conts. Rep. (BNA) 2 d8 (summarizing July 8,

Agency continued to reimburse contractors without adequate oversight and continued to pay excessive award fees.[45] Also, the average equipment usage markup by Superfund contractors had jumped to 427%.[46] Both the EPA Inspector General and an Assistant Comptroller General in the GAO testified before Congress that EPA had failed to correct serious contract management problems between 1986 and 1988.[47]

About forty percent of EPA's work, including investigating pollution and conducting cleanups, is done by private contractors.[48] There are legitimate reasons why EPA has relied so heavily on private contractors. From 1981 to 1992, EPA's total contract management program in all areas increased 237%, while its work force grew only 25%.[49] Since 1979, EPA's budget has not grown in real dollars, while its workload increased significantly.[50] In 1989, OTA recommended an increase in EPA staff and salaries to reduce the Agency's dependence on contractors.[51] Nevertheless, by 1992 EPA had just begun to increase its contract management staff.[52]

1992, hearing)[hereinafter *Oversight Needed*].

[45] *See Collapse of Contract Management*, *supra* note 44, at 331. *See also Oversight Needed*, *supra* note 44.

[46] *See Collapse of Contract Management*, *supra* note 44, at 331; *Oversight Needed*, *supra* note 44. However, former EPA Administrator William Reilly stated that estimates of contractors overcharging EPA for the cost of cleanup equipment may be inaccurate because such costs are calculated under the assumption that the equipment is used twenty-four hours each day. *See Collapse of Contract Management*, *supra* note 44, at 331; *Oversight Needed*, *supra* note 44.

[47] *See Collapse of Contract Management*, *supra* note 44, at 331, 354; *Oversight Needed*, *supra* note 44.

[48] Elizabeth Neus & Anne Willette, *Who Will Cleanup Fernald? Companies Carry Baggage of Their Own*, CINCINNATI ENQUIRER, Aug. 2, 1992, at A1, A6.

[49] Rose Gutfield, *EPA Phases Out Computer Sciences Work in Overhaul*, WALL ST. J., July 2, 1992, at B8.

[50] *See Fiscal Year 1992 Budget Review: Hearings Before the Senate Comm. on Environment and Public Works*, 102d Cong., 1st Sess. 320-21 (1991)[hereinafter *1992 Budget Hearings*](statement of Richard L. Hembra, Director of Environment Protection Issues, General Accounting Office). *See also* John A. Applegate, *Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control*, 9 YALE J. REG. 277, 279 n.1 (1992); *Funding Plan for EPA Falls Short of Inflation Needs of Air, Water Programs, Lobbyists Contend*, 22 Env't Rep. (BNA) 2338 (Feb. 7, 1992)(quoting Environment Budget Priorities report stating EPA's budget in real dollars has grown six percent since 1979, while its workload has doubled).

[51] OTA ASSESSMENT, *supra* note 5, at 8 n.7.

[52] *See generally Collapse of Contract Management*, *supra* note 44, at 358-59.

B. *Settlements*

SARA formalized EPA's settlement policies[53] and created a framework for settling CERCLA cases.[54] Section 9622 of SARA authorizes the President, who delegates his authority to EPA, to enter into agreements with PRPs "that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation."[55] The number and value of settlements increased after SARA was enacted. In Fiscal Year 1985 there were 135 settlements with an aggregate value of $152.1 million; in Fiscal Year 1988 there were 221 settlements with an aggregate value of $494.3 million.[56]

The following sections provide background on CERCLA settlements. Understanding SARA's settlement policies is important because they often affect the extent to which PRPs or Superfund contractors influence EPA selection of remedies for particular sites. The possibility of settlement also affects whether Superfund contractors or PRPs will conduct a cleanup.

1. *Mixed Funding Settlements*

SARA authorizes EPA to enter "mixed funding" settlements, where monies from both PRPs and the Superfund finance remediation of a site.[57] The conference report accompanying SARA identified circumstances in which mixed funding settlements might be appropriate. These circumstances include the presence of orphan shares of waste caused by bankrupt, unidentifiable, or dissolved PRPs, and situations where PRPs refuse to settle.[58]

In 1988, EPA promulgated a guidance document on mixed funding.[59] The Agency described three scenarios in which EPA, at its discretion, agrees to conduct or pay for a portion of a response

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[53] 42 U.S.C. § 9622 (1988).

[54] *Id.* *See* Balcke, *supra* note 11, at 126, 133-34.

[55] 42 U.S.C. § 9622(a) (1988).

[56] Jennifer Martin, Comment, *A Prescription to Expedite Hazardous Waste Cleanups: De Minimis Settlements and ADR*, 21 GOLDEN GATE U.L. REV. 361, 362 n.8 (1991).

[57] 42 U.S.C. § 9622(b)(1) (1988). *See also* Balcke, *supra* note 11, at 136-38; Barry E. Hill, *Negotiating Superfund Mixed Funding Settlements*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,651 (Nov. 1991); Mank, *supra* note 7, at 246.

[58] H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 252 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3345.

[59] *See* Superfund Program; Mixed Funding Settlements, 53 Fed. Reg. 8279 (1988)[hereinafter Mixed Funding]; Hill, *supra* note 57, at 10,652.

action, or both.[60] Of the three, EPA prefers preauthorization agreements. Under preauthorization, a PRP conducts the remedial action and later seeks reimbursement from the Superfund for costs deemed not its responsibility.[61] Preauthorization recognizes that PRPs often perform the most economical cleanups and that EPA, as a regulatory rather than a public works agency, lacks the proper staffing to perform cleanups.[62]

SARA states that EPA shall make all reasonable efforts to recover costs for Superfund reimbursement.[63] Use of "reasonable efforts" leaves the Agency some discretion. Thus, EPA, when involved in mixed funding settlements, will either use the Superfund to cover orphan shares or will insist upon recovering all costs from PRPs.[64] That is, EPA will pursue either an uncompromising or an accommodating approach with PRPs. The conference report accompanying SARA emphasized that "the burdens of mixed funding should be shifted to non-settlors."[65] Yet, EPA has suggested it will, in certain circumstances, approve mixed funding where the Superfund permanently pays a portion of the cleanup.[66] Obviously, PRPs are more likely to settle if EPA assumes the risk of paying for part of the cleanup for costs not recoverable from nonsettlors.[67] By 1991, there had been few mixed funding settlements.[68]

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[60] *See* Mixed Funding, *supra* note 59, at 8279-84 (discussing "preauthorization," "cash-out," and "mixed work" arrangements); Balcke, *supra* note 11, at 137 n.75; Hill *supra* note 57, at 10,652.

[61] *See* Mixed Funding, *supra* note 59, at 8282; Balcke, *supra* note 11, at 137; Hill, *supra* note 57, at 10,652.

[62] *See* Balcke, *supra* note 11, at 135 n.68; Mank, *supra* note 7, at 259-60.

[63] 42 U.S.C. § 9622(b)(1) (1988).

[64] *See* Balcke, *supra* note 11, at 137-38.

[65] H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 252 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3345.

[66] *See* Balcke, *supra* note 11, at 138 n.80. *See also* CHURCH, *supra* note 12, at 96 (government implicitly accepts some costs in Superfund settlements).

[67] *See generally* CHURCH, *supra* note 12, at 34-35, 51-52, 81, 96, 104 (discussing mixed funding settlement with General Motors at Harvey and Knott's Drum site in Delaware).

[68] *See* Hill, *supra* note 57, at 10,651. In response to industry criticism that EPA has rarely used mixed funding settlements, the Agency has hired a contractor to talk with interested parties and get their views on how mixed funding could be used more. *Mixed Funding, Risk Assessment Targeted in Studies to be Released Soon by Agency*, 23 Env't Rep. (BNA) 2718 (Feb. 19, 1993). The report is being circulated for comment at the Agency and will be sent back to the contractor for final editing. *Id.* For the purposes of this Article, it is significant that EPA used a contractor for this work rather than its own staff.

2. *RI/FS Settlements*

SARA authorizes EPA to enter partial settlements where a PRP conducts the remedial investigation/feasibility study (RI/FS) without agreeing beforehand to perform the cleanup.[69] The RI/FS process is critical for determining a site's problems and weighing alternative remedies.[70] Because the RI/FS determines the cleanup strategy, contractor involvement in the RI/FS process is essential if contractors are to understand their role in the Superfund program.

In the remedial investigation, EPA—generally through private contractors—or a PRP collects data, estimates the nature and extent of contamination at the site, characterizes the physical condition of the site, identifies likely routes of contaminant migration, and estimates the risks that exposure presents to surrounding populations.[71] The Agency next conducts a feasibility study, again usually through contractors. Using information from the remedial investigation, EPA develops and evaluates potential remedies for a site, and selects a preferred remedy.[72] RI/FSs generally require two to three years to complete.[73]

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[69] 42 U.S.C. § 9604(a) (1988). *See also* Balcke, *supra* note 11, at 138-40; Mank, *supra* note 7, at 253. The Agency must first determine whether the PRP is "qualified," and also must hire a contractor, at the PRP's expense, to oversee the RI/FS. *Id.* U.S.C. § 9604(a)(1) (1988). Furthermore, CERCLA mandates that all proposed RI/FS settlements be filed as consent decrees, requiring court approval and a public comment period. 42 U.S.C. §§ 9622(d)(1)(A), (d)(2)(B). One study found that EPA and PRPs negotiated having a PRP conduct the RI/FS in 48% of EPA Region III's 152 NPL sites; in 49.2% of Region V's 266 NPL sites; and in 36.1% of Region IV's 155 NPL sites. CHURCH, *supra* note 12, at 124 nn.30, 32. The study's authors admitted to a number of methodological limitations in the study. Still, the study suggests that many PRPs are in fact interested in the possibility of conducting RI/FS's. CHURCH, *supra* note 12, at 124 nn.30, 32.

[70] *See* Balcke, *supra* note 11, at 128.

[71] Brantly, *supra* note 12, at 974 (citing ENVIRONMENTAL PROTECTION AGENCY, EPA/540/G-89/004, GUIDANCE FOR CONDUCTING REMEDIAL INVESTIGATIONS AND FEASIBILITY STUDIES UNDER CERCLA-INTERIM FINAL 1-6 (1988)).

[72] 40 C.F.R. §§ 300.430(e)-(f). *See also* Brantly, *supra* note 12, at 974.

[73] *See* Balcke, *supra* note 11, at 128 n.28. The Center for Hazardous Waste Management found that RI/FSs were significantly slower after passage of SARA, averaging thirty-three months to complete. CHURCH, *supra* note 12, at 135 nn.26, 28 (citing Alfred R. Light, *Superfund: Evaluations and Proposals for Reform*, Address at the 52nd National Conference of the American Society for Public Administration (1990)). Post-SARA RI/FSs are slower because SARA imposed additional requirements for entering into an RI/FS settlement. *See* 42 U.S.C. § 9604(a)(1) (1988). *See* Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5036-38 (1985)[hereinafter 1985 Policy]. *See also* Balcke, *supra* note 11, at 139 (comparing 42 U.S.C. § 9604(a)(1) with 1985 Policy, *supra*, at 5038). There is evidence that private parties conduct RI/FSs faster than EPA. *See* Balcke, *supra*

After providing public notice of the RI/FS and receiving public comment on the preferred remedy, EPA announces its final decision in a Record of Decision.[74] Finally, the Agency, with its contractors, develops and implements a remedial design plan.[75]

In June 1990, EPA announced a new policy barring PRPs from performing RI/FSs. The Agency claimed that PRPs frequently produced biased documents which underestimate site risks. This, in turn, required EPA to carefully supervise the work of PRPs and their contractors.[76] The new policy would shift the task of performing the RI/FSs from PRPs to Superfund contractors.

Business groups sued EPA over its new policy,[77] asserting that government contractor RI/FSs are two to five times more expensive than private company RI/FSs.[78] Also, industry groups contended that EPA failed to submit the new policy for public comment and that the Agency should conduct a more thorough policy review before making any change.[79] This criticism culminated in a consent decree between EPA and industry groups, in which the Agency agreed to review its decision and solicit public comment.[80]

In February 1992, EPA published a notice of evaluation and request for public comment in the Federal Register.[81] The Agency stated that its evaluation did not dictate any specific outcome and that it would adopt a different approach if it would better serve the

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note 11, at 134-35; Mank, *supra* note 7, at 253 nn.90-91. Pursuant to the Superfund Accelerated Cleanup Model program, EPA is now experimenting with ways to streamline the site investigation process. Lawrence, *supra* note 16, at 2963-64. *See also supra* note 16. For example, the Agency is testing the combination of the remedial investigation with the expanded site investigation that collects data to prepare the HRS scoring package, which then is used to determine if a site will be listed on the NPL. Lawrence, *supra* note 16, at 2964. *See also supra* note 10 and accompanying text.

74 40 C.F.R. § 300.430(f) (1992).

75 *Id.* § 300.435.

76 Superfund Program: Settlement Policy on the Performance of Risk Assessments at Superfund Sites, 57 Fed. Reg. 6116, 6116 (1992)[hereinafter Risk Assessments].

77 Chemical Mfr. Assoc. v. EPA, No. 90-1460 (D.C. Cir.), *cited in* Risk Assessments, *supra* note 76, at 6118 n.4.; Mank, *supra* note 7, at 253 n.90.

78 Wade Lambert & Ellen J. Pollock, *Former Ashland Oil Chairman Gets 2 Years' Probation*, WALL ST. J., Dec. 3, 1990, at B8; Mank, *supra* note 7, at 253 n.90.

79 *Public Comment, Risk Assessment Policy Review Key to Settlement Between EPA, Industry Groups*, 22 Env't Rep. (BNA) 1931 (1991)[hereinafter *Public Comment*].

80 *Id.*

81 Risk Assessments, *supra* note 76, at 6118-19. *See also Public Comment*, *supra* note 79, at 1931.

public's interest.[82] The Agency estimated that it would complete its evaluation by February 1993.[83] After completion, EPA will submit its evaluation for a second public comment period and plans to issue a final decision four months thereafter.[84]

3. *Consent Decrees and Superfund Contractors*

Many PRPs believe litigation is cheaper than consenting to government cleanup demands.[85] Some commentators agree, challenging the conventional wisdom that it is cheaper to settle because PRPs can perform cleanups more efficiently than EPA contractors.[86] They argue that EPA's standard consent decree forms are so onerous that PRPs are better off either allowing EPA to perform the cleanup itself or waiting for the Agency to issue an administrative order requiring that PRPs perform the work. The commentators claim that when PRPs perform a cleanup, the cost of EPA contractor supervision wipes out much of the perceived savings.[87] Furthermore, EPA oversight contractors often require that PRP contractors redo their work, something the Agency is less likely to require its own contractors to do.[88] Thus, the extent to which the Enforcement First strategy shifts the cost of cleanups from the government to PRPs is limited.

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[82] Risk Assessments, *supra* note 76, at 6118.

[83] *Id.* On March 15, 1993, EPA published notice of the availability of the Agency's evaluation report on risk assessment and also its response to public comments submitted in response to the February 20, 1992, notice on how EPA should conduct the risk assessment evaluation. Superfund Program; Policy on the Performance of Risk Assessment Evaluation Report and Responses to Public Comments on EPA's Conduct of the Evaluation; Notice of Availability, 58 Fed. Reg. 13,757 (1993). By April 14, 1993, the public must submit comments on the risk assessment evaluation. *Id.*

[84] Risk Assessments, *supra* note 76, at 6118-19. *See also Public Comment*, *supra* note 79, at 1931 (settlement between EPA and industry groups requires second comment period).

[85] Jeff Bailey, *Economy Alone May Not Rejuvenate Chemical Waste*, WALL ST. J., Aug. 3, 1992, at B3. *See also* Stephen L. Kass & Michael B. Gerrard, *CERCLA Settlements with the EPA*, N.Y.L.J., April 24, 1992, at 3 (EPA consent decrees so onerous that PRPs should consider litigation instead).

[86] *See, e.g.*, Robert W. Frantz, *Superfund Settlements: A Vanishing Breed*, 6 NAT. RESOURCES & ENV'T 14, 17; Kass & Gerrard, *supra* note 85, at 3 n.9; Bradford F. Whitman, *EPA's Model Superfund Consent Decree Presents Major Risks for Settling Party*, 22 Env't Rep. (BNA) 2314, 2314-16 (1992).

[87] Frantz, *supra* note 86, at 17; Kass & Gerrard, *supra* note 85, at 3; Whitman, *supra* note 86, at 2314-15.

[88] Frantz, *supra* note 86, at 17; Kass & Gerrard, *supra* note 85, at 3; Whitman, *supra* note 86, at 2314-15.

II

AGENCY CAPTURE AND EPA

Traditional capture theory examines the extent to which regulated industries have captured their regulators. Under CERCLA, EPA regulation of PRPs is not true regulation; the Agency seeks redress by filing tort-like actions to compel PRPs to either perform cleanups or pay for completed cleanups.[89] The Agency does not regulate its Superfund contractors or environmental groups. Still, Superfund contractors and environmental groups play an important role in shaping Superfund cleanup methods and cost allocation. Influencing policy is not identical to capturing a regulatory agency. However, where, as here, a major agency program is being heavily influenced, it is necessary to abandon a rigid definition of capture. Otherwise, those problems associated with traditional agency capture, which can also affect public benefit programs like Superfund, might continue unnoticed. Thus, this Article discusses agency capture as a continuum in which the degree of capture ranges from an interest group exercising some influence over an agency's policies to situations where a regulated industry completely captures a regulatory agency.[90]

President Nixon and Congress considered agency capture when they established EPA and its organizational structure.[91] Since 1970, both Congress and the Office of Management and Budget (OMB) have sought intensive oversight of the Agency, fighting one another for control of EPA's destiny for fear that the Agency would be captured.[92]

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[89] Although suing for past PRP conduct is not direct regulation, the threat of future liability under CERCLA obviously affects some firms' current and future behavior. Also, EPA does have quasiregulatory functions in supervising PRP cleanups. *See infra* notes 152, 158, 161, and accompanying text.

[90] Ayres and Braithwaite's discussion of capture in terms of the amount of lobbying expenditures by an industry implies there is a continuum of capture. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 63-70 (1992). Understanding capture requires distinguishing between capture as an ideal type or Platonic idea in which complete capture is possible, and capture that is found in the real world, which is necessarily incomplete.

[91] *See* Lazarus, *supra* note 2, at 311, 315-20, 364. *See generally* Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 L. & CONTEMP. PROBS. 249, 264-72 (1991).

[92] *See* Lazarus, *supra* note 2, at 364. An interesting issue, beyond the scope of this Article, is whether OMB could capture EPA through OMB's role in applying cost-benefit analysis under President Reagan's Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981). A number of commentators have discussed whether OMB's

A. *EPA and Traditional Models of Agency Capture*

Despite these fears, there is no consensus as to whether EPA has been captured. Professors Dwyer and Lazarus have each argued that it is unlikely that any single interest group could capture EPA. Their position is based on the premise that EPA has a "social mission" and manages a wide range of programs affecting many constituencies.[93] Dwyer and Lazarus contend that capture theory developed in response to the behavior of agencies, such as the Interstate Commerce Commission, which only regulate a distinct kind of economic activity.[94] They observe that agency capture theory assumes that special interests wield undue influence over an agency because of the general public's fleeting concern with complex regulatory issues; this slight concern is no match for concerted lobbying efforts by regulated industries.[95]

Both Dwyer and Lazarus assert that EPA does not fit into this

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cost-benefit analysis role unduly infringes on the statutory duties of regulatory agencies, although they have not explicitly examined the problem in terms of agency capture. *See generally* Jeffrey H. Howard & Linda E. Benfield, *Rulemaking in the Shadows: The Rise of OMB and Cost-Benefit Analysis in Environmental Decisionmaking*, 16 COLUM. J. ENVTL. L. 143 (1991). A similar issue is whether the Bush administration's Council on Competitiveness, which oversaw the regulatory review functions of OMB's Office of Information and Regulatory Affairs (OIRA) and which was headed by Vice President Dan Quayle, sought to capture EPA and other agencies on behalf of powerful industries. *See generally* CHRISTINE TRIANO & NANCY WATZMAN, ALL THE VICE PRESIDENT'S MEN: HOW THE QUAYLE COUNCIL ON COMPETITIVENESS SECRETLY UNDERMINES HEALTH, SAFETY, AND ENVIRONMENTAL PROGRAMS (1991)(highly critical account by OMB Watch and Public Citizen's Congress Watch); Michael Duffy, *Need Friends in High Places*, TIME, Nov. 4, 1991, at 25 (discussing allegations that Dan Quayle's Council on Competitiveness attempted to undercut EPA's wetlands and clean air policies). The Clinton administration has abolished the Council on Competiveness, but will continue the centralized regulatory review procedures established by President Reagan in Executive Order 12,291. *Clinton Administration Orders Retraction of Dozens of Last-Minute Bush Regulations*, 23 Env't Rep. (BNA) 2571, 2572 (Jan. 29, 1993). Vice President Albert Gore stated that OIRA will review the bulk of regulations, and that the Clinton administration will develop a new regulatory appeals process. *Id. See also Disputes Over Environmental Rules to go to OMB Office, EPA Chief Says*, 23 Env't Rep. 2720, 2720 (Feb. 19, 1993)[hereinafter *OMB Office*](EPA Administrator Carol Browner said OIRA will handle regulatory review). OMB Director Leon Panetta has stated that Gore may establish a review group within OMB to resolve conflicts among agencies over regulations, and Gore himself, on February 8, 1993, said that the Vice President will be the ultimate arbitrator of interagency disputes over proposed regulations. *Id.*

[93] *See* Dwyer, *supra* note 3, at 278, 309-10; Lazarus, *supra* note 2, at 364-66.

[94] *See generally* Huntington, *supra* note 1 (examining agency capture at the Interstate Commerce Commission).

[95] Dwyer, *supra* note 3, at 309; Lazarus, *supra* note 2, at 364-65.

theory.[96] First, they contend that the public has retained a strong interest in environmental issues.[97] Professor Lazarus points out that public opinion stopped President Reagan from reversing pro environmental policies,[98] and citizen groups favoring environmentalism have effectively mobilized public opinion and influenced agency policy.[99] Professor James Q. Wilson strengthens Dwyer and Lazarus' contention. Wilson argues that, since the 1970s, techniques like direct mail have made it easier for public-interest groups to organize the public; this, in turn, makes it more difficult for industries to capture an agency.[100] Although public interest groups generally have less influence with an agency than industrial groups do, Wilson maintains that today it is rare to find an agency serving only a regulated industry's interests.[101]

Second, Dwyer and Lazarus assert that capture of the entire EPA is improbable because the Agency's regulated community has too many conflicting interests.[102] For example, fearing their competitors might gain an advantage, companies that have heavily invested in pollution control equipment would likely oppose relaxation of pollution restrictions. Also, pollution control equipment manufacturers, a sizeable industry, would probably resist deregulatory efforts.[103]

Additionally, EPA employees' belief in the Agency's "social mission" obstructs the capture of EPA. According to Lazarus, that belief causes EPA employees to discount needs of the regulated.[104] In fact, Lazarus argues that Agency employees enhance, not hinder, private sector career opportunities by acting aggressively; aggressive action, because it results in forceful enforcement, increases the regulated industries' demand for former EPA employees' environmental expertise.[105]

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96 Dwyer, *supra* note 3, at 309; Lazarus, *supra* note 2, at 364.

97 Dwyer, *supra* note 3, at 309-10; Lazarus, *supra* note 2, at 365.

98 Lazarus, *supra* note 2, at 365 n.335.

99 *Id.* at 365.

100 WILSON, *supra* note 1, at 83-84. For example, although the Environmental Defense Fund's membership is relatively small, the group plausibly claims to speak on behalf of a significant portion of the public. *Id.* at 84.

101 *Id.* at 84-85.

102 Dwyer, *supra* note 3, at 310; Lazarus, *supra* note 2, at 365.

103 Dwyer, *supra* note 3, at 310; Lazarus, *supra* note 2, at 365. *See also $170 Billion Spent on Environment in 1992; Market Continuing to Grow, Economist Says*, 23 Env't Rep. (BNA) 3022, 3022-23 (discussing size of U.S. pollution control industry).

104 Lazarus, *supra* note 2, at 365-66.

105 *See id.* at 366 n.347. *See also* WILSON, *supra* note 1, at 86-87 (asserting that

Focusing exclusively on traditional agency capture theory, Dwyer and Lazarus each make persuasive arguments that regulated industries are unlikely to capture the entire EPA. However, they fail to address the strong possibility that capture of a discrete unit within an agency may occur. Specifically, outside groups may have captured, or at least exercise undue influence over, the Superfund program.

B. *Interest Groups and Agencies*

Straying from the traditional definition of agency capture, some scholars have discussed agency capture within broader paradigms, such as interest group politics. Determining what constitutes capture as opposed to interest group politics, however, is difficult once one ventures beyond the traditional definition of capture. Professor Paul Quirk observes that "regulatory decisions do not necessarily present neat conflicts with a clear and homogeneous 'public interest' on one side, pitted against a 'regulated industry interest,' also clear and homogeneous, on the other."[106]

Professors Ian Ayres and John Braithwaite use game theory to present an idea of regulatory capture in which the degree of capture is a positive function of lobbying expenditures by an interest group.[107] But Professor Richard Stewart asserts that informal accommodations between regulators and regulated industry can benefit society by reducing costly litigation, and do not necessarily represent undue industry influence or capture.[108] Stewart argues

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the more professional the orientation toward work, the more likely an employer will hire a former government employee for her skills than for her contacts).

[106] PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 6 (1981).

[107] *See* AYRES & BRAITHWAITE, *supra* note 90, at 66 ("capture is 'purchased' by lobbying expenditures, L, such as preparing submissions, the time involved in building friendships with regulators, and the cost of bribes"). Under their theory, different levels of lobbying expenditures lead to three different policy results (pareto-efficient, pareto-inefficient, and socially ambiguous). Also, they discuss three types of capture: (1) inefficient capture; (2) zero-sum capture; and (3) efficient capture. *See id.* at 63-70. According to Ayres and Braithwaite, some types of lobbying may lead to socially beneficial, or efficient, capture outcomes because the interest group convinces the agency to adopt a better policy. Other types of lobbying may lead to "zero sum," or inefficient, capture or have ambiguous welfare results. Furthermore, public interest groups often raise the costs of capture by forcing a firm to also lobby public interest groups having the legal authority or political influence to challenge an agency decision which favors the firm. *See id.* at 71-73.

[108] *See* Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 663-65. Ayres and

that the rise of new types of social regulation such as environmental law, along with the growth of public interest groups and changes in administrative law designed in part to prevent regulatory capture, have undermined accommodation and have led to increased litigation.[109]

C. *The Problem of Baselines*

In a broad sense, this Article's premise of "capture" of the Superfund program refers to various interest groups seeking to influence and lobby the Agency to change its policies. Measuring the success of such influence is difficult.

Determining whether an interest group has exercised undue influence on an agency requires a baseline, or background principle,[110] of what the agency's decision would have been absent that group's lobbying efforts. For instance, in the case of the Interstate Commerce Commission, one wonders what railroad rates would have been had the Commission acted in the public interest rather

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Braithwaite reach similar conclusions regarding potential advantages from cooperation between regulators and the regulated industry. They argue that some forms of regulatory capture are pareto-efficient and should be encouraged. *See* AYRES & BRAITHWAITE, *supra* note 90, at 63-81.

[109] *See generally* Stewart, *Discontents of Legalism*, *supra* note 108, at 659-60, 664-68, and *passim*. Stewart suggests that market incentives replace regulatory legalism wherever possible. *Id.* at 657, 683-86. Ayres and John Braithwaite share similar concerns about counterproductive litigation. They argue that a "zealous" public interest group may deter pareto-efficient forms of capture by continuing litigation against socially beneficial agreements between industry and an agency. AYRES & BRAITHWAITE, *supra* note 90, at 75-78. Instead of Stewart's market incentive solution, Ayres and Braithwaite argue in favor of an empowerment theory of republican tripartism that would encourage cooperative behavior by providing public interest groups a larger voice in the regulatory process so that such groups have less incentive to bring litigation. AYRES & BRAITHWAITE, *supra* note 90, at 75-78, 81-86. Stewart argues that only a limited potential for encouraging regulatory negotiations exists among industry, public interest groups, and agencies because public interest groups raise funds through publicity from litigation; Ayres and Braithwaite, however, are confident that tripartism can induce public interest groups to abandon unnecessary litigation. *Compare* Stewart, *supra* note 108, at 657, 674-78 (regulatory negotiations are likely to be limited in light of propensity of public interest groups to pursue litigation) *with* AYRES & BRAITHWAITE, *supra* note 90, at 75-86 (the empowerment of public interest groups can work to overcome such groups' tendency to litigate). Stewart is skeptical as to whether game theory can predict the outcome of environmental negotiations. *See* Stewart, *supra* note 108, at 676-77.

[110] *See, e.g.*, CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION 116, 141-42, 207-21, and *passim* (1990)(discussing how much of public law still covertly accepts common law, rather than post-New Deal administrative state, as a baseline).

than to protect the declining railroad industry.[111]

There are methodological difficulties in posing counterfactual hypthoses even for a relatively simple variable such as railroad rates.[112] That EPA faces serious policy and scientific disputes regarding which are the best cleanup remedies causes more difficulty in establishing a baseline. Because of the difficulties encountered in measuring baselines, this Article attempts to develop a qualitative, rather than a quantitative, answer to whether some groups are exercising undue influence in ways that Congress and EPA can and should limit.[113] The Superfund program is too important a resource allocation to look the other way.

III

EPA CONTRACTORS, DEPENDENT BUREAUCRACIES, AND INTEREST GROUP POLITICS: THE "CAPTURE" OF SUPERFUND

The most obvious group that would want to capture the Superfund program is the PRPs. While PRPs exercise some influence over EPA, they are not necessarily the group most successful at influencing Agency policy. One commentator argues that "EPA's reliance on industry for information and expertise creates an institutional bias favoring potentially responsible parties."[114] He concedes, however, that the Agency is "not necessarily captured in the sense that industry controls the decisionmaking process," and that the Agency, in seeking industry advice to help develop efficient policies, believes it is acting in the public's interest.[115] Interestingly, he claims that Superfund contractors play a critical role in the rela-

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[111] *See generally* Huntington, *supra* note 1 (discussing how railroad industry captured Interstate Commerce Commission).

[112] Political scientist Samuel P. Huntington compared railroad freight rates with wholesale prices from 1908 to 1950 to show ICC's acquiescence to railroad demands. *See* Huntington, *supra* note 1, at 481-85. Yet, Huntington could not demonstrate what would have happened to rates absent ICC regulation. Professor Paul J. Quirk asserts that assumptions regarding what agencies would have done absent industry influence are often driven by the critic's view of what the agency should have done. QUIRK, *supra* note 106, at 4.

[113] Professor Quirk has suggested that in the case of complex regulatory issues involving several conflicting interest groups, a qualitative analysis is necessary because such problems are beyond the competence of strictly objective analysis. *See id.* at 6.

[114] Ellison Folk, *Public Participation in the Superfund Cleanup Process*, 18 ECOLOGY L.Q. 173, 184 (1991).

[115] *Id.*

tionship between PRPs and EPA: "Contractors who develop cleanup plans work both for EPA and potentially responsible parties and create a link between the two parties."[116]

A. *Superfund Contractors: Who Runs the Superfund?*

How much influence do Superfund contractors exert over Superfund program policies? Examining the effectiveness of the Agency in managing its contractors provides insight into the answer. The less effective the management, the more likely that contractors are influencing the program. Also, because the Agency and PRPs frequently use the same contractors,[117] conflicts of interest between contractors and PRPs, discussed below, can shape Agency Superfund policy.

1. *How Clean is Clean?*

Congressional investigators estimate that Superfund contractors spend 100% to 500% more than PRPs to clean up a given site.[118] Contractors would probably defend themselves by claiming that they perform more stringent cleanups than PRPs. The Agency contends that, absent close supervision by EPA staff or Superfund contractors, PRP RI/FSs generally underestimate risk.[119] Indeed, a 1992 GAO study found that in a period from 1987 to 1990, PRPs usually selected less protective containment remedies than did EPA.[120] These facts are disputable. Either PRP-hired contractors are underestimating risk to please the PRPs or EPA contractors are overestimating risks to justify their employment or to earn excessive compensation. The difficulty of ascertaining appropriate cleanup

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116 *Id.* at 213-14.

117 *See Public Comment*, *supra* note 79, at 1931.

118 *See* OTA ASSESSMENT, *supra* note 5, at 7.

119 *See supra* notes 76-79 and accompanying text.

120 U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-92-138, SUPERFUND: PROBLEMS WITH THE COMPLETENESS AND CONSISTENCY OF SITE CLEANUP PLANS 3 (1992)[hereinafter GAO, SUPERFUND PROBLEMS](private parties selected waste containment at forty-three percent of sites they managed whereas EPA did so at only twenty-five percent of sites it managed); *GAO says Private Parties Select Containment Remedies More Often Than EPA*, 23 Env't Rep. (BNA) 724 (July 3, 1992)[hereinafter *GAO Says*]. However, Don Clay, EPA assistant administrator for solid waste and emergency response, disputed the GAO's conclusions and stated that differences in the number of containment remedies were based on the types of sites involved. *Id.* at 725. Furthermore, Clay asserts that 1991 data shows that PRPs now select treatment, rather than containment, remedies as often as does EPA. *Id.* at 725.

standards for a given site complicates this issue.[121]

Although it favors permanent treatment solutions,[122] SARA gives EPA considerable discretion in weighing costs and other factors when determining cleanup levels.[123] Section 9621(d) of CERCLA requires EPA to consider legally applicable or relevant federal and state requirements in other environmental statutes when making this determination.[124] In 1988, OTA criticized EPA for choosing impermanent cleanup solutions, such as capping a site or using deed restrictions, rather than permanent solutions.[125] PRPs have also been criticized for their cleanup choices. Several studies, finding that PRP RI/FSs are biased in favor of minimizing costs, asserted that extensive EPA supervision was necessary to produce acceptable PRP RI/FSs.[126] As a result, at least one commentator has argued that PRPs and the Agency are doing a poor job of protecting the public.[127]

2. *Waste and Superfund Contractors*

Exploring whether EPA contractors operate cost effectively is easier than attempting to assess whether recommendations by PRP or EPA contractors best serve the public interest. In 1988, GAO, the EPA Inspector General, and EPA released reports showing that the Agency had failed to control the costs and work quality of its Superfund contractors in both remedial and removal projects.[128] In 1989, OTA severely criticized the use of EPA contractors in Superfund for both cost and policy reasons.[129]

One EPA critic acknowledged that EPA, by adopting ACRS,[130] may have improved its Superfund contract management

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121 *See generally* Donald A. Brown, *EPA's Resolution of the Conflict Between Cleanup Costs and the Law in Setting Cleanup Standards Under Superfund*, 15 COLUM. J. ENVTL. L. 241 (1990).

122 42 U.S.C. § 9621(b) (1988).

123 *Id.* § 9621(a). *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 375 (1992)(Congress gave EPA "substantial discretion"); Brown, *supra* note 121, at 278 (EPA has reserved to itself "almost unlimited discretion").

124 *See* PERCIVAL, *supra* note 123, at 375-77; Brown, *supra* note 121, at 249-50.

125 *See* OFFICE OF TECHNOLOGY ASSESSMENT, ARE WE CLEANING UP? 12-14 (1988). *See also* PERCIVAL, *supra* note 123, at 376-77 (discussing OTA study); Folk, *supra* note 114, at 183-84 (same).

126 *See* Risk Assessments, *supra* note 76, at 6117.

127 *See* Folk, *supra* note 114, at 183-84.

128 *See* Brantly, *supra* note 12, at 969, 975-79, 990-97.

129 *See generally* OTA ASSESSMENT, *supra* note 5, at *passim*.

130 *See* Brantly, *supra* note 12, at 979 n.105. *See supra* notes 28-31, 42, and

since the critical 1988 studies.[131] Soon thereafter, however, the Agency admitted that its ACRS program had serious problems.[132] Additionally, many studies continued to criticize EPA's use of contractors in all its programs.[133]

In 1988, EPA hired forty-five contractors under ACRS contracts lasting up to ten years each; at the time, PRPs were conducting only thirty-eight percent of the cleanup work and EPA anticipated that Superfund contractors would perform most of the remainder.[134] The ACRS program, designed to improve EPA's management of contractors, may have worsened the situation. A *Washington Post* story charged that, since 1988, nearly one-third of the $200 million used by EPA to clean Superfund sites had been spent on administrative expenses and "program management" of private contractors.[135] Further, the story charged that Superfund contractors often had little real work to perform, that EPA had spent millions of dollars for unused pollution-detection devices, and that, under the ACRS program, EPA had paid the rent, salaries, training and recruiting costs, profits, and bonuses of contractors, regardless of how many cleanups they managed.[136]

In a memorandum issued the same day as the *Washington Post* story, the EPA Administrator questioned the cost effectiveness of ACRS in light of the fact that PRP cleanups had doubled in number while EPA contractor cleanups had declined.[137] The Administrator appointed a task force to investigate the charges of contractor abuses.[138] Soon thereafter, several members of Congress demanded an investigation into the EPA Inspector General's failure to audit most of the Superfund contractors' billings, amounting to

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accompanying text.

131 *See* Brantly, *supra* note 12, at 979.

132 *See infra* notes 137-42 and accompanying text.

133 *See infra* notes 135-36, 143-46, 149-51, 169, 172-80, and accompanying text.

134 *See* CONTRACTING REPORT, *supra* note 24, at 1507; Michael Weisskopf, *Administrative Costs Drain 'Superfund'; Few Toxic Waste Sites Actually Cleaned Up*, WASHINGTON POST, June 19, 1991, at A1; *Agency Official Downplays Contract Problems, Says U.S. Facilities will Dominate NPL Process*, 22 Env't Rep. (BNA) 1410 (Oct. 4, 1991).

135 Weisskopf, *supra* note 134, at A1.

136 *Id.*; *Cost Recovery Rule Withdrawn from OMB Pending Study of Superfund Contracting System*, 22 Env't Rep. (BNA) 1188 (Aug. 30, 1991)[hereinafter *Cost Recovery*].

137 *See Cost Recovery*, *supra* note 136, at 1188.

138 *Reilly Creates Task Force to Examine Contractor Abuses in Response to Story*, 22 Env't Rep. (BNA) 524 (June 28, 1991)[hereinafter *Reilly Creates*].

more than one billion dollars from 1983 to 1990.[139]

On October 1, 1991, EPA issued a report which recommended changes to lower Superfund contractor costs while increasing their utility.[140] The report acknowledged that contractors had billed the Agency for "inappropriate" items such as business cards, parking fees, and office plants.[141] The report concluded that EPA had failed to conduct both effective contract administration and oversight.[142]

The criticism continued into 1992. The EPA Inspector General blasted the Agency for its mismanagement of contractors and its overreliance on contractors for administrative and technical work in several of its programs.[143] Congressional and internal Agency studies have found improper training of contractor employees, charges for "idle time," and improper reimbursements for such items as Christmas parties and gifts.[144] Contractors have also improperly used taxpayer money for football tickets, alcohol at employee parties, beach houses, and corporate jets.[145] CH2M Hill, EPA's largest private contractor, was charged with improperly billing $873,000 for corporate jets, $7700 for alcoholic beverages, $4100 for tickets to professional sports events, $1636 for candy for clients, and $483,900 in excessive employee relocation expenses.[146]

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[139] Elliot Diringer, *Congress to Probe Superfund; Investigators to Search for Abuses by Contractors*, S.F. CHRONICLE, July 8, 1991, at A1.

[140] *See generally* CONTRACTING REPORT, *supra* note 24, at 1509-13.

[141] *Id.* The report cautioned that these charges were not necessarily illegal. *Id.* at 1508. An OMB study has proposed certification requirments for contractors working for civilian agencies that would allow the government to bring criminal charges against contractors making false statements. *See infra* notes 246-50 and accompanying text.

[142] *See* CONTRACTING REPORT, *supra* note 24, at 1508.

[143] *See* Gutfeld, *supra* note 49, at B8. *See generally Collapse of Contract Management*, *supra* note 44, at *passim*.

[144] *See* Gutfeld, *supra* note 49, at B8. *See generally Collapse of Contract Management*, *supra* note 44, at *passim*. *See also Oversight Needed*, *supra* note 44 (summarizing testimony at congressional hearing detailing contractor abuses at EPA).

[145] Neus & Willette, *supra* note 48, at A6.

[146] Anne Willette, *Company Defends Its Record*, CINCINNATI ENQUIRER, Aug. 3, 1992, at A6. *See also* Keith Schneider, *Company Accused of Bilking U.S. on Waste Sites*, N.Y. TIMES, Mar. 20, 1992, at A34 (GAO charges CH2M Hill of overbilling $2.3 million; $11,739 for Christmas party, $2750 for specialty chocolates, $453 for party balloons, and $65 for rental of a reindeer suit for children's party). CH2M Hill has also been charged with overbilling the Agency $21 million from 1987 through 1989 because the company failed to separate costs that are ineligible for government payment. Willette, *supra*, at A6. Representative Mike Synar, (D)-Oklahoma, questions the practice of some Superfund contractors giving the government a "voluntary management reduction" to catch unallowable expenses inadvertently included in their cost pools. *See Acquisition Management,*

CH2M Hill responded that its "preferred customer" rate protected the government from overcharges.[147] As a result, an EPA committee launched to examine contracting activities has recommended a "total overhaul" of the Agency's contract program.[148] Although the abusive contractor billing suggests these contractors influence Superfund policy, it alone does not prove that contractors significantly influence the Superfund program.

3. *Conflicts of Interest with PRPs*

There are potential conflicts of interest when EPA and PRPs hire the same contractors, as they often do.[149] In 1989, a Senate subcommittee report charged that key EPA policy decisions were being made by private consulting firms that simultaneously represent polluters that are subject to EPA regulation.[150] Senator Pryor, the subcommittee's chairperson, criticized the Agency for allowing consultants to establish policy and for failing to prevent conflicts of interest.[151]

EPA has not ignored conflicts of interest. In response to the Senate subcommittee's criticism, and fearing that conflicts of interest by contractors could taint the Agency's efforts to recover cleanup costs from PRPs,[152] EPA drafted a rule regulating conflicts of interest by Superfund contractors.[153] The Hazardous Waste Action Coalition, a 115-member contractor group, has criticized the proposed rule, charging that there was no evidence of significant

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OFPP Plans Major Changes in Civilian Agency Contracting, Audit Practices—Inadequate Agency Supervision Faulted at Dingell Hearing, 58 Fed. Conts. Rep. (BNA) 21 d3 (Dec. 7, 1992)[hereinafter *OFPP Plans*].

147 Willette, *supra* note 146.

148 Gutfeld, *supra* note 49, at B8.

149 *Public Comment*, *supra* note 79, at 1931.

150 *EPA Policy Decisions Made By Private Firms With Little Agency Control, Senate Panel Told*, 19 Env't Rep. (BNA) 2107 (Feb. 10, 1989)[hereinafter *EPA Policy*].

151 *Id. Infra* section III.A.4. will discuss policy decisions that Superfund contractors were or are making on behalf of the Agency. Part IV will examine proposed legislation designed to prevent contractors from making EPA policy decisions.

152 *See EPA Contractors Criticize Proposed Superfund Conflicts of Interest Rule*, 21 Env't Rep. (BNA) 534 (July 7, 1990)[hereinafter *EPA Contractors*](EPA official states stricter conflict of interest rules needed to protect Agency suits against PRPs).

153 *See* Acquisition Regulation Concerning Conflicts of Interest, 55 Fed. Reg. 17,724 (1990)(proposed Apr. 26, 1990). *See also EPA Contractors*, *supra* note 152, at 534 (EPA proposed rule because of Senator Pyror's criticisms and fear contractors could taint cost recovery against PRPs).

conflicts of interest that had impaired the Agency's recovery of costs from PRPs.[154] In 1991, EPA was again criticized for not resolving the conflict of interest problem and for failing to issue the conflict of interest rule.[155]

If contractors representing PRPs were also exercising significant influence over EPA Superfund policy, one would expect the Agency to emphasize low-cost cleanup strategies which benefit PRPs. Indeed, some evidence indicates that EPA does emphasize cleanup remedies that are less expensive than what SARA mandates.[156] Yet, contrary to this expectation is the reality that contractors, as self-interested parties, desire inflated costs and expensive cleanups to assure more work and higher profits. Under this assumption, contractors representing PRPs would not necessarily push EPA to emphasize low-cost cleanups.

There is no conclusive proof that contractors influence EPA to raise or lower costs. Overall, however, contractors probably have a greater self-interest in persuading EPA to undertake expensive remedial actions, although it is difficult to determine to what extent contractors convince the Agency to adopt more expensive approaches or simply reinforce EPA's own protective tendencies.[157]

4. *Ideological Capture*

Perhaps the most distressing form of agency capture is ideological.[158] Ideological capture occurs when an agency believes that what is good for the regulated industry is good for America.[159] Has the Superfund program been ideologically captured? While classic

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[154] *See EPA Contractors*, *supra* note 152, at 534.

[155] *See GAO Blasts EPA on Contract Management, Indemnification, Conflicts of Interest*, 22 Env't Rep. (BNA) 1649, 1650 (Nov. 1, 1991).

[156] *See supra* note 123-27 and accompanying text.

[157] *See infra* notes 209-11 and accompanying text.

[158] Ian Ayres and John Braithwaite explain ideological capture in the following terms: In a capture model, through lobbying the regulated firm is able to win the hearts and minds of the regulators. In a sense capture is achieved as the lobbying causes the regulators to care about different things. At the captured extreme the regulators think that "what is good for GM is good for America." AYRES & BRAITHWAITE, *supra* note 90, at 63. Similarly, a social psychology explanation of ideological capture suggests that regulators are likely to identify after many years with the people they deal with more than anyone else, members of the regulated industry. *See* SHAPIRO, *supra* note 1, at 65-66.

[159] *See* SHAPIRO, *supra* note 1, at 66 (discussing capture of ICC by railroad industry; "[h]aving lived in the railroads for twenty years, it is easy to see how an ICC bureaucrat could come to believe that the railroads needed lots of carrots and no sticks").

"capture" theory is limited to regulatory agencies and industries, Professor Wilson argues that nonregulated interest groups have reason to develop "client relationships" with, and shape the views of, government agencies that provide funding for them or can otherwise serve their interests (although he does not specifically address the issue of whether a dominant "client group" can ideologically capture a "client agency").[160]

In the context of the Superfund program, it may be even more important for nonregulated interest groups to capture the hearts and minds of EPA regulators because determining what are the most appropriate cleanup methods for a given site presents more complex and ambiguous issues than does establishing railroad rates.[161] There is so much disagreement about how EPA should conduct the Superfund program—and thus disagreement of what is the baseline "public interest"—that it is probably impossible to develop a quantitative approach, such as conducting social science surveys of Agency staff for measuring the extent to which various interest groups influence EPA or abuse their "client relationships." This Article will attempt a qualitative assessment to answer some of these questions.

5. *Are Superfund Contractors a Dependent Bureaucracy?*

The strongest evidence that Superfund contractors have captured, or at least exercise undue influence over, the Superfund program is the amount and type of work the Agency delegates to the contractors. As discussed in Section I.B., Congress and EPA initially determined that private contractors, rather than an enlarged EPA staff, should implement the "short-run" Superfund program. By 1986, it was clear that the program might take decades and cost hundreds of billions of dollars. Still, the Agency continued to rely on contractors to perform the bulk of the cleanup work.[162] During the 1980s, EPA spent between eighty and ninety percent of its Superfund program budget, approximately $4 billion, on private contractors.[163]

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160 *See* WILSON, *supra* note 1, at 80. For example, Wilson argues that research professors have developed client relationships with the National Academy of Sciences and National Science Foundation. *Id.*

161 *See generally supra* notes 110-13 and accompanying text (baseline for determining undue influence by interest groups is more complex for Superfund cleanup remedies than railroad rates).

162 *See* OTA ASSESSMENT, *supra* note 5, at 1-3.

163 *Id.* at 3-4.

This excessive reliance is not entirely the Agency's fault. Congress and the Executive Branch have failed to provide EPA with the staff and resources necessary to manage the Superfund program.[164] In fact, the Agency has not received an increase (in constant dollar terms) in funding for its staff to offset the increased burdens of the Superfund program.[165]

Contractors handle many tasks, they: analyze cleanup technologies; perform risk assessments; identify feasible cleanup alternatives; draft Records of Decision; design cleanups; and perform the physical work of cleaning up Superfund sites. Although a single contractor generally does not conduct all of these tasks, the scope of these undertakings demonstrate that contractors are involved in every facet of the Superfund program. Because of the broad scope of contractor involvement, contractors can influence EPA policy decisions. Indeed, OTA found that contractors do make policy decisions.[166] For example, contractors determine whether a site needs cleaning, and, if so, whether the site qualifies for a fund-financed cleanup.[167] Also, contractors were involved in developing both the NCP and the guidance documents that implement the NCP.[168]

OTA essentially charged that contractors had captured the Superfund program: "Contractors conduct so many program activities that, taken as a whole, the contracting industry has enormous influence over Superfund, perhaps more than Congress, the public, environmental groups, the news media and other institutions."[169] Contractor influence stems, in part, from private sector salaries. Because contractors generally pay higher salaries than the Agency, contractors frequently hire technically experienced former EPA staff.[170] High EPA staff turnover impedes EPA supervision of contractors and drains Agency expertise.[171] As a result, OTA asserts that contractors, presumably because of their expertise, provide most of the information and analysis for key initial policy drafts.[172]

OTA's study suggested that Superfund contractors wish to perpetuate the program because "the contracting industry has become

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164 *See supra* notes 49-52 and accompanying text.
165 *See* OTA ASSESSMENT, *supra* note 5, at 3-4.
166 *See generally id.*
167 *Id.* at 12.
168 *Id.*
169 *Id.* at 2.
170 *See id.* at 32.
171 *Id.* at 32-33.
172 *Id.* at 12.

a constituency benefiting from a large Superfund program."[173] To that extent, Superfund contractors have interests contrary to PRPs, who obviously wish to minimize the cost and scope of the program. OTA recommended that an independent group study whether PRPs should begin to conduct more cleanups,[174] implying that Superfund contractors would disfavor more PRP involvement.[175]

Finally, OTA claimed that Superfund contractors have grown into a "dependent bureaucracy" which exerts pressure for permanence and expansion as would an internal bureaucracy, but remains less subject to government control and public scrutiny.[176] The study noted, for example, that EPA pays for contractors to attend Superfund conventions, conferences, and trade shows.[177] In 1989, EPA spent $210,000 to send more than eighty contractor representatives to a two day orientation session in Dallas.[178] It is unlikely that either Congress or EPA desire a "dependent bureaucracy." Perhaps this outcome is tolerable to the Agency and the public because the PRPs ultimately foot most of the bill.

Unfortunately, OTA's study did not lead to major changes in EPA contractor practices.[179] In a July 1992 hearing concerning the collapse of contract management at EPA, Representative Dingell denounced the Agency and its Administrator for allowing contractors to play such a major role in both shaping EPA policy and running the Agency.[180]

OTA's study is probably the best evidence that Superfund contractors exercise such strong influence over Superfund policy that they may have captured the program. Before concluding that contractors have captured the Superfund program, other groups which may influence the program must be considered, namely PRPs, the hazardous waste treatment industry, environmental public interest groups, and Congress.

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173 *Id.* at 6.

174 *Id.*

175 *Id.* at 7.

176 *See id.* at 43.

177 *See id.* at 43-44.

178 Michael Weisskopf, *supra* note 134, at A1.

179 *See supra* notes 48-52 and accompanying text.

180 *See Collapse of Contract Management*, *supra* note 44, at 325-26 (statement of Representative Dingell regarding role of all EPA contractors, not just Superfund contractors).

6. *The Public's and PRPs' Interests in Contractor Management*

Recall Professors Dwyer and Lazarus' contention that strong public interest, inter alia, has prevented the capture of EPA.[181] This contention may be inaccurate because the public may have little interest in EPA management of its programs and its contractors. Rather, the public's interest probably stops at concerns about the quality of the environment. So long as the publicized sites are cleaned, the public most likely has little interest in the specifics of EPA implementation. Also, when PRPs, as opposed to the Superfund, are paying the bill, the public may be less concerned about contractor excesses.

One would expect that PRPs have a keen interest in controlling contractor expenses because they bear the contractors' financial burden. PRPs, however, have other interests which may impede efforts to lower EPA contractor abuses. First, PRPs are often more concerned with suing other PRPs than they are with reforming the Superfund contractor system. Second, as Professor Marc Landy and Mary Hague argue, PRPs are too disunited to lobby Congress effectively for change.[182] That PRPs have been ineffective lobbyists might be accurate. But their failure may be more a result of their unpopularity than their disunity. Indeed, PRPs are often industrial Fortune 500 corporations.[183] Presumably, these giant corporations and their trade associations are well organized and have access to congressional decisionmakers.

Superfund contractors alone are no match for major PRPs when it comes to influencing Agency policy. Thus, fully understanding the role of contractors in influencing EPA policy and possibly capturing the Superfund program requires an examination of the relationships among contractors, the hazardous waste treatment industry, and public interest groups.

B. *The Hazardous Waste Treatment Industry*

Landy and Hague argue that the Superfund program primarily benefits environmental groups, lawyers, and the hazardous waste treatment industry.[184] In particular, they argue that an "unholy al-

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[181] *See* discussion *supra* section II.A.

[182] *See* Marc K. Landy & Mary Hague, *The Coalition for Waste: Private Interests and Superfund*, *in* ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 67 (Michael S. Greve et al. eds., 1992).

[183] *See* CHURCH, *supra* note 12, at 110.

[184] *See* Landy & Hague, *supra* note 182, at 77.

liance" exists between the Hazardous Waste Treatment Council (HWTC), which they claim advocates permanent treatment solutions on behalf of its members, and environmental groups.[185] HWTC broke away from another contractors' organization because that organization represented landfill operators, and landfilling is not a permanent solution to the hazardous waste problem in the eyes of HWTC.[186]

In 1988, HWTC and several environmental groups, including the Environmental Defense Fund, the National Audubon Society, the Sierra Club, the Natural Resources Defense Council, and the United States Public Interest Research Group, published a report criticizing the Superfund program for favoring containment remedies over permanent cleanups.[187] In 1990, the same coalition issued a report which again criticized EPA for relying too heavily on containment strategies.[188] It is based on these reports that Landy and Hague argue that HWTC and environmental groups have formed an alliance designed to promote the Agency's adoption of expensive permanent cleanup strategies.[189]

Landy and Hague do not specifically address agency capture, but their arguments suggest that the hazardous waste treatment industry, in conjunction with environmental groups, have captured or unduly influence the Superfund program. On the other hand, Professor Lazarus argues that the pollution control equipment industry would help block any regulated industry attempts to capture the Agency.[190] Landy and Hague turn that argument on its head, contending that the pollution control industry might capture the Agency in order to overregulate industry and that an alliance with

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185 *Id.* at 78-81. HWTC does not represent all Superfund contractors, but primarily those who perform treatment rather than containment or disposal. *Id.* at 78.

186 *Id.*

187 *See* OTA ASSESSMENT, *supra* note 5, at 28 n.30; Landy & Hague, *supra* note 182, at 79. The study was titled RIGHT TRAIN, WRONG TRACK: FAILED LEADERSHIP IN THE SUPERFUND PROGRAM.

188 *See* Landy & Hague, *supra* note 182, at 79. The report was titled TRACKING SUPERFUND.

189 *See* Landy & Hague, *supra* note 182, at 78-81. *Cf.* OTA ASSESSMENT, *supra* note 5, at 28 (Remedial Contractors Council seeks to "clean up" Superfund contracting industry by driving out "dirt" contractors that are unable to perform proper remedial work). HWTC would have similar interests as the Remedial Contractors Council in promoting Superfund contractors who utilize the technology sold by its members and in criticizing contractors who do not.

190 *See* Lazarus, *supra* note 2, at 365.

environmental groups allows HWTC to do so.[191] Landy and Hague do not present convincing evidence, however, that these groups have captured EPA. In fact, that these groups exert some influence over the Agency is hardly surprising or inappropriate.

Landy and Hague do imply that there is something wrong with the hazardous waste treatment industry or environmentalists trying to convince EPA to use permanent treatment methods at more sites, but they fail to discuss the statutory grounds that support permanent solutions. SARA favors permanent treatment solutions, although the statute gives the Agency considerable discretion in weighing costs and other factors when determining cleanup levels.[192] The term "capture" is not appropriate where an agency is simply implementing a statutory mandate.[193]

In seeking to discredit SARA's permanent treatment approach, Landy and Hague claim that the environmentalists who secured SARA's enactment are part of a "Public Lobby" based upon a New Left ideology which is hostile to business.[194] The environmentalists, it is argued, supported provisions in SARA which serve the movement's broader antibusiness political agenda.[195] Yet, Landy and Hague fail to identify clearly who belongs to the "Public Lobby." They also fail to acknowledge that environmental groups are increasingly willing to work with business to promote common goals. Their argument that HWTC and environmentalists have formed an alliance is adverse to their contention that environmentalists are ideologically biased against all business interests.

The preference for expensive, permanent cleanup remedies embedded in SARA's legislative process, Landy and Hague further assert, is fundamentally misguided. Yet, Landy and Hague fail to consider seriously whether the public simply wanted a greater degree of safety than they think is worthwhile. Landy and Hague also fail to acknowledge the considerable disagreement among experts concerning which types of cleanup techniques are appropriate. Fi-

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191 *See generally* Landy & Hague, *supra* note 182, at 78-81.

192 42 U.S.C. § 9621(b) (1988)(preference for permanent treatment). *See also supra* notes 122-24 and accompanying text. Landy and Hague are aware that SARA establishes a preference for permanent remediation of Superfund sites; yet, they fail to consider whether that statutory preference might justify the lobbying efforts of the hazardous waste treatment industry or environmentalists, groups of which Landy and Hague are perhaps overly eager to criticize. *See generally* Landy & Hague, *supra* note 182, at 73-81.

193 *See* WILSON, *supra* note 1, at 75-76.

194 *See* Landy & Hague, *supra* note 182, at 75-76.

195 *Id.* at 75.

nally, despite their claim that PRPs are too disunited to lobby Congress effectively, Landy and Hague undervalue the influence of the trade associations that lobby on behalf of PRPs. According to Landy and Hague, only the American International Group (AIG), the largest underwriter of commercial and industrial insurance in the United States, has mounted a major effort to eliminate PRP liability (AIG urges replacing PRP liability with cleanups financed through a broad-based insurance fund).[196] Landy and Hague criticize this proposal for its failure to address societal overinvestment in hazardous waste cleanups.[197] They maintain that EPA is aware that Superfund's public health benefits are negligible relative to the program's enormous costs.[198] The Agency, they claim, supported CERCLA's enactment in order to gain additional resources.[199] However, they assert that the program is no longer a political asset for EPA because the public and Congress blame the Agency for the sluggish pace of cleanups.[200] In a rare optimistic comment, Landy and Hague express hope that EPA will admit to the public that Superfund is a huge waste of money, but conclude that this is unlikely because EPA would have to both challenge the powerful constituencies that support Superfund and upset the Agency's funding for the program.[201]

Ultimately, Landy and Hague imply that the environmental movement and HWTC have duped the public and Congress into believing that permanent cleanups are necessary.[202] They argue that PRPs will not be able to influence successfully the future of CERCLA policy-making unless they overcome the "public hyste-

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196 *Id.* at 81-82.

197 *Id.* at 82.

198 *See id.* at 71, 83. Although EPA believes that the environmental and health risks posed by hazardous waste sites are less than the risks posed by, for instance, pesticide residues, the statute requires the Agency to spend far more on the former. *See* ENVIRONMENTAL PROTECTION AGENCY, COMPARING RISKS AND SETTING ENVIRONMENTAL PRIORITIES: OVERVIEW OF THREE REGIONAL PROJECTS 62-65 (1989); ENVIRONMENTAL PROTECTION AGENCY, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS 77-78, 84-86, 91-99 (1987). *See also* Applegate, *supra* note 50, at 279 n.4 (discussing EPA studies cited in this footnote); Lester B. Lave, *Risk Assessment and Regulatory Priorities*, 14 COLUM. J. ENVTL. L. 307, 309-11 (1989)(discussing studies showing that regulatory expenditures do not correlate with greater risk).

199 Landy & Hague, *supra* note 182, at 71-72.

200 *See id.* at 71-72, 82-83.

201 *Id.* at 82-83.

202 *See id.* at 82-84.

ria" over "ticking time bombs."[203] They assert that the public will not understand the excessive costs of these cleanups until taxpayers have to foot the bill.[204] Landy and Hague advocate decentralizing the Superfund program by allocating monies to individual states for budgets based on individual site cleanup costs.[205]

C. *Structural Incentives*

Professor Wilson argues that maritime carriers were able to "capture" the Federal Maritime Commission (FMC) because the Commission was burdened with too much paperwork and had to regulate in an environment where carriers' proposed rates were rarely challenged.[206] He contends that these structural incentives allowed carriers to capture the FMC without using bribes or offering lucrative jobs to former government employees.[207] The FMC simply entered a reactive mode in which it approved most rate requests.[208]

Structural incentives, not an unholy alliance, are a better explanation of why contractors have such a large role in managing the Superfund program and why the program might err on the side of expensive cleanup remedies. A structural incentive that increases Superfund contractors' role in policy decisions is the lack of funding for all necessary EPA staff.[209] As discussed above, contractors, by hiring many experts who might otherwise work for EPA, employ much of the expertise needed to implement the program.[210] A possible desire on the part of EPA staff to please prospective employers is not, however, a source of contractor influence. As Professors Lazarus and Wilson assert, EPA professional staff with significant experience will be hired by industry for their skills despite any anti-industry positions taken while at the Agency.[211] If the Agency is to escape dependence upon contractors, Congress must provide EPA with more resources to pay higher salaries.

Although contractors may advocate relatively expensive per-

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[203] *Id.* They do acknowledge, however, that some of the alleged "public hysteria" has subsided. *Id.* at 83.

[204] *Id.*

[205] *Id.* at 83-84.

[206] *See* WILSON, *supra* note 1, at 75.

[207] *Id.*

[208] *Id.*

[209] *See supra* notes 49-52 and accompanying text.

[210] *See supra* notes 170-72 and accompanying text.

[211] *See supra* note 105 and accompanying text.

manent cleanups, structural incentives would likely have pushed EPA in the same direction anyway. First, parties, including EPA, are more likely to spend excessively on cleanups if the money is someone else's. Second, EPA has a political incentive to be protective in choosing remedies, particularly in light of SARA's preference for permanent cleanups. Landy and Hague may be correct that HWTC and environmental groups lobby for permanent remedial solutions. Again, however, EPA probably would have adopted similar policies on its own.

D. *Arguments that Superfund Has Not Been Captured*

It is debatable whether contractors have captured the Superfund program. One could argue that EPA's adoption of the Enforcement First strategy, which was followed by an increase in PRP cleanups, would not have occurred had contractors captured the program. However, contractors continue to play a significant role in overseeing PRP cleanups.[212] Also, capturing the Superfund program is more difficult to conceptualize because that program represents just one part of a large government agency—EPA—which, as a whole, has not been captured. Capture would probably require that the program be sufficiently independent from central, uncaptured control. Such independence is unlikely; congressional subcommittees pay considerable attention to the Superfund program and pressure EPA's leadership to monitor Superfund abuses.[213]

Absent an increase in resources, central control by Congress or EPA's top leadership may be insufficient to overcome structural incentives favoring the use of contractors in policymaking roles. Also, central oversight may not be sufficient to overcome a possible "bias" in favor of permanent cleanups. That PRPs and special taxes replenish the Superfund, and that most feel it is safer to err on the side of protection, exacerbates the problem. Professor Wilson suggests that congressional investigations of the FMC did little to overcome the structural biases favoring carriers.[214] Thus, if Congress wants to reduce the role of Superfund contractors, it must change the structural incentives.

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[212] *See supra* notes 16-18, 30, 48, and accompanying text.

[213] *See supra* notes 47, 139, 144, 150-51, 180, and accompanying text; discussion *infra* section III.F.

[214] *See* WILSON, *supra* note 1, at 74-75.

E. *The Public*

Having discussed the role of EPA, PRPs, Superfund contractors, HWTC, and organized environmental public interest groups in shaping Superfund policy, this Article will now look at the role of the general public.[215] Citizens living near a Superfund site naturally want the most expensive and low-risk cleanups because they receive all the benefits while paying little of the costs. The tendency of citizens to demand the safest cleanup favors the permanent treatment orientation of HWTC and environmental interest groups. However, the general public is unlikely to invest time tracking Superfund contractor expenditures as long as PRPs or the special taxes replenish the Superfund and pay the bills. Still, John and Jane Citizen are likely to be outraged by huge cost overruns for candy bars and sports tickets.

CERCLA originally favored expert decision making over public involvement.[216] The statute had few provisions for formal public participation in the cleanup process and did not authorize citizen suits.[217] Although the public could participate in general rulemaking proceedings, the statute did not provide for public participation in proceedings which addressed cleanup decisions concerning specific sites.[218] Nor did the statute specifically provide for citizen participation in negotiations or enforcement proceedings with PRPs.[219] SARA changed this, requiring public notice and comment on Superfund cleanup plans.[220] To empower citizens, SARA autho-

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215 Some readers may wonder whether this discussion of agency capture ignores the impact of individual leaders in directing an agency's policies, organizational operations, and culture. Without question, leaders are important. For example, commentators frequently argue that EPA, under Anne (Gorsuch) Burford, Administrator from 1981 to 1983, enforced its statutory mandates far less aggressively than it has subsequently. Also, Professors Elliott and Ackerman argue that the strong 1970 Clean Air Act Amendments resulted from political competition between President Nixon and Senator Muskie, then a strong contender for the Democratic 1972 presidential nomination. The competition led both politicians to propose stronger legislation than either really desired so each could claim the environmental mandate. Thus, leaders do matter, but structural problems resulting from statutory mandates, organizational realities, and funding shortages have a larger impact. *See* E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 335-38 (1985).

216 *See* Folk, *supra* note 114, at 181.

217 *Id.* at 193.

218 *Id.*

219 *Id.* Courts have split on the issue of intervention by citizen groups. *Id.* at 193-94 n.131 (discussing cases).

220 *See* 42 U.S.C. § 9617 (1988). *See also* Folk, *supra* note 114, at 194 (discuss-

rizes technical assistance grants (TAGs) for any group of individuals that might be affected by a release or threatened release from an NPL facility.[221] SARA also authorizes citizen suits.[222]

Ellison Folk argues that the public plays a relatively passive role in the Superfund decision-making process.[223] He maintains that, despite their differences, EPA, PRPs, and contractors have developed a "professional camaraderie" in which they oppose increased public involvement that could diminish their respective roles in the cleanup process.[224] Folk also asserts that EPA staff members usually believe that they can effectively represent the public's interests without significant public participation.[225] As a result, EPA generally discourages public participation in negotiations with PRPs over cleanup plans.[226]

Public concerns may play a larger role during the Clinton Administration than they did during the Reagan-Bush era. Vice President Gore, for instance, has backed citizens who oppose the construction of a hazardous waste incinerator in East Liverpool, Ohio.[227] If public participation increased, how would it affect the Superfund process? Folk suggests that EPA and PRPs are biased towards least-costly options, whereas the public often prefers the permanent and more expensive cleanup solutions.[228]

F. *Congress*

Congress has sent mixed signals regarding the management of the Superfund program. While it has helped identify contractor

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ing SARA's public notice and comment provisions).

221 42 U.S.C. § 9617(e)(1) (1988). *See also* Folk, *supra* note 114, at 194-95 (discussing TAGs). Before SARA, however, EPA had created a Superfund Community Relations Program. Folk, *supra* note 114, at 195-99.

222 42 U.S.C. § 9659 (1988).

223 *See* Folk, *supra* note 114, at 213.

224 *Id.* at 213-14.

225 *Id.* at 214.

226 *Id.* at 214 n.262. The Superfund Accelerated Cleanup Model (SACM) program may decrease public participation because less participation is required for removal than for remedial actions, and SACM emphasizes removals. Lawrence, *supra* note 16, at 2965. EPA, however, has the discretion to exceed the community relations requirements in the NCP, or to use remedial action procedures at sites with high public or state interest, even if a nontime-critical removal action would result in a faster cleanup. *Id.* at 2965. Ultimately, EPA must decide how to balance the potentially contradictory goals of quicker cleanups and allowing the public sufficient opportunity for input into cleanup decisions.

227 Timothy Noah, *Gore Vows to Block Incinerator Start-Up, Suggesting He'll Play an Activist Role*, WALL ST. J., Dec. 8, 1992, at B6.

228 *See* Folk, *supra* note 114, at 184-85.

abuses, Congress is partly responsible for cutting the budget for government auditors and allowing the increase in private contractor participation.[229]

Although Congress has played a constructive role in monitoring how effectively agencies manage their private contractors,[230] Professor Lazarus criticizes congressional oversight of EPA. He asserts that various subcommittees make conflicting demands on the Agency and that the process wastes significant Agency resources.[231] Still, Congress, in conjunction with OTA and GAO, has played a critical role in uncovering contractor abuses.[232] Because Congress can change structural incentives, major reforms in management of EPA contractors would likely come through Congress. While there is always the possibility that contractors can and will lobby Congress to preserve their favored position,[233] existing evidence suggests that Congress can effectively push contractor reforms at EPA. Professor Lazarus and others note, however, that Congress has often failed to provide sufficient appropriations for EPA to carry out its statutory mandates.[234] While the Reagan and Bush adminis-

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[229] *Compare* Dan Morgan, *Administration Supports Penalties for Overbilling; OMB Official Testifies for Contractor Sanctions*, WASH. POST, Dec. 4, 1992, at A10 (beginning in 1991 Congress has become increasingly critical of management of federal programs, including monitoring of private contractors); *OFPP Plans*, *supra* note 146, at 21 d3 (Representative Dingell criticizes Bush administration for relying too heavily on private contractors and opposing efforts of his committee to hire more auditors) *with* Keith Schneider, *U.S. Says Lack of Supervision Encouraged Waste in Contracts*, N.Y. TIMES, Dec. 2, 1992, at A1, C20 [hereinafter *U.S. Says*](Congress shares blame because it approved administration budgets slashing auditors and increasing private contractors until 1992).

[230] *See* Morgan, *supra* note 229, at A8 (discussing congressional efforts to investigate contractor abuses and government mismanagement in early 1990s).

[231] *See generally* Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 L. & CONTEMP. PROBS. 205, 205-39 (1991). Lazarus acknowledges that oversight can be valuable in checking agency abuses. *Id.*

[232] *See supra* notes 47, 139, 150-51, 180, 228-31, and accompanying text.

[233] "Public choice" theory asserts that interest groups in some circumstances may capture or exercise undue influence in Congress to obtain legislation favorable to its interests at the expense of the public good. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991)(examining evidence supporting public choice hypothesis and discussing its "republican" critics).

[234] Congress consistently provides EPA less money than the Agency needs to carry out its ambitious statutory mandates. In fact, congressional appropriations in constant dollar terms have declined since the inauguration of President Reagan in 1981 (although there have been some modest increases since 1985). *See* Lazarus, *supra* note 2, at 329-30. *See also* sources cited in *supra* notes 49-52 and accompanying text. Congress frequently saddles EPA with onerous responsibilities when

trations might have been responsible for many of the problems, it was Congress that approved administration budgets that provided for the elimination of many government jobs and the significant privatization of government.[235]

IV

SOLUTIONS TO THE PREDICAMENT

This section examines the following potential solutions to the Superfund contractor morass: judicial review; improved auditing; proposed legislation that would restrict contractors' ability to act in policy making roles for EPA; and incentive contracts designed to increase efficiency.

A. *Judicial Review*

Some commentators argue in favor of "meaningful" judicial review of EPA's response costs when the Agency brings cost recovery actions against PRPs.[236] On the other hand, three government attorneys argued that judicial review of EPA's cost recovery actions against PRPs wastes time because courts almost always conclude that the Agency has adequately documented its expenses.[237] This Article contends that there are broad policy arguments for rejecting expanded judicial review as a panacea to cure excessive contractor

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it enacts grand statutes purporting to save the nation's environment. However, Congress often undercuts the Agency in the less publicized appropriations process, which is under the jurisdiction of different congressional committees than those that propose environmental legislation. *See* Lazarus, *supra* note 2, at 328-30.

[235] *See U.S. Says*, *supra* note 229, at A1, C20.

[236] *See* Robert H. Fuhrman & David B. Hird, *EPA Proposed Rule on Superfund Cost Recovery: Streamlining or Steamrolling*, 23 Env't Rep. (BNA) 1438, 1438-42 (Sept. 18, 1992); Brantly, *supra* note 12, at 970-71. CERCLA makes PRPs liable for "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A) (1988). Thus, whether EPA is entitled to recover its response costs depends on whether its cleanup actions are "not inconsistent with the [NCP]." On August 6, 1992, EPA proposed a rule amending certain provisions of the NCP and establishing new regulations on CERCLA cost recovery. Recovery of Costs for CERCLA Response Actions, 57 Fed. Reg. 34,742 (1992)[hereinafter Recovery of Costs]. *See* Fuhrman & Hird, *supra* (criticizing proposed rule). The proposed rule would expand the NCP's definition of recoverable indirect costs, apparently limit a defendant's ability to challenge costs on grounds that they are inconsistent with the NCP, and restrict the types of documentation that EPA must provide to PRPs. *See generally Cost Recovery*, *supra* note 136, at 34,744-51; Fuhrman & Hird, *supra* (criticizing provisions relating to indirect costs, PRP cost challenges, and documentation).

[237] *See* Beehler et al., *supra* note 38, at 10,763-77.

costs. While there are reasonable due process and statutory arguments in favor of vigorous judicial review of Agency expenses when EPA sues PRPs in cost recovery actions,[238] as a practical matter, aggressive judicial review attacks only the most flagrant Superfund contractor abuses. This is because courts tend to defer to the Agency's technical judgments with respect to the selection and implementation of cleanup remedies.[239] Congressional reform of the auditing and contracting process could achieve a more comprehensive solution.

On December 3, 1992, the Administrator of the Office of Federal Procurement Policy for OMB testified before a House subcommittee on the subject of an OMB initiated report prepared by OMB and auditors from twelve major civilian agencies, including EPA.[240] The report, titled "Summary Report of the SWAT Team on Civilian Agency Contracting" (SWAT Report), found that federal agencies may have wasted vast amounts of money because they failed to supervise the thousands of private companies that were doing much of the government's work.[241] The SWAT Report, the first comprehensive study by the White House on mismanagement in federal contracting, is a major critique of the Reagan and Bush administrations' aggressive efforts to shift public work to the private sector.[242] The report implicitly questions the notion that private contractors perform government work more efficiently than the government.[243] The report reveals that the Reagan and Bush ad-

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238 *See generally* Fuhrman & Hird, *supra* note 236, at 1438-42 (arguing in favor of vigorous judicial review of EPA expenses in cost recovery actions against PRPs); Brantly, *supra* note 12, at 970-71, 980 (same). *But see* Beehler et al., *supra* note 38, at 10,763-77.

239 One commentator who favors "meaningful" judicial review of EPA expenses concedes that courts must give considerable deference to EPA's technical judgments, but contends that courts should deny recovery of costs where "no technical judgment is necessary to determine whether implementation has been cost-effective." Brantly, *supra* note 12, at 986-87. This solution is not practical because technical judgments are important in most major decisions EPA makes about remedy selection and implementation.

240 *See* Morgan, *supra* note 229, at A10; *OFPP Plans*, *supra* note 146.

241 *See* Keith Schneider, *For the Government, Contractors Have Special Rates*, N.Y. TIMES, Dec. 6, 1992, at E2 [hereinafter *For the Government*]; *U.S. Says*, *supra* note 229, at A1.

242 *See For the Government*, *supra* note 241, at 2; *U.S. Says*, *supra* note 229, at A1, C20.

243 *Compare For the Government*, *supra* note 241, at 2 (OMB report casts serious doubts on Reagan and Bush administrations' privatization policies) *with* Editorial, *No Proof on Privatization*, ATLANTA J. & CONST., Dec. 4, 1992, at A16 (while OMB report found billions of dollars in waste, study does not prove using govern-

ministrations were penny wise and pound foolish: the administrations saved millions of dollars by hiring fewer auditors but allowed potentially billions of dollars of waste by failing to properly supervise thousands of contractors.[244]

The SWAT Report proposed a number of reforms. One proposal was to place the Defense Contract Audit Agency, which has the most experience in monitoring the costs of private contracts, in charge of monitoring all federal contractors.[245] Additionally, the report proposed extending to civilian agencies the certification and penalty provisions currently imposed by the Department of Defense to assure that indirect cost submissions by private firms include only allowable costs.[246] The certification requirement would authorize the government to bring criminal charges against contractors who make false statements.[247] The penalty provisions would authorize the government to impose a penalty equal to or sometimes double the amount of the disallowed expense.[248] Presently, contractors are usually required to pay back only disallowed expenses.[249] Furthermore, the OMB official testifying suggested that the costs of conducting audits be included in the contract.[250]

If Congress, after EPA improves its auditing system, believes that expanded judicial review is still necessary, special administrative law judges should be used to conduct the initial review of such issues. Federal district judges lack the time and expertise to effectively second guess the Agency's remedy selection and implementation decisions.

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ment employees would have been more efficient).

[244] *See* Editorial, *U.S. Called Off Its Fiscal Watchdogs*, ATLANTA J. & CONST., Dec. 7, 1992, at A12 [hereinafter *U.S. Called Off*]("But the millions of dollars that can be saved by hiring fewer auditors doesn't begin to offset the billions of dollars that are lost as a result."); *For the Government*, *supra* note 241, at 2 ("A central reason for the mismanagement, said the report, was the policy of cutting the number of Federal auditors while the number and value of contracts was soaring.").

[245] *See* Morgan, *supra* note 229, at A8; *U.S. Says*, *supra* note 229, at A1, C20; *OFPP Plans*, *supra* note 146.

[246] *See OFPP Plans*, *supra* note 146.

[247] *See* Morgan, *supra* note 229, at A10.

[248] *See id.* (discussing penalty provisions); *U.S. Says*, *supra* note 229, at C20 (federal officials stated contractors charge government for questionable costs because there is usually no penalty other than paying back money).

[249] *See* Morgan, *supra* note 229, at A10; *U.S. Says*, *supra* note 229, at C20.

[250] *See OFPP Plans*, *supra* note 146 (testimony of Allan Burman, Administrator of Office of Federal Procurement Policy for OMB before House Energy and Commerce Oversight and Investigations Subcommittee, Dec. 3, 1992).

B. *Limiting Contractor Functions*

In addition to mandating improved auditing of contractor billing, Congress should consider reducing the number of contractors the Agency employs and should rethink the types of jobs they are allowed to perform. EPA, mainly a regulatory agency rather than a public works agency, does not have the staffing to adequately perform or oversee cleanups.[251] Congress must provide the Agency more resources before the Agency can reduce its dependence on contractors. Congress should also enact legislation which carefully defines the roles of EPA staff and contractors. Without action, EPA's contractor management problems will not be solved.[252]

Congress has considered new legislation which would establish a new cabinet-level Department of the Environment, prohibit contractors from performing inherently governmental functions such as formulating and analyzing policy options, and restrict contractor conflicts of interest.[253] Regardless of whether Congress acts on such proposals, it should enact provisions which prohibit contractors from performing policy functions and which tighten conflict of interest rules.

The proposed legislation does not adequately limit the role of contractors in supervising remedial work. A 1990 Senate Report by

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[251] *See* Mank, *supra* note 7, at 259 n.128; Balcke, *supra* note 11, at 135 n.68. EPA does function as a public works agency in issuing grants to Publicly Owned Treatment Works under the Clean Water Act. 42 U.S.C. § 1281(g) (1988).

[252] On July 8, 1992, the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce held a hearing on the "Collapse of Contract Management at the EPA." *See generally Collapse of Contract Management*, *supra* note 44, at *passim*; *Oversight Needed*, *supra* note 44. Then EPA Administrator William Reilly pledged that the Agency would reform its general contract management program and had already begun specifically addressing problems with Superfund contractors, including cancelling one ACRS contract. *See generally Collapse of Contract Management*, *supra* note 44; *Oversight Needed*, *supra* note 44. Representative John Dingell pointed out that EPA had failed in the past to solve identified problems with contract management and expressed skepticism about whether the Agency would actually implement fundamental reforms in its contract management. *See Collapse of Contract Management*, *supra* note 44, at 467-68; *Oversight Needed*, *supra* note 44.

[253] *See* S. 533, 102d Cong., 1st Sess. § 113 (1991)(passed Senate on Oct. 1, 1991)(prohibiting contractors from performing inherently governmental functions and restricting contractor conflicts of interest); H.R. REP. NO. 428, 101st Cong., 2d Sess. 34-37 (1990)(discussing § 115 of House Bill No. 3847, which would have prohibited contractors from performing inherently governmental functions and restricted contractor conflicts of interest); S. REP. NO. 262, 101st Cong., 2d Sess. 37-40 (1990)(discussing § 211 of Senate Bill No. 2006, which would have prohibited contractors from performing inherently governmental functions and restricted contractor conflicts of interest).

the Committee on Government Affairs stated:

> The Committee recognizes that certain EPA contracts provide for contractors to supervise, coordinate, or integrate the non-policy work of other contractors and sub-contractors, such as in the Alternative Remedial Construction Strategy (ACRS) program. To the extent such activity facilitates and expedites the remedial construction program, it is consistent with this subsection.[254]

The Committee today might have a more critical view of the ACRS program in light of recent reports of contractor abuses and EPA's own criticisms. At a minimum, EPA staff should supervise the Agency contractors' work because such supervision inevitably affects the implementation of policy choices.

The Agency can reduce, to some extent, the role of Superfund contractors by emphasizing a stronger Enforcement First strategy, one that pushes for more PRP-performed cleanups.[255] EPA's attempt to impose stringent consent decrees, however, may backfire and cause PRPs to resist entering into settlements.[256] Moreover, many of the advantages of PRP-performed cleanups are lost when Superfund contractors supervise PRP work.[257] EPA should be provided with the resources to hire personnel who are qualified to supervise PRP cleanups. In this way, EPA would avoid employing a different standard for review of government contracts than it does for PRP work.[258]

C. *Incentive Contracts*

Traditionally, there are two varieties of government contracts.[259] The most common are fixed-price contracts, where the contractor agrees to perform specified work or deliver a product at an agreed-upon price and the client agrees to pay the fixed price if the contractor performs fully.[260] Fixed-price contracts are best suited for undertakings with relatively few technological and economic uncertainties, such as purchasing supplies and arranging for routine construction services.[261]

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254 S. REP. NO. 262, *supra* note 253, at 38.

255 *See supra* notes 39-42 and accompanying text.

256 *See supra* notes 43, 85-88, and accompanying text.

257 *See supra* notes 87-88 and accompanying text.

258 *See supra* note 88 and accompanying text.

259 *See* 48 C.F.R. § 16.101(b) (1991); Stefan Reichelstein, *Constructing Incentive Schemes for Government Contracts: An Application of Agency Theory*, 67 ACCOUNTING REV. 712, 713 (1992); Brantly, *supra* note 12, at 988.

260 *See* 48 C.F.R. § 16.202-1 (1991); Brantly, *supra* note 12, at 988.

261 *See* 48 C.F.R. § 16.202-2 (1991); Reichelstein, *supra* note 259, at 713;

In cost-reimbursement contracts, the contractor agrees to use its best efforts to perform the specified work, and the client agrees to reimburse the contractor for all of the contractor's "allowable" costs, plus a fee.[262] Cost-reimbursement contracts, often referred to as cost-plus contracts,[263] are used when the work involves nonroutine services or products, the cost of which cannot be estimated accurately before the work is performed.[264] Because cost-plus contracts create an incentive for contractors to pad costs,[265] the government often uses a mixed cost-plus-fixed-fee contract (which fixes the contractor's profit allowance) in place of the standard cost-plus contract.[266]

Because EPA's work is often on the cutting edge of technology, it frequently uses cost reimbursable contracts, under which the Agency pays for the contractor's time and materials rather than for a definite product.[267] In some cases, EPA has employed Superfund contractors under cost-plus-award-fee (CPAF) contracts, under which the contractor is reimbursed for all allowable costs plus a fee consisting of two components: an initially agreed upon fixed "base fee," plus an "award fee" determined by the Agency based upon its evaluation of the contractor's performance.[268] CPAF contracts seek to motivate "exceptional performance" in situations where objective incentives are infeasible and the extra costs the Agency incurs to evaluate the contractor's performance are "justified by the expected benefits."[269]

Despite good intentions, using these contracts has not eliminated contractor abuses. Specifically, two Inspector General audits

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Brantly, *supra* note 12, at 988.

[262] *See* 48 C.F.R. § 16.301 (1991); Brantly, *supra* note 12, at 988.

[263] 48 C.F.R. § 16.301-2 (1991); Brantly, *supra* note 12, at 988-89.

[264] *See* 48 C.F.R. § 16.301-2 (1991); Brantly, *supra* note 12, at 988-89.

[265] Reichelstein, *supra* note 259, at 713.

[266] *Id.* Federal regulations require agencies to consider a number of factors, including the complexity and risks associated with a project, the contractor's capital and equipment costs, and the degree of incentive necessary to motivate excellent performance when negotiating fees designed to provide the contractor with a reasonable profit. *See* 48 C.F.R. §§ 15.900-.905 (1991); Brantly, *supra* note 12, at 989.

[267] *See Collapse of Contract Management*, *supra* note 44, at 342 (testimony of John C. Martin, EPA Inspector General). *See also* Brantly, *supra* note 12, at 988-89 (discussing cost-reimbursement contracts).

[268] *See* 48 C.F.R. § 16.404-2 (1991)(defining CPAF contracts). *See also* Brantly, *supra* note 12, at 995-98 (discussing use of CPAF contracts in Superfund program); 48 C.F.R. § 1516.404-270 (1991)(providing regulations applicable to CPAF contracts).

[269] *See* 48 C.F.R. § 16.404-2(b)(1)(i-iii) (1991); Brantly, *supra* note 12, at 995.

and one GAO report concluded that EPA had paid excessive award fees and award fees for unsatisfactory performance.[270] One commentator contends, however, that the total fees awarded by EPA to the contractors, as reported in the GAO report, were not excessive relative to those fees paid under the typical fixed-fee contract.[271] The commentator argues that it is probably legal for the Agency to give partial award fees to contractors who deliver less than satisfactory performance, although he maintains EPA violated regulations concerning CPAF contracts in other respects.[272] The legality of EPA award procedures, however, is not at issue here. Rather, at issue is the Agency's granting of partial awards to poorly performing contractors; this may reduce the contractors' incentive to perform well.

Recently, the government (especially the Defense Department) has increased the use of contracts which control costs by basing the contractor's profit on the extent to which it keeps costs below a negotiated cost target.[273] One concern with such contracts is the difficulty of formulating realistic cost targets.[274] EPA should explore whether such incentive contracts are feasible. In the past, there was probably too much uncertainty surrounding the costs of cleaning up hazardous waste facilities to formulate cost targets.[275]

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[270] *See* Brantly, *supra* note 12, at 995. In some cases, EPA paid award fees before the quality of the work could be evaluated and despite concurrent recognition that the contractor's performance was inadequate. *Id.* at 995-96.

[271] *Id.* at 996-98.

[272] *Id.* He also contends that in some instances the Agency acted contrary to government regulations when it rolled over unpaid award fees from one contract year to another; for these costs, EPA should be denied recovery. *Id.* at 997-98.

[273] *See* Reichelstein, *supra* note 259, at 713-14.

[274] *See id.* at 713. Reichelstein argues that cost-plus-incentive-fee contracts can be improved by using budget-based schemes that place the burden on the contractor, who presumably has the best information regarding the costs of a project, to select a budget and then make the incentive profit proportional to the budget variance. *Id.* at 713-14. According to Reichelstein, previous modeling analysis has shown that budget-based schemes generate desirable reporting and performance incentives. *Id.* at 714. It is unclear whether Superfund contractors have better information than EPA about the eventual costs of cleaning up a hazardous waste site, although contractors generally can hire more experienced employees than EPA. *See infra* notes 275-76 and accompanying text.

[275] *See generally* U.S. GENERAL ACCOUNTING OFFICE, GAO/AFMD-92-40, SUPERFUND: EPA COST ESTIMATES ARE NOT RELIABLE OR TIMELY 1-14 (1992)(EPA's cost estimates fail to consider realistic costs for future sites, estimated and actual cleanup costs, and long-term treatment, and are overly optimistic about extent to which PRPs will finance new cleanup actions); *Congress Cannot Rely on EPA Cost Estimates to Make Decisions on Program Funding*, 23 Env't Rep. (BNA) 768, 768-69 (July 10, 1992)(same); *GAO Says*, *supra* note 120, at 724-25

The Agency is currently developing more standardized approaches to cleaning up sites[276] and should use incentive contracts based on cost targets if the Agency can accurately estimate cleanup costs. Obviously, if EPA continues to furnish partial awards to contractors despite serious cost overruns, then incentive contracts may have no more influence than the current CPAF system does in encouraging good contractor performance.

CONCLUSION

Superfund contractors have not captured the Superfund program. They have, however, formed a dependent bureaucracy that feeds on the program's structural incentives and EPA's inadequate staffing. While contractors have not drastically changed Superfund policies from what these policies probably would have been without their influence, Superfund contractors have taken advantage of these shortcomings, and as a result have enjoyed a prosperous existence.

The lack of clear standards for determining "how clean is clean" makes it difficult to ascertain whether the Superfund program results in too few or too many permanent remedial cleanups.[277] Structural incentives within the Superfund process seem to encourage EPA to require more protective approaches: it is the PRPs that are supposed to pay, and the public generally chooses to err on the side of safety.

Because the public demands a safe environment, Congress will unlikely change the structural incentives which currently favor more protective cleanup measures. Landy and Hague may be correct that cleanup resources would be allocated more efficiently if the

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(GAO found many cleanup plans failed to set cleanup goals and EPA agreed that the Agency should create a new database for Superfund remedies).

[276] *See Revitalization Program One Year Later: Mix of Better Management, 'Coming of Age,'* 23 Env't Rep. (BNA) 1497 (Oct. 2, 1992)(EPA developing guidance on standardized procedures for cleaning up sites for wood treaters, municipal landfills, and sites contaminated by lead acid batteries and polychlorinated biphenyls); *GAO Says*, *supra* note 120, at 725 (GAO official states that EPA plans to standardize remedies). Standardized approaches to cleanups would likely utilize an established process to determine which problems at a site should be addressed, rather than specifying that a particular method of technology must be used during every cleanup. *See New Technologies, Standard Remedies Pose Conflicts for Regional Officials*, 22 Env't Rep. (BNA) 1535 (Oct. 11, 1991). However, there is potential for conflict between standardizing remedies and stifling innovative technology. *Id.*

[277] *See supra* notes 121-27 and accompanying text.

public directly paid for Superfund cleanups.[278] However, a congressional shift of direct costs onto the public is unlikely because the public probably prefers that the "evil" corporations pay for cleanups. In any event, after PRPs pass on most of their costs, consumers ultimately pay for Superfund cleanups.

Congress and the Clinton administration can change some of the auditing and funding problems that contribute to excessive contractor costs. In Fiscal Year 1979, during the Carter administration, civilian agencies contracted for services valued at $23 billion. In Fiscal Year 1991, during the Bush administration, that figure rose to $55 billion.[279] OMB's SWAT Report found that, as of September 30, 1991, there existed a backlog of 13,000 audits with a value of approximately $160 billion.[280] OMB's Office of Federal Procurement Policy Administrator testified before a congressional subcommittee that it would take until 1997 to eliminate that backlog at current auditing staff levels.[281]

The Reagan and Bush administrations encouraged privatization of government based, in part, on a political philosophy that government workers are lazy and inefficient compared to private business people.[282] Furthermore, the Reagan and Bush administrations tightened civilian agency budgets, at least in real terms. As a result, agencies used more private contractors to hold down overhead.[283] In the case of EPA, Congress shares some responsibility for significantly increasing the Agency's responsibilities while holding the Agency's budget roughly constant in real dollar terms.[284]

As discussed above, the general decrease in monetary resources caused, in some federal departments, a shortage of expertise necessary to perform increasingly specialized jobs. In turn, as OMB's SWAT Report concluded, some agencies could not function without contractors.[285] For instance, during 1992 the Agency paid $20,000

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278 *See* Landy & Hague, *supra* note 182, at 82-84.

279 *See OFPP Plans*, *supra* note 146 (testimony of J. Dexter Peach, Assistant Comptroller General of GAO at House Energy and Commerce Oversight and Investigations Subcommittee, Dec. 3, 1992).

280 *See id.* (testimony of Allan Burman, Administrator of Office of Federal Procurement Policy of OMB at House Energy and Commerce Oversight and Investigations Subcommittee, Dec. 3, 1992).

281 *Id.*

282 Editorial, *U.S. Called Off*, *supra* note 244, at A12.

283 *See* Dan Morgan, *U.S. Acknowledges Flaws in Contract Audit System; OMB Reports Lax Oversight of Payments*, WASH. POST, Dec. 3, 1992, at A8.

284 *See supra* notes 49-52 and accompanying text.

285 *For the Government*, *supra* note 241, at E2.

to a contractor to prepare an official response to a congressional report which criticized the Agency's improper use of contractors![286] The proposed fiscal 1993 budget for EPA, however, could significantly slash contractor appropriations.[287]

The Clinton administration must reject the Reagan-Bush dogma that private contractors are necessarily better than government employees. While privatization is sometimes more efficient, a government agency needs sufficient qualified staff to supervise private contractors and to make key policy decisions. To rephrase President Reagan, sometimes government may be the solution rather than the problem.[288]

A recent government study concluded that there are fundamental problems with the federal contracting program because the Reagan and Bush administrations slashed the number of government auditors and contractor supervisors while simultaneously expanding the use of private contractors to perform government functions.[289] Congress and the Clinton administration must redress the balance between the use of private contractors and the need for adequate government staff to monitor contractors. In particular, Congress should mandate that EPA personnel make all key policy decisions regarding cleanup methods and should require that EPA staff actually supervise the cleanup work of both contractors and PRPs. Carol M. Browner,[290] the new EPA Administrator, must

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[286] *Id.*

[287] *Plan to Distribute EPA Budget Cuts Likely to Affect Contractors, Analysts Say*, 23 Env't Rep. (BNA) 2091, 2091-92 (Dec. 25, 1992)(Congress reduced Bush administration budget request for EPA by over $100 million, and as a result then EPA Administrator William Reilly reluctantly proposed cuts for other contractor-involved programs such as global warming, North American Free Trade Agreement, and Montreal Protocol on phaseout of chemicals that deplete stratospheric ozone layer). It is unclear what the impact will be on Superfund contractors, but the Agency is decreasing its Superfund appropriation for the first time since SARA's enactment. *Id.* at 2092.

[288] Ronald Reagan won the 1980 presidential election in part because of his popular slogan, "Government is the problem, not the solution." *See, e.g.*, Steven V. Roberts et al., *That Sinking Feeling*, U.S. NEWS & WORLD REP., Nov. 2, 1992, at 22.

[289] *See* Dan Morgan, *supra* note 283; *U.S. Says*, *supra* note 229, at A1, C20; *OFPP Plans*, *supra* note 146.

[290] *See* Keith Schneider, *The Nominee for E.P.A. Sees Industry's Side Too*, N.Y. TIMES, Dec. 17, 1992, at A13 (discussing Browner's record). As head of Florida's Department of Environmental Regulation, Browner rejuvenated a demoralized staff of 1500 and made the agency one of the most active in the Florida government. *Id.* On March 10, 1993, EPA Administrator Browner told a House subcommittee that she was "appalled" by the Bush administration's record on EPA contract management and pledged aggressive remedies. *Browner Assails Past Con-*

improve the Agency's management of its contractors and revitalize its staff. It remains to be seen whether the Clinton administration and Browner can overcome the budget limitations and statutory demands that led the Agency to rely so heavily upon private contractors in the first place.

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tract Management, Tells House Panel Sweeping Change Coming, 23 Env't Rep. (BNA) 3012 (Mar. 19, 1993). In putting together the fiscal year 1994 budget, she pledged not to reduce contract management staff. *Id.*