

# Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's

James J. Florio†

In the 1970's Congress established an environmental protection regulatory system by passing laws which, like many preceding regulatory statutes, set relatively broad goals and timetables and left substantial discretion to the implementing agency on how best to achieve those goals. As demonstrated in the recent reauthorizations of the Resource Conservation and Recovery Act (RCRA)<sup>1</sup> and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),<sup>2</sup> however, Congress is no longer confident that the Environmental Protection Agency (EPA)<sup>3</sup> will exercise such discretion as intended by Congress. As a result, Congress itself has had to assume the role of regulator, making some of the detailed technical and administrative determinations typically left to the implementing agency. Instead of authorizing EPA to regulate the disposal of chemical wastes, Congress has prescribed the limits. Instead of relying on EPA to meet deadlines, Congress has established self-enforcing standards to be implemented in the absence of agency action. Instead of allowing EPA to establish technical standards of safety, Congress has set minimum requirements that EPA may not reduce.

† United States Representative for the First District of New Jersey, and Chairman of the House Subcommittee on Commerce, Transportation and Tourism, which has jurisdiction over hazardous waste issues. The author wishes to express his thanks for assistance in the preparation of this article to Gregory E. Lawler, Chief Counsel of the Subcommittee, and William Roberts and Rena Steinzor, Counsels to the Subcommittee.

1. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6907; 42 U.S.C. §§ 6911-6916, 6921-6931, 6941-6949, 6951-6954, 6961-6964, 6971-6979, 6981-6986 (1982)); *amended by* Solid Waste Disposal Act Amendments of 1980, Pub. L. 96-482, 94 Stat. 2334 (1980) (codified at 42 U.S.C. §§ 6991-6991(i)); and Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, Title I, 98 Stat. 3224 (codified at 42 U.S.C. §§ 6924).

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9657 (1982); 26 U.S.C. §§ 4041, 4611-4612, 4661-4662, 4681-4682 (1982); 33 U.S.C. § 1364 (1982); 49 U.S.C. § 11901 (1982)). CERCLA is commonly known as "Superfund."

3. EPA was created in 1970 to handle the rash of environmental legislation enacted during the 1960's. Reorg. Plan No. 3 of 1970, PUB. PAPERS: RICHARD NIXON 578-87 (1970). In its creation, EPA was a hybrid, inheriting specific responsibilities from the Federal Water Quality Administration, the Department of Health, Education, and Welfare, the Atomic Energy Commission, and the Department of Agriculture. Despite this patchwork of authority, EPA has, until recently, been regarded as a strong advocate for environmental protection.

Congress was provoked into assuming this new regulatory role by a recalcitrant EPA which was fulfilling the current Administration's objective of environmental deregulation.<sup>4</sup> In line with the philosophy of the Reagan Administration, EPA has consistently refused to carry out the congressional intent expressed in its organic statutes. Against this, the traditional tools of Congressional oversight have proven ineffective. Congress, at least in part inspired by strong public opinion,<sup>5</sup> has repeatedly criticized EPA's failure to enforce laws and questioned the appointed officials' commitment to such enforcement.<sup>6</sup> Under most administrations, political criticism and strong public opinion would return regulatory policy to a sensible middle ground. In the 1980's, however, EPA and the Administration have argued that the federal government need not pursue environmental protection, while Congress meanwhile focused its debates on how to ensure it. In the debate over RCRA and Superfund legislation, the validity of the fundamental goal of environmental protection has itself become the matter of dispute between the Administration and Congress.<sup>7</sup>

This article explores the atypical situation in which Congress takes over as regulator due to the politically motivated refusal of an executive branch agency, namely EPA, to act responsibly. Regulatory theorists have long concerned themselves with the structural failures of administrative agencies, such as chronic inefficiency<sup>8</sup> and the agencies' susceptibility to

4. Two examples illustrate the ongoing conflict between the Reagan Administration and Congress over expanding existing environmental statutes. The Administration's position on reforming the Clean Air Act of 1970, 42 U.S.C. § 7401-7642 (1982), was criticized in 1981 as a "sugar-coated prescription for dirty, unhealthy air" by environmentalists and as "dangerous retreat" by Members of Congress. 37 CONG. Q. ALMANAC 507 (1981). Similarly, the 1984 attempt to reauthorize the Safe Drinking Water Act, 42 U.S.C. §§ 300(f)-300(j) (1982), which would have put teeth into a dormant program, was opposed by the Reagan Administration because it would have expanded federal involvement. 40 CONG. Q. ALMANAC. See J. LASH, K. GILLMAN, AND D. SHERIDAN, *A SEASON OF SPOILS* (1984).

5. In September 1981, the New York Times/CBS News Poll published survey results which indicated that Americans cared deeply about protecting the environment. Sixty-seven percent did not favor the relaxation of environmental laws in order to achieve economic growth. Forty-five percent held protection of the environment to be such an important goal that the requirements and standards could not be too high, regardless of the cost. The results of these and other related polls are summarized in THE CONSERVATION FOUNDATION, *STATE OF THE ENVIRONMENT 1982* 424-29 (1982).

6. In considering amendments to RCRA, for example, many members of Congress questioned EPA's commitment to enforce existing provisions of law when no personnel or resources were being devoted by the Agency to implement them. *Resource Conservation and Recovery Act Reauthorization: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 97th Cong., 2d Sess. 424-25 (1982)* [hereinafter cited as *1982 House RCRA Hearings*].

7. Conflicts between the Administration and Congress over CERCLA are described in detail in SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 98TH CONG., 2D SESS., *INVESTIGATION OF THE ENVIRONMENTAL PROTECTION AGENCY, REPORT ON THE PRESIDENT'S CLAIM OF EXECUTIVE PRIVILEGE OVER EPA DOCUMENTS, ABUSES IN THE SUPERFUND PROGRAM, AND OTHER MATTERS 121-57* (Comm. Print 1984) [hereinafter cited as *OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE REPORT*].

8. See, e.g., R. LITAN & D. NORDHAUS, *REFORMING FEDERAL REGULATION* 81-99 (1983).

capture by the industries they regulate.<sup>9</sup> Congressional dissatisfaction with EPA stems not from structural problems, but from political recalcitrance on the Agency's part. The problems created by such inter-branch political standoffs are exacerbated by the common practice of delegating broad authority to the administrative agencies, a practice which has presumed a general consensus between legislators and the executive agency staff on policy goals. The present conflict between Congress and EPA dramatically illustrates how the executive branch, acting through the administrative agencies, can virtually emasculate statutes through strategic inaction.

This article examines Congress as regulator in the context of the reauthorization of RCRA in 1984 and the current proposals for reauthorizing Superfund. Part I reviews the legislative history of the original RCRA and CERCLA acts. Part II describes EPA's implementation, or, more precisely, non-implementation, of these hazardous waste laws. The congressional reaction to this regulatory failure, culminating in the drastic limitation of agency discretion in the reauthorized versions of RCRA and CERCLA, is discussed in Part III. Part IV analyzes the factors that pushed Congress to adopt the regulatory role, discusses the advantages and failings of Congress as rulemaker, and offers broad guidelines for determining when such Congressional behavior is most appropriate.

## I. Congress Delegates to EPA

RCRA and CERCLA are the two federal laws designed to deal with hazardous waste. RCRA established a regulatory system covering the generation, transportation, storage, and disposal of hazardous waste, while CERCLA created and funded a federal program to clean up abandoned hazardous waste disposal sites.

### A. *The Passage of RCRA*

Congress passed the Resource Conservation and Recovery Act, the first federal effort to control the disposal of hazardous waste, in 1976, before the extent and danger of hazardous waste disposal problems became widely known. RCRA created a "cradle to grave" regulatory system for hazardous waste, requiring generators, transporters, and disposers to maintain written records of waste transfers, and establishing standards, procedures, and permit requirements for disposal.<sup>10</sup>

9. See, e.g., Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 6 (1974).

10. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921-6924 (1976).

As in most other federal regulatory statutes, including other environmental laws, Congress prescribed goals in broad terms only: what was to be achieved by EPA and when. For example, EPA was directed to develop standards within eighteen months for facilities disposing of hazardous waste<sup>11</sup> and to include provisions for record-keeping,<sup>12</sup> treatment, storage, and disposal methods,<sup>13</sup> requirements for location, design, and construction,<sup>14</sup> contingency plans for accidents,<sup>15</sup> and financial responsibility requirements.<sup>16</sup> The only substantive direction was a requirement that the EPA regulations protect "health and the environment."<sup>17</sup>

Although the task given to EPA was enormously complex—perhaps more complex than anyone, including Congress, understood at the time—the delegation of enormous discretion to EPA was sensible. Prescribing standards for hazardous waste disposal required careful analysis of scientific and economic data and a thorough understanding of the commercial system for hazardous waste disposal. In 1976 the information and analysis necessary for sound formulation of the regulatory details were simply not available to Congress, although enough was known to indicate that considerable hazards did exist.

In our scheme of government the role of an environmental regulatory agency is to act as the scientific and technical expert in filling in the details of the environmental protection policy enunciated by Congress. Only an executive branch agency possessing sufficient technical expertise, administrative skills, and bureaucratic resources can administer a nationwide regimen for controlling the disposal of hazardous waste. Soon after the enactment of RCRA, EPA learned that the development of hazardous waste regulations would be an enormously difficult task. The complexity of the technical issues involved in determining disposal methods appropriate to the thousands of different chemicals and other wastes, each presenting different dangers,<sup>18</sup> was compounded by the enormous economic impact of controlling the high volume of hazardous waste produced in this

11. *Id.* § 6921(a).

12. *Id.* § 6924(1).

13. *Id.* § 6924(3).

14. *Id.* § 6924(4).

15. *Id.* § 6924(5).

16. *Id.* § 6924(6).

17. *Id.* § 6924.

18. The difficulty of assessing the appropriate disposal method for different types of chemicals is discussed in OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL 156-218 (1983) [hereinafter cited as OTA REPORT]. For example, appropriate disposal methods vary with the underlying geology of an area. *Id.* at 182. See also V. PYE, R. PATRICK, & J. QUARLES, GROUNDWATER CONTAMINATION IN THE UNITED STATES 15-19 (1983).

country.<sup>19</sup> In the developmental stage of this regulatory system, EPA, like any bureaucracy in a similar situation, moved slowly.

### B. *The Birth of Superfund*

As Congress and the Administration learned more about past hazardous waste disposal practices and their effect on the environment, they soon realized that the country faced an environmental crisis.<sup>20</sup> Sparked by episodes such as the catastrophes at Love Canal<sup>21</sup> and Kentucky's "Valley of the Drums,"<sup>22</sup> Congress recognized that, aside from the regulatory problems addressed in RCRA, a remedial program was needed to clean up existing hazardous waste dumps. Improper hazardous waste disposal had poisoned the land and water of thousands of communities across the country.<sup>23</sup> In community after community, officials discovered sites where chemical wastes had been dumped in the ground for years, or even decades.<sup>24</sup> The sites were simply abandoned, and in many cases the owners had disappeared. No one took responsibility for these abandoned sites, and the local, state, and federal governments had neither the legal authority nor the resources to clean them up.

The federal response to this crisis was to assume responsibility for the cleanup of the worst sites. The 96th Congress, during the last days of the Carter Administration, enacted the Comprehensive Environmental Response, Compensation and Liability Act.<sup>25</sup> CERCLA's program had two major components. First, the law established a \$1.6 billion trust fund, to be funded over a period of five years primarily by taxes on the domestic production and import of chemical "feedstocks"—the basic chemical building blocks that are used to manufacture most other chemical

19. It has been estimated that about 255 to 275 million metric tons of hazardous waste are generated annually. OTA REPORT, *supra* note 18, at 3. By 1990 an estimated \$12 billion per year will be spent to manage such waste. *Id.* at 5.

20. An EPA study indicated that there were 80,263 sites in the nation with contaminated pits, ponds, and lagoons. OTA REPORT, *supra* note 18, at 5. In addition, EPA also identified, as part of the Superfund program, 418 uncontrolled hazardous waste sites which needed priority attention. Three hundred and forty-seven of those sites were determined to pose direct threats to drinking water supplies and were thought to cause birth defects, cancer, and other diseases. Wash. Post, Dec. 21, 1982, at A2, col. 1.

21. N.Y. Times, Aug. 2, 1978, at A3, col. 1. See also L. GIBBS, LOVE CANAL—MY STORY (1982).

22. Wash. Post, Feb. 3, 1979, at A2; N.Y. Times, July 11, 1980, at B4, col. 5.

23. See generally M. BROWN, LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS (1979).

24. EPA estimated that 150 million metric tons of hazardous wastes were being dumped annually, while the Office of Technology Assessment estimated approximately 250 to 275 million tons per year. W. DRAYTON, AMERICA'S TOXIC PROTECTION GAP, THE COLLAPSE OF COMPLIANCE WITH THE NATION'S TOXICS LAWS 50 (1984).

25. See *supra* note 2.

products.<sup>26</sup> The fund was to be used to clean up sites that presented immediate public health and environmental hazards and for which judgments against the private responsible parties could not be obtained. The expectation was that the federal government would clean up several hundred of the worst sites in a cooperative effort with the states, but that thousands of remaining sites would be left for the states to clean up. Second, CERCLA established liability for the private parties who generated the wastes found at a dump site, those who transported such wastes, and those who owned and operated the dump.<sup>27</sup> These liability provisions held such parties strictly, jointly and severally liable<sup>28</sup> for the costs of cleaning up the site<sup>29</sup> and permitted the federal government both to recover the funds expended by the federal fund<sup>30</sup> and to issue orders compelling private responsible parties to conduct such cleanups on their own.<sup>31</sup>

Within these basic parameters CERCLA gave EPA virtually unlimited discretion in carrying out its provisions.<sup>32</sup> For example, the statute's central cleanup provision gave the agency open-ended authority to respond to a release or threatened release of any "hazardous substance, pollutant or contaminant" that "may present an imminent and substantial danger to the public health."<sup>33</sup> Each of these key terms was defined in the broadest possible manner.<sup>34</sup>

Some opponents of the original legislation warned that the broad definitions and administrative discretion would lead to excessive activity

26. Hazardous Substances Response Revenue Act of 1980, Pub. L. No. 96-510, tit. II, § 221, 94 Stat. 2796, 2801 (1980) (codified at 42 U.S.C. § 9631 (1982)). The chemical feedstocks include crude oil and petroleum products, *id.*, 94 Stat. at 2797 (codified at 26 U.S.C. § 4611 (1982)), and 42 specified chemicals, *id.*, 94 Stat. at 2799 (codified at 26 U.S.C. § 4661).

27. CERCLA, 42 U.S.C. § 9607 (1982).

28. CERCLA does not directly establish a culpability standard; however, all courts which have addressed the issue have interpreted § 107 to impose strict liability, *See, e.g.*, South Carolina Recycling, 14 ENV'T'L. L. REP. (ENVTL. L. INST.) 20722 (D.S.C. Feb. 23, 1984), and several have extended strict liability to § 106 cases; *see, e.g.*, United States v. Price, 13 ENV'T'L. L. REP. (ENVTL. L. INST.) 20843 (D.N.J. July 28, 1983). Although the issue has not been conceded by waste generators, the court decisions to date have concluded that responsible parties are jointly and severally liable unless they prove a basis for allocation. *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983); United States v. Stringfellow, 14 ENV'T'L. L. REP. (ENVTL. L. INST.) 20385 (C.D. Cal. Apr. 5, 1984). *See also* Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund*, 50 NOTRE DAME LAW. 260 (1981).

29. CERCLA, 42 U.S.C. § 9607(a)(4) (1982).

30. *Id.*

31. CERCLA, 42 U.S.C. § 9606(a) (1982). Sections 9606-9607 specifically give the President authority to issue orders to do what he deems necessary in the situation.

32. *Id.* §§ 9606, 9607. The statute conferred on the President all authority to expand the trust fund and enforce its liability provisions. The President subsequently delegated most of these decisions to the EPA Administrator.

33. *Id.* § 9604(a)(1)(B).

34. For example, the term "release" is defined, with a few limiting exceptions, as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. . ." *Id.* § 9601(22).

and overregulation by the bureaucracy. Congressman David Stockman warned of an “undirected regulatory blunderbuss”:

The bill prescribes drastic overkill and resource waste in three separate dimensions: inventory requirements, monitoring, and clean-up. . . . [C]lean-up methods and costs are wide open and authority to order and directly fund cleanup is plenary, rather than limited to cases of imminent threat to public health.<sup>35</sup>

Senator Jesse Helms, the most active critic of the Senate version of the legislation, also protested:

[W]e are going far beyond what is needed to address the real problem—that of abandoned waste sites. I am concerned that the addition of this whole “release” concept will unnecessarily open the “Pandora’s box” of new regulations and notice requirements—requirements which will not assist in the cost-effective cleanup of waste sites but that will in addition merely provide jobs for more bureaucrats at the expense of the consumers of America.<sup>36</sup>

In spite of these criticisms, Congress did set ambitious goals and delegate substantial authority to EPA to design a program to implement these goals. Notwithstanding the optimistic language of the statute, no one expected a perfect agency response free of the false starts and delays normal to any bureaucratic undertaking. As the technical problems became more difficult, EPA’s progress slowed. As the economic impacts grew, the outside pressure on EPA also rose, slowing the implementation process even further. No one expected EPA to design programs that would please every member of Congress or outside interest group. It was expected, however, that EPA would make a good faith effort to achieve the goals set out by CERCLA in a timely fashion. Congress anticipated that resulting agency actions might emphasize problems that it had not previously been aware of, or that EPA might even suggest that it needed new or different authority to cope with the problems. What Congress did not foresee was that EPA would intentionally ignore CERCLA’s clear statutory goals and decline to exercise the ample authority Congress provided to achieve them.

35. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, HAZARDOUS WASTE CONTAINMENT ACT OF 1980, H.R. REP. NO. 1016, Pt. I, 96th Cong., 2d Sess. 72 (1980) (dissenting views of Representatives Stockman and Loeffler). While Congressman Stockman was commenting on a version of the legislation that was changed substantially prior to final passage, his observations are equally relevant to the specific aspects of the final law that he identifies.

36. 126 CONG. REC. 30,972 (1980).

## II. EPA Abuses Its Discretion

EPA's implementation of RCRA and CERCLA provides an excellent example of how a recalcitrant agency can use the tools at its disposal to undermine Congressional intent in the implementation process. A brief review of the regulatory history of the two statutes clearly demonstrates that EPA actively resisted achievement of the specific goals established by Congress.

### A. RCRA

Congress enacted RCRA in 1976 to increase the safety of hazardous waste disposal practices. Key provisions required EPA to develop standards for facilities handling hazardous waste, to establish a system of permits for such facilities, and to determine the technology appropriate for the disposal of particular wastes.<sup>37</sup>

Implementation of the RCRA program began during the Carter Administration. The delays and false starts inherent in the initial implementation of most regulatory efforts were commonplace: EPA quickly fell behind schedule in efforts to issue regulations for permits and standards by the statutory deadlines as it discovered the complexity of the problem and the decisions it faced.<sup>38</sup> EPA's pace under Carter prompted criticism, but its underlying commitment to implementing the statute was not challenged.

In 1981 the situation changed. EPA's nominal efforts to implement the protective provisions of RCRA clearly reflected the Reagan Administration's antipathy for regulation by the federal government and its concern for selection of the least expensive means to dispose of hazardous waste. Indeed, the test at EPA was not whether a regulatory system met the statutory prescription to protect the environment, but rather whether it met the Administration's ideological regulatory standard.<sup>39</sup> Congress fully

37. The standards provision of RCRA was intended to require establishment of a comprehensive system prescribing methods of disposal and design which would ensure that waste disposal facilities were safe. It was linked with another provision which required EPA to develop regulations requiring all owners and operators of hazardous waste facilities to have a permit. EPA would issue a permit to an applicant if the agency determined that the facility had complied with the appropriate standards and other requirements of the permit regulations. To give EPA time to develop standards and a process for issuing permits, the law also provided for "interim status," which allowed firms to continue to operate if they simply notified EPA that they were in operation on the date of enactment. 42 U.S.C. § 6925(e) (1982).

38. For example, regulatory standards for generators, transporters, and disposal facilities which were required to be promulgated within 18 months after enactment of RCRA in 1976 were never issued during the four-year tenure of the Carter Administration. Nevertheless, the Carter EPA had twice attempted to issue standards between 1976 and 1980. See *infra* text accompanying notes 43-45.

39. This philosophy was characterized by EPA Administrator Anne Gorsuch as "doing more with less." NEWSWEEK, Mar. 7, 1983, at 21.



expects agencies to exercise delegated discretion in a manner consistent with the Executive's political ideology. Tension between legislative intent and regulatory implementation is inevitable and expected. This tension is usually resolved through a series of small compromises and skirmishes between the legislative and executive branches, often effectuated through Congressional oversight. In the case of EPA and RCRA, however, the Administration's philosophy was more fundamentally at odds with the statute. EPA's implementation of the Administration's philosophy actually subverted the statutory goals by delaying statutorily required action and ignoring technical and scientific information that indicated a need for additional requirements.

Bureaucracies rarely implement regulations as quickly as Congress would like. Certainly progress under RCRA was slow in the years of the Carter Administration, and there was no reason to expect the pace to pick up after Reagan took office. Normal bureaucratic delay and delay resulting from initiating a regulatory program are far different, however, from a conscious political decision by the executive branch to avoid the implementation of a law.

The degree of delay undertaken by the Reagan Administration is best illustrated by the example of the land disposal regulations. RCRA required EPA to finish developing the standards and permit regulations within eighteen months of enactment.<sup>40</sup> Yet despite this statutory deadline, EPA did not issue final standards for land disposal facilities until almost six years after RCRA was enacted, four and one-half years after the deadline. EPA first proposed uniform design standards for hazardous waste disposal facilities in December 1978.<sup>41</sup> Two years later, in October 1980, EPA considered using a site-specific risk assessment approach instead of the uniform design standards because of criticisms of the latter.<sup>42</sup> Thirty months after the initial proposal EPA proposed standards which

More generally, in the early days of his first term as president, Ronald Reagan quoted with favor from Calvin Coolidge that "no plan of centralization has ever been adopted which did not result in bureaucracy, tyranny, inflexibility, reaction and decline." PUB. PAPERS: RONALD REAGAN: 1981 at 466 (1982). The Office of Management and Budget was given great power to substantively review regulations and constrain the regulatory process by President Reagan's Executive Order No. 12291, 3 C.F.R. § 127 (1982), and by the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1982). The review process, which required EPA to submit all "major" proposed rules to OMB along with a "Regulatory Impact Analysis" before a final rule could be issued, is described in *Role of OMB in Regulation: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981).

40. 42 U.S.C. §§ 6922-6924 (1976).

41. 43 Fed. Reg. 58,982 (1978).

42. 45 Fed. Reg. 66,816 (1980). This would have required EPA to evaluate the potential risks to human health and the environment posed by a particular facility's location, design, construction, and operation.

incorporated the site-specific risk assessment approach.<sup>43</sup> Even then, however, EPA did not intend to promulgate its standards in final form until the fall of 1983. It was only because of a court order<sup>44</sup> that EPA issued its final standards for land disposal facilities in July 1982 to become effective January 26, 1983.<sup>45</sup>

Promulgation of the long-delayed land disposal standards, however, did little to improve the safety of hazardous waste disposal practices, primarily because the regulations imposed no immediate requirements on land disposal facilities. The standards EPA established applied only when a facility sought a "final permit." Those operating under "interim permits" were allowed to continue operating without regard to the newly issued standards. Facilities were not required to submit final permit applications unless EPA requested them to do so.<sup>46</sup> Not surprisingly, EPA's progress in calling for permits was exceedingly slow.<sup>47</sup> By delays in standard-setting and permit review, EPA managed to postpone any effective change in the treatment of hazardous waste under RCRA for years beyond the time foreseen by Congress.

In addition to delaying implementation, EPA consistently ignored important technical information if the information appeared to lead to additional environmental regulation, and thus increase costs to industry. This approach subverted the basic purposes of RCRA. EPA's insistence on land disposal as a sensible environmental option is illustrative of this

43. Reproposal of Proposed Rule and Proposed Amendments to Rule, 46 Fed. Reg. 11,126 (1981) (codified in revised form in 40 C.F.R. §§ 122, 260, 264) (proposed Feb. 5, 1981). Due to the alleged complexity of the issues involved, the agency provided an eight-month comment period during which it issued a "supplemental notice of repropoed rulemaking" on May 26, 1981, seeking additional comments on its proposal. Supplemental Notice of Repropoed Rulemaking, 46 Fed. Reg. 28,314 (1981).

44. On November 13, 1981, EPA was ordered "to promulgate regulations for existing hazardous waste land disposal facilities on or before February 1, 1982." *Illinois v. Gorsuch*, 530 F. Supp. 340, 341 (D.D.C. 1981). The Court of Appeals for the District of Columbia affirmed this order in its decision of July 15, 1982. *National Solid Wastes Management Ass'n v. Gorsuch*, 684 F.2d 1033 (D.C. Cir. 1982).

45. Interim Final Rule, 47 Fed. Reg. 32,274 (1982). Even then EPA stated that the agency "has promulgated today's regulations ahead of the schedule which the Agency had desired, in order to comply with the D.C. Circuit's court order." *Id.* at 32,278.

46. *See, e.g.*, 40 C.F.R. § 270.10(e)(4) (1983).

47. Not until early 1983 did EPA begin to call in land disposal permit applications, and even then only slowly: by March 24, 1983, only 150 permits had been called in. The first completed applications were not due back until August or September 1983. *Hazardous Waste Control and Enforcement Act of 1983: Hearings Before the Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce*, 98th Cong. 1st Sess. 351 (1983) [hereinafter cited as *1983 House RCRA Hearings*]. By mid-1983 only one landfill had been issued a final permit and only 10 final permit decisions were planned for such facilities in fiscal year 1984. GENERAL ACCOUNTING OFFICE, INSPECTION, ENFORCEMENT AND PERMITTING ACTIVITIES AT HAZARDOUS WASTE FACILITIES 18 (1983).

technique.<sup>48</sup> EPA clung doggedly to the belief that land disposal<sup>49</sup> was an environmentally sound policy and was preferable to other disposal methods, despite evidence that land disposal caused serious environmental hazards<sup>50</sup> and despite the widespread recognition that effective and available treatment alternatives existed.<sup>51</sup> For decades industry simply disposed of chemical and other wastes in the ground, with minimal protections for the environment. As evidence of the dangers created by such practices mounted, certain improvements in landfill technology were added, such as liners, caps, groundwater monitoring, and leachate collection systems to meet the more demanding regulatory requirements. Safer, more advanced forms of disposal, including incineration, neutralization, recycling, and biological treatment, became increasingly available,<sup>52</sup> but the price was greater than that of simple land disposal.

In 1982, a letter from EPA Administrator Gorsuch stated that "landfilling is the lowest risk option currently available for dealing with large quantities of hazardous waste generated each year. It represents a commonsense alternative to the indiscriminate practices of the past."<sup>53</sup> When asked in 1983 to reconcile the agency's policy favoring land disposal with various reports detailing its hazards,<sup>54</sup> EPA's Acting Assistant

48. Under RCRA, EPA was initially given complete responsibility to determine the technology appropriate for the disposal of particular wastes. 42 U.S.C. § 6924 (1976).

49. Land disposal involves burying wastes in excavations and requires a high degree of engineering to prevent contamination of the environment. Landfills are usually less expensive than other disposal methods but they do not assure permanent containment of the hazardous waste. A good landfill would include a liner and a system designed to collect possible leakages of waste. Problems involving land disposal methods may not become apparent until long after the disposal facility is closed. THE CONSERVATION FOUNDATION, *SITING HAZARDOUS WASTE MANAGEMENT FACILITIES* 21-22 (1983).

50. Indeed, 40 C.F.R. § 261.33 (1985) comprises a list of substances known by the EPA in 1980 to have been toxic waste hazards when discarded improperly. The list includes more than 500 hundred substances then positively identified as hazardous. EPA itself has stated that "the regulation of hazardous waste land disposal must proceed from the assumption that migration of hazardous wastes and their constituents and by-products from a land disposal facility will inevitably occur." 46 Fed. Reg. 11,128 (1981). Additionally, a report by the Office of Technology Assessment, published in March 1983, indicated that, despite the inherent threat to the groundwater posed by land disposal, "as much as 80 percent of federally regulated hazardous waste . . . are being placed in or on the land." OTA REPORT, *supra* note 18, at 5.

51. Bromm, *EPA's New Land Disposal Standards*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 15027, 15031, (1982) identifies "several types of hazardous waste management processes" other than land disposal. These include underground treatment and storage in tanks, thermal treatment other than incineration, and chemical, physical, and biological processes.

52. OTA REPORT, *supra* note 18, at 158-97.

53. 1982 *House RCRA Hearings*, *supra* note 6, at 96. When EPA was directly questioned on this policy at a 1982 hearing, an agency official acknowledged that this was agency policy and that "for a large part of the hazardous waste spectrum, yes, landfilling is an appropriate alternative." *Id.* at 163.

54. A 1982 case study by Peter Montague of four state-of-the-art land disposal facilities found that each leaked toxic chemicals, even though each of the facilities used double liners and a leachate collection system. 1982 *House RCRA Hearings*, *supra* note 6, at 67 (statement of Peter Montague). Similarly, a 1983 study by the Office of Technology Assessment concluded that "land disposal, which

Administrator Lee Thomas argued that land disposal was effectively regulated by EPA and should be the primary option for disposal.<sup>55</sup> Thus the agency neglected the effective and available alternatives to land disposal.<sup>56</sup>

EPA also failed to choose the most protective regulatory option in establishing land disposal design standards. The regulations that were finally promulgated contained a series of technical requirements for the design of land disposal facilities, such as the requirement that waste piles and landfills have a single liner and leachate collection system.<sup>57</sup> These design requirements again ignored the availability of more technologically advanced systems. The Office of Technology Assessment criticized the regulations: "[t]he reliability of this design is inferior to a double-liner with a leak detection system."<sup>58</sup> EPA was aware that surface impoundments could be designed with two liners and a leak detection system between the

is used for as much as 80 percent of hazardous wastes, cannot even under the new [1982] EPA land disposal regulations assure adequate protection of public health and environment, either in the near-term or decades from now." *1983 House RCRA Hearings*, *supra* note 47, at 119 (statement of Joel S. Hirschhorn, quoting OTA REPORT, *supra* note 18, at 174-86 (1983)). The State of California's Office of Appropriate Technology presented a 1981 report which found that 70 percent of that state's hazardous waste surface impoundments had been determined to have a "high potential for groundwater contamination." *Solid Waste Disposal Act Amendments of 1983: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 98th Cong., 1st Sess. 133 (1983) [hereinafter cited as *1983 Senate RCRA Hearings*] (statement of S. Kent Stoddard, referring to OFFICE OF APPROPRIATE TECHNOLOGY, STATE OF CALIFORNIA, ALTERNATIVES TO THE LAND DISPOSAL OF HAZARDOUS WASTES: AN ASSESSMENT FOR CALIFORNIA (1981) [hereinafter cited as STATE OF CALIFORNIA REPORT]).

Even EPA's own reports indicated that of the 30,000 surface impoundments used for industrial wastes, 70% were operating without any liner system and 39% were said to have a high potential to contaminate groundwater. OFFICE OF DRINKING WATER, U.S. EPA, SURFACE IMPOUNDMENT ASSESSMENT NATIONAL REPORT 114-16 (1983).

55. "I would say as far as a last resort is concerned, at the current time it is a primary option for our disposal, one that we feel we are regulating and will continue to regulate . . . At some point in time in the future, it may be a last resort. I don't know." *1983 House RCRA Hearings*, *supra* note 47, at 378 (statement of Acting Assistant Administrator Lee Thomas).

56. Treatment methods and capacity other than land disposal are available, but sorely underutilized. A study by the National Academy of Sciences found that there are technologies capable of dealing with almost all hazardous wastes. COMMITTEE ON DISPOSAL OF HAZARDOUS INDUSTRIAL WASTES, NATIONAL MATERIALS ADVISORY BOARD, NATIONAL RESEARCH COUNCIL, MANAGEMENT OF HAZARDOUS INDUSTRIAL WASTES iii (1983), *reprinted in part in 1983 Senate RCRA Hearings*, *supra* note 54, at 178.

The OTA REPORT concluded that "there are technologically feasible alternatives that could be used to reduce the volume of wastes generated or to treat wastes so as to permanently remove hazards." *1983 RCRA House Hearings*, *supra* note 47, at 119-20. Similar conclusions were reached in the STATE OF CALIFORNIA REPORT, which concluded that "it is technologically feasible to recycle, treat, or destroy at least 75% of all the hazardous wastes which were disposed of in our Class I landfills," *1983 RCRA Senate Hearings*, *supra* note 54, at 135, citing STATE OF CALIFORNIA REPORT *supra* note 54; and from testimony presented by firms using treatment technologies. *See, e.g., 1983 RCRA House Hearings*, *supra* note 47, at 247 (statement of the Chemical Manufacturers Association).

57. 40 C.F.R. §§ 264.251, 264.301 (1985). In addition, the regulations provided that any land disposal facility, including surface impoundments, waste piles, and landfills, which installed two liners and a leak detection system could be exempted from the extensive groundwater monitoring requirements. *Id.* at § 264.222 (1985).

58. OTA REPORT, *supra* note 18, at 186.

liners,<sup>59</sup> but obviously discounted this fact when promulgating the regulations.

### B. *Inaction on Superfund*

A similar pattern of delay and conscious misinterpretation of the law occurred in the implementation of the Superfund program. Superfund was designed for quick, effective action against sites that threatened communities.<sup>60</sup> Congress provided EPA with enormous authority, discretion, and funding to achieve massive cleanups promptly.<sup>61</sup> In contrast, EPA's emphasis was not on aggressively using these tools to clean up sites, but on making sure that its actions caused minimal disruption and minimal expenditure of federal funds.

EPA's implementation of CERCLA was guided in part by the desire to discourage extension of the tax supporting Superfund after the five-year tax mechanism expired in 1985.<sup>62</sup> The tax could only continue if affirmatively extended by Congress. According to the sworn Congressional testimony of William N. Hedeman, then Director of EPA's Office of Emergency and Remedial Response and in charge of the day-to-day operation of the Superfund program, the primary motivation behind the "go slow" approach was to avoid reauthorization of the program: "[T]here was a hidden agenda . . . not to set into motion events that would lead to what

59. EPA's groundwater monitoring exemption was also criticized. A House report called the exemption entirely inappropriate. "EPA should not have to award bonuses to operators for merely designing their facilities in an appropriate manner. Groundwater monitoring is a relatively inexpensive, yet crucial, alert system for ascertaining facility integrity." The report determined that EPA had "failed to require universally the application of available technology to minimize hazardous waste releases into the environment." H. R. REP. NO. 198, Part 1, 98th Cong. 1st Sess. 62, 63 (1983).

60. A part of CERCLA called for the development of criteria to be used in determining which sites required immediate remedial action. Based on these criteria, a national priorities list of hazardous waste sites was to be developed. The fund itself was to be used for the cleanup. 42 U.S.C. § 9605 (1982).

61. Superfund contained several provisions designed to create a list of the most dangerous sites, which the federal government would quickly address. The liability provisions enacted by Congress gave EPA enormous latitude to force cleanup. EPA could order parties to clean up and sue them for treble damages if they failed to do so, or EPA could use the fund to clean up and then recover from responsible parties. One important provision giving EPA authority to conduct cleanups provided:

The President shall select appropriate remedial actions determined to be necessary to carry out this section which are to the extent practicable in accordance with the national contingency plan and which provide for that cost-effective response which provides a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund established under subchapter II of this Chapter to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the need for immediate action.

*Id.* § 9604(c)(4).

62. OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE REPORT, *supra* note 7, at 123-26. The report describes the so-called "hidden agenda" of Administrator Anne Gorsuch and Assistant Administrator Rita Lavelle. They restricted cleanup activity under Superfund in order to diminish federal involvement and foster increased reliance on state funds.

is referred to as 'Son of Superfund' or the extension of the tax or reenactment of the law beyond the 1985 cutoff."<sup>63</sup> Indeed, Administrator Gorsuch wrote in a memorandum to the President's Cabinet Council on Natural Resources and Environment: "[W]e are trying to avoid 'son of superfund'."<sup>64</sup>

One example of EPA's efforts to avoid son of Superfund was the agency's delay in developing and taking remedial action on the "National Priorities List." EPA was required by CERCLA to publish a nationwide priority list (NPL) of abandoned hazardous waste sites for Superfund cleanup.<sup>65</sup> The first version of the final NPL,<sup>66</sup> published in September 1983, included 406 facilities;<sup>67</sup> with proposed additions it has now grown to 850.<sup>68</sup> Yet, although EPA had performed several studies and had begun

63. *Id.* at 124 (quoting *EPA: Investigation of Superfund and Agency Abuses—Part 2: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 160 (1983)).

64. OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE REPORT, *supra* note 7 (quoting *EPA: Investigation of Superfund and Agency Abuses—Part 3: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 382, 389 (1983)).

65. 42 U.S.C. § 9605(8)(b). The NPL was compiled by EPA as follows: The states submitted to EPA their priorities for action and EPA established criteria for ranking the states' submissions. The law stipulated that, to the extent practicable, the list must include at least 400 of the highest priority facilities, and must be updated on an annual basis. To facilitate EPA's compilation of the NPL, CERCLA required owners of potential Superfund sites to notify the government of the type and amount of hazardous waste on their property. Within 180 days after the law was enacted, any person who owned or operated a disposal facility at the time that hazardous substances were "stored, treated or disposed of" at such facility was required to notify EPA of the facility's existence with information about the amount and type of any hazardous substance to be found there. 42 U.S.C. § 9603(c) (1982). Only facilities accorded interim status under Subtitle C of the Solid Waste Disposal Act were exempted from this requirement. 42 U.S.C. § 6925(e) (1982). This inventory ultimately included roughly 20,000 separate locations. HOUSE COMM. ON ENERGY AND COMMERCE, SUPERFUND AMENDMENTS OF 1985, H. R. REP. NO. 253, Part 1, 99th Cong., 1st Sess. 56 (1985) [hereinafter cited as SUPERFUND AMENDMENTS OF 1985: PART 1].

66. In October 1981, EPA issued the first version of the Superfund priority list containing 114 sites, calling it the "Interim Priority List." U.S. EPA Release, EPA Announces First 114 Top-Priority Superfund Sites (Oct. 23, 1981) (unpublished; copy on file with the *Yale Journal on Regulation*).

67. Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40670 (1983) amended by 49 Fed. Reg. 19,482 (1984) (codified at 40 C.F.R. App. B (1984)).

68. Amendment to National Oil and Hazardous Substances Contingency Plan; The National Priorities List, 50 Fed. Reg. 37,950, 37,951 (1985) (to be codified at 40 C.F.R. App. B). The sites ultimately selected were the most dangerous based on such criteria as the amount of hazardous wastes they contained, the toxicity of the waste, the degree to which the wastes had already seeped into groundwater, and the proximity and size of potentially exposed populations. EPA used a scoring system known as the "Mitre Model" to rank sites. The model assigned numerical points to the criteria considered, from which an aggregate score for the site was developed. The relatively arbitrary cut-off score of 28.5 points was established for inclusion on the NPL. This cut-off score was based on the lowest number of points assigned to the first 400 sites that the law required to be listed. For a description of the methodology used to develop the Mitre Model, see OTA REPORT, *supra* note 18, at 383-84, 386-87.

Sites for the National Priorities List are chosen from a nationwide inventory, called the Emergency Remedial Response Information System, kept by EPA. In 1985 there were at least 19,500 hazardous

numerous negotiations with responsible parties, by January 1986 EPA had completed remedial action at only eight sites on the NPL.<sup>69</sup> This was consistent with the Administration's ideology of minimizing federal intervention in environmental matters and avoiding disruption of industry, but was not consistent with Congress' expressed goal of cleaning up the environment as quickly as possible.

EPA's decision to base cleanup standards on an *ad hoc* analysis of site-specific factors also reflected the agency's disregard for the goals of the Superfund program. This approach allowed EPA to ignore the environmental safety standards carefully developed under other federal environmental statutes to protect human health. Under the EPA regulations, for example, maximum contamination levels for drinking water established under the Safe Drinking Water Act<sup>70</sup> would not necessarily be attained by a Superfund cleanup.<sup>71</sup> Thus residents near "cleaned up" Superfund sites might be exposed to concentrations of chemicals found dangerous under the drinking water law. EPA justified its *ad hoc* policy by arguing that each site was unique and that the Agency needed flexibility to respond to each individual site differently.<sup>72</sup> While the promulgation of standards for Superfund cleanups requires difficult technical judgments about acceptable risks, there should be no question that at least those standards developed under other laws to protect the public's health should apply to Superfund remedies. Site-by-site standard setting allowed EPA to consider factors which were not intended by Congress. The scandal-ridden history of the first years of the program shows that factors such as the identity of

wastes sites in the inventory, and possibly as many as 130,000 to 378,000 additional eligible sites not yet included. COMPTROLLER GENERAL OF THE UNITED STATES, GOVERNMENT ACCOUNTING OFFICE, EPA'S INVENTORY OF POTENTIAL HAZARDOUS WASTE SITES IS INCOMPLETE 3, 6, 18-25 (1985).

69. 50 Fed. Reg. 53,448 (1985). EPA added that it has used Superfund money to take hundreds of more limited, short-term actions, which were designed to stabilize the site while awaiting a more permanent remedy and that it was making progress on final clean-ups at sites. *Reauthorization of Superfund, Hearings before the Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 23 (1985) (testimony of Lee M. Thomas).

70. 42 U.S.C. § 300(f)-(j) (1982).

71. National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300 (1985).

72. The introduction to EPA's cleanup standard regulations states:

EPA developed the methodology for determining the appropriate extent of remedy based on the recognition that experience in developing remedies for hazardous waste sites is limited. Moreover, each hazardous waste site has unique characteristics which merit individual attention. Often the unique characteristics of sites will represent factors that have never been dealt with before. These considerations led EPA to develop a methodology which would provide structured and reasoned decision-making while still allowing the flexibility to deal with unique and unforeseen characteristics. . . . The system does not explicitly require that environmental standards be used in determining the appropriate extent of remedy.

Final Rule, 47 Fed. Reg. 31,180, 31,184-85 (1982).

the private parties responsible and the political affiliation of local officials were allowed to influence the cleanup requirements significantly.<sup>73</sup> Site-by-site standard setting also gave EPA discretion in weighing factors. The choice of which standard to apply to site cleanups directly affected the cost to the federal fund and the responsible parties. It also, however, affected the level of risk faced by those whose land and water were threatened by the site. Unfortunately, according to representatives of communities around sites, EPA approached cleanup on an *ad hoc* site-by-site basis and health standards were not uniformly applied.

As a result of a lawsuit,<sup>74</sup> in November 1985 EPA issued new uniform national standards for Superfund cleanups which incorporated many of the health standards developed under other major federal environmental laws.<sup>75</sup> The Agency stated, however, that it was adopting the standards as a matter of policy, and not because it was legally obligated to do so.<sup>76</sup> EPA maintains that it may drop some or all of the borrowed standards as a matter of administrative discretion.<sup>77</sup>

Despite the delegation of enormous authority, discretion, and funding to EPA, the massive cleanup effort envisioned and directed by Congress did not occur. EPA's reluctance to commit trust funds and its continued resistance to the imposition of any burden on industry resulted in a cleanup

73. See OVERSIGHT AND INVESTIGATIONS REPORT, *supra* note 7, at 158-243.

74. In 1982, the Environmental Defense Fund (EDF) sued EPA to compel the agency to develop uniform national standards for the cleanup of Superfund sites. *Environmental Defense Fund v. United States Environmental Protection Agency*, No. 82-2234 (D.C. Cir. 1984). The legal theory of the case was two-fold. First, EDF argued that the Superfund program was legally required to comply with the specific standards contained in other major environmental laws because CERCLA did not contain either an express or implied repeal of such provisions. Thus, if regulations promulgated under the Safe Drinking Water Act contained a binding maximum contamination level for a certain chemical, a Superfund cleanup should ensure that the level of the chemical in the drinking water affected by the waste dump was brought down at least to the required maximum standard. Second, EDF contended that EPA's failure to issue uniform cleanup regulations incorporating the standards contained in other environmental laws basically amounted to a violation of the Administrative Procedure Act's prohibition of arbitrary and capricious administrative action. The central relief sought by the lawsuit was the promulgation of such uniform regulations.

75. In January 1984, EDF settled its lawsuit with EPA. The settlement agreement stipulated that the agency would promulgate regulations that applied "relevant quantitative health and environmental standards and criteria" developed by EPA under other programs to the selection of a Superfund remedy. A little over a year later, the agency did in fact propose a series of detailed amendments to the National Contingency Plan in response to the settlement agreement. *National Oil and Hazardous Substances Pollution Contingency Plan*, 50 Fed. Reg. 5862 (1985) (to be codified at 40 C.F.R. § 300). In November 1985, these revisions were promulgated in final form. *National Oil and Hazardous Substances Pollution Contingency Plan; Final Rule*, 50 Fed. Reg. 47,912 (1985) (to be codified at 40 C.F.R. § 300).

76. In adopting the regulations, EPA stated that "the requirements of other Federal environmental and public health laws, while not legally applicable to CERCLA response actors, will generally guide EPA in determining the appropriate extent of cleanup. . ." 50 Fed. Reg. at 47,912, 47,917 (1985).

77. *National Oil and Hazardous Substances Pollution Contingency Plan*, 40 C.F.R. § 300 (1985).



program that virtually everyone has described as inadequate.<sup>78</sup> Thus, in its implementation of Superfund, as in its implementation of RCRA, EPA subordinated the goals of the statutes to those of the Administration. EPA's efforts under both statutes were hopelessly behind schedule, technically misguided, and substantively ineffective. The result in both cases was that hazardous waste disposal practices and cleanup activities advanced little from the time the legislation was enacted.

### III. Congress Narrows Agency Discretion

In the early 1980's, evidence of the seriousness and scope of the hazardous waste problem mounted while EPA stalled. Congress grew increasingly frustrated with the obvious manipulation practiced by the political appointees at the Agency, as well as with the substantive environmental policy the Agency pursued.

In 1983, five and one-half years after the mandatory deadline for promulgation of RCRA standards and permits, the 98th Congress began a reauthorization process for RCRA. There was still no enforceable system for regulating the disposal of hazardous waste and little prospect for one soon. The problems recognized in 1976 had become common knowledge and, by 1983, evidence of the dangers was even more compelling. Not surprisingly, Congress made clear that it would not allow the delays to continue. Any confidence that EPA could be trusted to act expeditiously had long since evaporated. Witnesses at Congressional hearings urged a legislative solution requiring that disposal firms obtain a permit and meet the federal operating standards.<sup>79</sup>

Congress responded by reauthorizing RCRA with a maze of new deadlines and statutory requirements.<sup>80</sup> For instance, all land disposal facilities operating under an "interim status" permit were required to submit applications for final permits by November 8, 1985, one year after the date of enactment.<sup>81</sup> This provision removed EPA's discretion to allow facilities to delay the submission of applications.<sup>82</sup> In response to these new statutory directives, the final permit applications now included a va-

78. See, e.g., SUPERFUND AMENDMENTS OF 1985, PART 1, *supra* note 65, at 55.

79. In testimony before Congress, witnesses made it clear that "the permitting process for hazardous waste facilities [must] be completed as quickly as possible so that the necessary upgrading of existing [interim status] facilities to meet RCRA standards can be accomplished." *1983 House RCRA Hearings*, *supra* note 47, at 455.

80. For a partial list of RCRA deadlines which EPA has identified, see ENVTL. F., Nov. 1985, at 4-5.

81. 42 U.S.C.A. § 6925(e)(2)(A) (West Supp. 1984-1985).

82. The amendments also placed a deadline on EPA's issuance of final permits. Final permits for all land disposal facilities had to be issued no later than Nov. 8, 1988, and by Nov. 8, 1989 for all incinerators. *Id.* at § 6925(c)(2)(A)(i)-(ii).

riety of demanding requirements, such as a summary of groundwater monitoring data for the facility and a description of any groundwater contamination by the facility.<sup>83</sup> If the contamination exceeded certain levels, the applicant had to establish a corrective action program to mitigate the contamination.<sup>84</sup> These requirements meant that a permit applicant had to collect a variety of detailed information and establish plans to clean up groundwater contamination before a permit application could be submitted. Any interim status facility that failed to submit its final permit application by the statutory deadline automatically lost its interim permit. Without interim status, such a facility would be required to cease operating, with criminal penalties for operating a facility without a permit.<sup>85</sup>

Over two-thirds of all operating, interim-status land disposal facilities chose not to submit final permit applications. Their failure to meet the statutory deadline effectively removed over 1000 land disposal facilities which were reluctant to comply with federal standards from the permit process, and thereby from the business of handling hazardous waste. Thus, the November 1985 permit application deadline accomplished more to insure the safe disposal of hazardous waste than nine years of agency inaction had done.<sup>86</sup>

The 1984 RCRA reauthorization also altered the design standards for waste facilities. The law defined the minimum technological standards required of landfills and surface impoundments.<sup>87</sup> For example, EPA's design regulations were required to provide that, at a minimum, each new landfill or surface impoundment install "two or more liners and a leachate collection system above (in the case of a landfill) and between such liners; and groundwater monitoring."<sup>88</sup> Until EPA could promulgate such rules, Congress established a precise description of the liners requirement:

83. *Id.* at § 6925(e)(2)(B); 40 C.F.R. § 270.14(c)(1)-(6) (1985).

84. *Id.* at § 270.14(c)(7)-(8).

85. 42 U.S.C.A. § 6928(d)(2)(A) (West Supp. 1984-1985).

86. According to an agency release "492 hazardous waste land disposal facilities operating under interim status have . . . applied for a final operating permit . . . [out of] approximately 1600 land disposal facilities . . . authorized to operate under interim status prior to November 8." U.S. EPA Release, 492 Hazardous Waste Facilities Certify Compliance (Dec. 6, 1985) (unpublished; on file with the *Yale Journal on Regulation*).

The so-called Loss of Interim Status provision also required interim status land disposal facilities to certify that they were in compliance with applicable groundwater monitoring and financial responsibility requirements for such facilities. 42 U.S.C.A. § 6925(e)(2)(B) (West Supp. 1985). Surveys by Congress and the General Accounting Office revealed widespread noncompliance with these requirements. *See, e.g.*, STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 1ST SESS., GROUNDWATER MONITORING SURVEY (Comm. Print 1985); U.S. GENERAL ACCOUNTING OFFICE, INSPECTION, ENFORCEMENT, AND PERMITTING ACTIVITIES AT NEW JERSEY AND TENNESSEE HAZARDOUS WASTE FACILITIES (1984).

87. 42 U.S.C.A. § 6924(o) (West Supp. 1984-1985).

88. 42 U.S.C.A. § 6924(o)(1)(A)(i)-(ii) (West Supp. 1984-1985).

[T]he requirement for the installation of two or more liners may be satisfied by the installation of a top liner . . . and a lower liner designed, operated and constructed to prevent the migration of any constituent through such liner. . . . For the purpose of the preceding sentence, a lower liner shall be deemed to satisfy such requirement if it is constructed of at least a 3-foot thick layer of recompacted clay or other natural material with a permeability of no more than  $1 \times 10^{-7}$  centimeters per second.<sup>89</sup>

This detailed specification of design criteria stands in stark contrast to the original language in the 1976 Act which stated only that EPA was to promulgate regulations governing the "location, design, and construction" of disposal facilities.<sup>90</sup>

Congressional reluctance to rely on EPA judgments was not limited to technological standards, but extended into all areas of the RCRA program. For example, the reauthorization calls upon EPA to develop performance standards for new storage tanks. The 1984 law, using broad language similar to the 1976 Congressional mandate, directed the Agency to develop storage tank standards which "shall include, but need not be limited to, design, construction, installation, release detection, and compatibility standards."<sup>91</sup> The new underground tank provisions, however, go further.<sup>92</sup> They provide that, until the effective date of EPA's new standards, tanks lacking corrosive protection may be installed only "if soil tests conducted in accordance with ASTM Standard G57-78, or another standard approved by the Administrator, show that soil resistivity in an installation location is 12,000 ohm/cm or more (unless a more stringent standard is prescribed by the Administration by rule)."<sup>93</sup>

Another example of Congressional dissatisfaction with EPA is the articulation in the RCRA reauthorization of a new national policy to discourage land disposal of hazardous waste.<sup>94</sup> As well as coming together on a

89. 42 U.S.C.A. § 6924(o)(5)(B) (West Supp. 1984-1985).

90. 42 U.S.C. § 6907(a) (1982).

91. 42 U.S.C.A. § 6691b(e) (West Supp. 1984-1985).

92. They state that until EPA's regulations are promulgated, no person may install an underground storage tank unless the tank will prevent releases due to corrosion for the life of the tank. Tanks must be "cathodically protected against corrosion, constructed of noncorrosive material, steel clad with a noncorrosive material, or designed in a manner" to prevent possible leaks. Finally, the material used in the construction or lining of the tank must be compatible with the substance to be stored. 42 U.S.C.A. § 6991b(g)(1) (West Supp. 1984-1985).

93. 42 U.S.C.A. § 6991b(g)(2) (West Supp. 1984-1985).

94. 42 U.S.C.A. § 6901(b)(8) (West Supp. 1984-1985). The House version found that "land disposal facilities are not capable of ensuring perpetual containment of certain hazardous waste, therefore, reliance on land disposal should be eliminated for those wastes." H.R. 2867, 98th Cong., 1st Sess. § 12(a), 130 CONG. REC. H9154 (1983). The House bill also added a new goal to the Solid Waste Disposal Act of 1983: "minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling

broad statement of policy, the House and Senate also agreed to detailed provisions designed eventually to prohibit the land disposal of particular toxic wastes.<sup>95</sup> These provisions set out in detail the wastes which must be prohibited, along with the limited conditions under which EPA may side-step the prohibitions. This statute lists, with an extraordinary degree of detail for a federal regulatory law, the kinds and concentrations of specific wastes which are banned from land disposal.<sup>96</sup>

and reuse, and treatment." *Id.* at § 12(b). The accompanying House Report made it clear that the House Committee "intends to convey a clear and unambiguous message to the regulated community and the Environmental Protection Agency: reliance on land disposal of hazardous waste has resulted in an unacceptable risk to human health and the environment." H.R. REP. NO. 198, 98th Cong., 1st Sess. 56 (1983). Similarly, the Senate bill, S. 757, 98th Cong., 1st Sess. § 26(b), 130 CONG. REC. S9138 (1984), amended RCRA to include a national policy statement which read: "The Congress hereby declares it to be the national policy of the United States that, whenever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." Both the House and Senate provisions were eventually incorporated into the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 101, 98 Stat. 3224, 3224 (to be codified at 42 U.S.C. §§ 6901-6902).

95. Hazardous and Solid Waste Amendments of 1984, § 201, 98 Stat. 3224, 3226 (to be codified at 42 U.S.C. § 6924).

96. For example, Congress described certain solvents and dioxins as "(A) dioxin-containing hazardous wastes numbered F020, F021, F022, and F023 (as referred to in the proposed rule published by the Administrator in the Federal Register for April 4, 1983), and (B) those hazardous wastes numbered F001, F002, F003, F004, and F005 in regulations promulgated by the Administrator under section 3001 (40 C.F.R. 261.31 (July 1, 1983)), as those regulations are in effect on July 1, 1983." 42 U.S.C.A. § 6924(e)(2) (West Supp. 1984-1985). Also, using a list developed by the State of California, the statutory ban applies to the following wastes:

(A) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing free cyanides at concentrations greater than or equal to 1,000 mg/l.

(B) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing the following metals (or elements) or compounds of these metals (or elements) at concentrations greater than or equal to those specified below:

- (i) arsenic and/or compounds (as As) 500 mg/l;
- (ii) cadmium and/or compounds (as Cd) 100 mg/l;
- (iii) chromium (VI and/or compounds (as Cr VI) 500 mg/l;
- (iv) lead and/or compounds (as Pb) 500 mg/l;
- (v) mercury and/or compounds (as Hg) 20 mg/l;
- (vi) nickel and/or compounds (as Ni) 134 mg/l;
- (vii) selenium and/or compounds (as Se) 100 mg/l; and
- (viii) thallium and/or compounds (as Th [sic]) 130 mg/l.

(C) Liquid hazardous waste having a pH less than or equal to two (2.0).

(D) Liquid hazardous wastes containing polychlorinated biphenyls at concentrations greater than or equal to 50 ppm.

(E) Hazardous wastes containing halogenated organic compounds in total concentration greater than or equal to 1,000 mg/kg.

42 U.S.C.A. § 6924(d)(2) (West Supp. 1984-1985).

The statute also provides that for the specifically identified wastes, the land disposal ban will take effect unless the waste has been treated in accordance with standards promulgated by EPA, 42 U.S.C.A. § 6924(m) (West Supp. 1984-1985), or unless EPA approves a site-specific petition from a facility which establishes that continued acceptance of the waste will not endanger human health and the environment. 42 U.S.C.A. §§ 6924(d), (e), (g) (West Supp. 1984-1985).

Regarding the specific lists of banned wastes, the minority view of the House report states that:

We in Congress do not have the technical expertise to declare such prohibitions . . . How do we know that the specific wastes listed . . . should be prohibited from all forms of land dispo-

## Hazardous Waste Policy

The technical specificity pervasive throughout the reauthorization prompted several lawmakers to comment that Congress was overstepping its bounds.<sup>97</sup> For example, Senator Symms remarked during consideration of the Conference Report on the 1984 Amendments that:

The fundamental problem with this bill is that it attempts to write detailed regulations into the law. Can any member of this body explain . . . why the lower liner of a hazardous waste disposal facility should have a permeability of  $1 \times 10^{-7}$  centimeter per second? . . . I submit that making these kinds of technical judgments is the function of EPA, not Congress. These particular regulations may be workable, even appropriate, but writing regulations is not our job.<sup>98</sup>

While Senator Symms' comments about the technical expertise of Congress are relevant, they fail to consider that without such specific action by Congress, the Agency would have continued to obstruct Congressional intent at every opportunity.

Although the reauthorization of Superfund awaits final agreement in a House-Senate Conference Committee, the legislative history thus far reveals that Congress is as dissatisfied with EPA's implementation of Superfund as it was with EPA's efforts with regard to RCRA. Five years after the enactment of Superfund, the Agency has made little progress in cleaning up the nation's most dangerous hazardous waste disposal sites. Testimony by New York Attorney General Robert Abrams was typical of the criticisms:

sal? How do we know that the concentration levels specified are appropriate? These are regulatory decisions which should not be made by Congress . . .

If this [RCRA Reauthorization] bill has a general weakness, it is that it is close to being a regulatory rather than a legislative document. Nowhere is that exemplified better than in this [land ban] section.

H.R. REP. NO. 198, 98th Cong., 1st Sess. 117 (1983).

If EPA fails to promulgate treatment standards before the statutory deadline or to approve a petition, the waste is simply banned from land disposal until the Agency acts. As with the submission of permits, and the minimum technological requirements, the ban on land disposal minimizes the need for EPA action. The statute sets forth the specific rules from which EPA may carve out exceptions, rather than requiring EPA to establish rules in the first instance.

97. In addition, some observers of Congress have seen problems of interpretation, implementation and enforcement created in some areas as Congress attempted to close loopholes and wrap a tight rein around hazardous waste disposal. Mugdan & Adler, *The 1984 RCRA Amendments: Congress as a Regulatory Agency*, 10 COLUM. J. ENVTL. L. 215 (1985). For example, enforcement problems might be expected to result from a provision in the amendments (§ 3001(d)(6)) that allows small quantity generators to accumulate waste for 180 days rather than the 90 days permitted other generators, with an exemption for generators that must transport wastes more than 200 miles. *Id.* at 220. Another example involves possible interpretations of the term "good faith compliance" as applied to interim status facilities. *Id.* at 225, referring to Pub. L. No. 98-616, § 243(a), 98 Stat. 3224, 3260 (to be codified at 42 U.S.C. § 6936(b)(3)).

98. 130 CONG. REC. S13812 (daily ed. Oct. 5, 1984).

Two shocking facts emerge. . . . First, only one-third of the money obligated for cleanups has actually been spent. Second, 2½ times as much money has been spent on administrative costs as on actual cleanups. Moreover, a close examination of the money supposedly spent on cleanups shows that much of that is going for preliminary studies and design work. In fiscal 1983, for example, actual permanent cleanup work was done at only 17 sites; 124 sites were still in the study stage. It is astonishing to me that at the end of the year, with 60 percent of the Superfund time period elapsed, a mere \$13.2 million—less than 1 percent of the \$1.6 billion fund—had been spent on permanent remedial cleanups at hazardous waste sites.<sup>99</sup>

In at least two areas—the rates at which abandoned sites are being cleaned up and the pollutant standards the remedial efforts must satisfy—congressional dissatisfaction with EPA is again being expressed in the form of highly specific statutory language. All of the major Superfund reauthorization bills considered in the House during the 98th and 99th Congresses contained provisions putting EPA's cleanup activities on a non-discretionary schedule.<sup>100</sup> The Administration objected, arguing that deadlines for commencing remedial efforts would simply inhibit the Agency's ability to complete the work properly. The Agency claimed it would achieve more without such requirements.<sup>101</sup> Nevertheless, in the various House Committees, the debate centered on how strict the schedules should be, not whether or not to have schedules.<sup>102</sup> The legislation

99. *Implementation of the Superfund Program: Hearings before the Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce, 99th Cong., 1st Sess. 464 (1984)* (statement of Robert Abrams) [hereinafter cited as *Reauthorization Hearings I*]. Attorney General Abrams continued:

And, despite the apparent flurry of activity at EPA, it is still true that for 400 of the 546 Superfund sites, the planning and design of a remedial program have not even begun. I believe that EPA's poor implementation of Superfund to date points to the need for a much more specific mandate to clean up hazardous waste sites. Superfund, as it is now written, gives EPA far more discretion than any other major environmental statute. The Clean Air and Clean Water Acts both impose many mandatory duties and timetables on EPA. These specific mandates have served to keep EPA's feet to the fire and to give the public the kind of implementation it expects.

*Id.* at 465.

100. See, e.g., H.R. 4813, 98th Cong., 2nd Sess. § 101 (1984) (inserting § 9004A in the Solid Waste Disposal Act); H.R. 5640, 98th Cong., 2nd Sess. § 111 (1984), 130 CONG. REC. H8819-55 (daily ed. Aug. 9, 1984) and 130 CONG. REC. H8929-9027 (daily ed. Aug. 10, 1984); H.R. 2022, 99th Cong., 1st Sess. § 111 (1985); and H.R. 2817 and 2005, 99th Cong., 2d Sess. § 104 (1985), 131 CONG. REC. H11,595-671 (daily ed. Dec. 10, 1985).

101. *Reauthorization of and Possible Amendments to the Comprehensive Environmental Response, Compensation and Liability Act of 1980: Hearings Before the Subcomm. on Water Resources of the House Public Works and Transportation Comm., 98th Cong., 2d Sess. 45 (1984)* (testimony of Lee M. Thomas).

102. SUPERFUND AMENDMENTS OF 1985: PART 1, *supra* note 65, at 71, 261-62; HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, SUPERFUND AMENDMENTS OF 1985, H.R. REP. NO. 253, Part 5, 99th Cong., 1st Sess. 12-13 (1985) (hereinafter cited as SUPERFUND AMENDMENTS OF 1985: PART 5).

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passed by the House in December 1985<sup>103</sup> required the Agency to commence "substantial and continuous physical on-site remedial action" at specified numbers of National Priorities List sites during each year of the five-year reauthorization period.<sup>104</sup>

Despite the pleas for flexibility from both EPA and the industry, both the House and Senate Superfund reauthorization bills also included provisions requiring the application of uniform standards to all cleanup sites.<sup>105</sup> The Senate bill mandated that all Superfund remedial actions attain maximum acceptable contamination levels which, at a minimum, assure protection of human health and the environment. This requirement corresponds to the standard under RCRA, which is one of the most protective

103. H.R. 2817, 99th Cong., 1st Sess. § 104(m) (1985).

104. *Id.* During each year of the five-year reauthorization period, the Agency must begin a specified number of remedial investigations and feasibility studies for NPL sites: 150 studies in the first year, 175 in the second year and 200 in each of the last three years. The studies are the first critical step in implementing long-term remedial action. By January 1, 1988, EPA must list 1600 facilities on the Superfund NPL.

105. In fact, EPA's adverse reaction to uniform standards heightened the concern by some that EPA would fail to require adequate cleanup. An EDF representative testified on the need for uniform national standards in the reauthorization legislation:

EPA has developed a policy of setting "site-specific" cleanup goals rather than a standard baseline to ensure that no less of a cleanup than that necessary to protect human health and the environment is implemented.

EPA's desire for vagueness in determining an appropriate extent of remedy can only be interpreted as a desire to fall short of the minimum protection of human health and the environment in some situations. Further guidance from Congress is clearly needed to ensure appropriate cleanup response by EPA. Without it, adequate protection of public health cannot be assured, and political pressure will continue to be a large factor in determining the course of remedial action.

*Reauthorization Hearings I, supra* note 99, at 106 (statement of Linda Greer).

Witnesses provided concrete examples of site cleanups where they contended that the absence of standards had endangered public health. At the Chemical Metals Industries site in Baltimore, Maryland, the clean-up was superficial and the off-site clean-up was totally inadequate. The contaminated soil was removed to a depth of one foot even though significant levels of contamination were detected as deep as fifteen feet. Off-site residents may be at risk of exposure to toxic gases, including hydrogen cyanide, by subsurface contamination. In the case of the Gratiot Golf Course site in St. Louis, Michigan, the contaminated soil was merely shifted from one side of the Pine River to the other. The state still warns against fish consumption as far as 60 miles downstream of the site. *Reauthorization of Superfund: Hearings before the Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 640-41 (1985) (statement of Richard Hind).

All of the major versions of both the House and the Senate Superfund reauthorization bills contained provisions establishing uniform national cleanup standards for remedial actions carried out under the program. S. 2892, 98th Cong., 2d Sess., § 104 (1984); H.R. 5640, 98th Cong., 2d Sess., § 107, 130 CONG. REC. H8819-55 (daily ed. Aug. 9, 1984) and 130 CONG. REC. H8929-9027 (daily ed. Aug. 10, 1984); S. 51, 99th Cong., 1st Sess., § 111, 130 CONG. REC. S138 (daily ed. Jan. 3, 1985); H.R. 2022, 99th Cong., 1st Sess., § 111 (1985). The Senate took the approach of prescribing a general standard and leaving it to the Agency to derive specific standards for individual hazardous substances or cleanup technologies, while the House set forth specific standards in the legislation and gave the Agency the opportunity to waive them if they turned out to be inappropriate in the context of a particular site. *See, e.g.*, S. 51, 99th Cong., 1st Sess. § 111, 130 CONG. REC. S138 (daily ed. Jan. 3, 1985); H.R. 2817, 99th Cong., 2d Sess., § 121 (1985).

in any of the major federal environmental laws. The bill allowed no waivers.<sup>106</sup>

The House bill goes much further. It adopted the same general "protection of human health and the environment" standard, without any waiver provision. It goes on, however, to list the specific standards, established under other major federal environmental laws, that must be incorporated into the cleanup standards for remedial actions under Superfund.<sup>107</sup>

While House and Senate conferees are still meeting to reach a compromise between the two versions of the bill, it is inevitable that the final product will require cleanup standards which meet those standards set by other environmental laws, since both bills already specify such a requirement. While only the House version has outlined a mandatory cleanup schedule, Congress' overwhelming concern over EPA's past inaction demonstrates a willingness by Congress to force EPA to act under very specific guidelines. Despite differences in the degree to which EPA's discretion was limited, the intent of both the Senate and House bills was to ensure that any cleanup met uniform standards which were consistent with other environmental laws.<sup>108</sup>

As with the 1984 RCRA amendments,<sup>109</sup> Congress' reaction to EPA's failure to implement the Superfund program satisfactorily appears, to date, to be to act as regulator and sharply limit EPA's discretion. The House bill requires EPA to begin cleanup activities at a specified rate and both bills direct EPA to meet specific maximum contamination standards for cleanup.<sup>110</sup> Since effective Superfund implementation requires affirmative action by the Agency, Congress cannot achieve its environmental goals

106. S. 51, *supra* note 105. The Senate bill also provided that remedial actions leading to "permanent solutions" are "to be preferred" over temporary containment remedies. While giving EPA useful guidance on this often controversial issue, the Senate language leaves the Agency with substantial discretion over the choice of technologies at a site. *Id.* § 111.

107. H.R. 2817 (H.R. 2005), § 121. The House legislation also states "permanent solutions" are the preferred technology for Superfund clean-ups. The legislation requires EPA, to the maximum extent practicable, to select permanent solutions when such solutions are feasible and achievable. It goes on to describe the factors EPA shall consider in making such determinations, and requires EPA to establish an "Interim Category," composed of all sites on the NPL where a permanent solution has not been implemented.

108. See SUPERFUND AMENDMENTS OF 1985: PART 1, *supra* note 65, at 95-100, 272-82; SUPERFUND AMENDMENTS OF 1985, PART 5, *supra* note 102, at 50-58; and SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, SUPERFUND IMPROVEMENT ACT OF 1985, S. REP. NO. 11, 99th Cong., 1st Sess. 19-20 (1985).

109. Others have recognized EPA's failure to heed RCRA's mandates as the spur to the extraordinary regulatory detail Congress included in the 1984 RCRA Amendments: ". . . between 1980 and 1983, Congress came to perceive EPA as an agency unwilling or unable to fulfill its mandate of environmental protection. Almost every section of the RCRA Amendments might be read as expressing a sense of frustration over the pace and scope of EPA action. For these reasons Congress elected to act, in effect, as its own regulatory agency." Mugdan & Adler, *supra* note 97, at 217.

110. H.R. 2005, 99th Cong., 2d Sess., §§ 104, 121, 131 CONG. REC. H11595-671 (daily ed. Dec. 10, 1985).



by simply prohibiting certain activities as it did in the RCRA amendments. Instead, the proposed amendments use administrative constraints, namely deadlines and mandatory uniform standards, to force EPA to make progress toward safe cleanups.<sup>111</sup>

#### IV. Implications of the RCRA and CERCLA Reauthorizations

Between 1887, when the Interstate Commerce Commission was established, and 1980, the congressional paradigm for coping with regulatory problems remained largely unchanged.<sup>112</sup> Congress established regulatory agencies, issued rather general guidelines for agency decisionmaking, and delegated to the agencies discretion over the details of rules and implementation tactics. Congress has occasionally altered the scope and content of specific regulatory goals in response to new economic theories, changed conditions, and public opinion, but generally, it has maintained a stable relationship with the administrative agencies: the legislature has formulated broad policy objectives and the agencies have devised the means to achieve them.<sup>113</sup>

In the area of hazardous waste regulation during the 1980's, however, the traditional reliance on delegated responsibility has collapsed, with

111. *Id.* Mugdan & Adler, *supra* note 97, at 217, have suggested that the 1984 RCRA Amendments are a vindication of Justice Rehnquist's view that Congress has on occasion improperly delegated to the executive branch its own constitutional responsibility to make legislative decisions. See Rehnquist's discussion of the "nondelegation doctrine"—that Congress, as the branch of our government most responsive to popular will, is best suited and most obligated to make important choices of social policy—in *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672, 685 (1979) (Rehnquist, J., concurring) (obligations imposed by Congress upon the Occupational Safety & Health Administration).

112. For example, the relatively broad mandates in the 1976 RCRA Act are similar to those established as far back as 1887 in the Interstate Commerce Act, 49 U.S.C.A. § 1(7)-(15) (1959):

The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter. . . .

Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority . . . to suspend the operation of any and all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission . . . to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them.

49 U.S.C.A. § 1(14)(a)-(15).

Indeed, it was Congress' self-professed inability to make finely-tuned regulatory determinations that led to the development of regulatory institutions in the first place, such as rate-setting under the Interstate Commerce Act as established in the 1906 Hepburn Act, 49 U.S.C. §§ 1, 6, 11, 14-16, 18, 20, 41 (1982). D. LOCKLIN, *ECONOMICS OF TRANSPORTATION* 229-31 (1972).

For a general discussion of the broad delegation of authority to administrative agencies by Congress, see Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

113. For a description of the general reluctance of Congress to delve into regulatory micro-management, see A. STONE, *REGULATION AND ITS ALTERNATIVES* 184-86 (1982).

profound implications for the overall regulatory structure. The wide discrepancy between the public's desire for vigorous environmental protection and the Reagan Administration's ideological preference for regulatory relief has forced Congress to produce a new regulatory system that significantly reduces agency discretion. Unfortunately, the inherent institutional limitations of Congress guarantee that this new order will have drawbacks not present in the traditional relationship between Congress and regulatory agencies. Nevertheless, where agencies have flagrantly and consistently refused to carry out legislative mandates, such drastic action by Congress is warranted.

#### A. *The Threshold for Congressional Action*

The RCRA and CERCLA cases suggest that Congress is ready and willing to make specific policy and implementation decisions, but only if the less drastic methods for disciplining agencies are ineffective. First, Congress will always use the more informal oversight mechanisms, including investigations and appropriations review, before resorting to statutory cures. Second, Congress will not intervene if other forces, such as direct political pressure on the Executive or lawsuits by advocates of the congressional position, create the requisite incentives to induce agency compromise. Even if neither of these methods is successful, Congress will often not intervene unless some event, such as an environmental disaster, an upsurge in public concern, or the approaching expiration of the program, moves the issue to the top of the legislative agenda.

As a general matter, Congress acts only when it is driven by exogenous political forces to act. In the regulatory area, for example, the original statutory creation of a remedial program is usually a response to extreme public pressure, often fueled by crises. Systematic reconsideration of the program design often occurs only when the existing authorization period has run out. Absent public crisis or impending lapse of an existing statute, regulatory issues will not reach the top of the congressional agenda.<sup>114</sup>

The history of RCRA demonstrates typical congressional reluctance to use the powerful tool of legislation to correct administrative problems. Despite the delays and obstructionist tactics of EPA, Congress began to address the problem with legislative direction only when the time appointed for reauthorization approached. Congress did not take legislative action until more than five years after EPA missed its deadlines for promulgating RCRA regulations on permit standards. When the need to

114. This approach by Congress has been labelled "crisis regulation." A. STONE, *supra* note 113, at 179-80.

reauthorize triggered congressional evaluation, however, the nearly universal frustrations with the experience of the previous five years produced a majority in favor of drastic action.

In both the RCRA and CERCLA programs, Congress did attempt to use the other tools at its disposal to direct the EPA implementation effort. Under most administrations, the appropriations process provides the greatest opportunity for congressional influence over agencies. During the Reagan era, however, when agency heads have often sought to contract or even abolish their own agencies, the congressional influence derived from the power of the purse has been greatly diminished.<sup>115</sup> Congress also used oversight hearings to investigate alleged wrongdoing at EPA.<sup>116</sup> These hearings highlighted grossly improper behavior by agency officials and clear failure to implement the laws. The hearings were successful in that Reagan was forced to replace Burford and to clean house among the top EPA officials. These personnel changes muted the confrontational tone of EPA, but did little to change the basic attitudes of the Administration toward environmental regulation or to speed the implementation of the laws. The traditional means of congressional oversight failed to produce the desired results.

The efforts of parties outside Congress to force implementation of the laws also failed in large part. Legal actions against an offending agency can be used to ensure that the letter of the law is followed. In the environmental area particularly and the regulatory field generally, lawsuits and threatened lawsuits by interest groups representing the regulated parties and the beneficiaries have given both the public and the judiciary important roles in ensuring that the agencies implement the statutes as written.<sup>117</sup> Lawsuits, however, are expensive, time-consuming, and resolve

115. On several occasions, Congress actually approved regulatory agency budgets larger than requested by the Administration. For example, EPA's final fiscal year 1983 appropriation exceeded the Administration's request by \$84 million. *President Signs Bill Worth \$3.7 Billion for EPA, \$84 Million More Than Requested*, 13 ENV'T REP. (BNA) 779 (Oct. 8, 1982).

The EPA budget, which was well over \$5.4 billion in the last two years of the Carter Administration, dropped to only \$3.0 billion in 1981. In spite of subsequent budget increase requests the current budget request for fiscal year 1987 is still only \$4.1 billion. OFFICE OF MANAGEMENT AND BUDGET, FY 1987 HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, table 5.2(1) (1986).

116. See *Gorsuch, 36 Other EPA Employees, Lavelle Subpoenaed by Dingell's Energy Subcommittee*, 13 ENV'T REP. (BNA) 1827-28 (Feb. 18, 1983).

117. In *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 851-52 (D.C. Cir. 1970), cert. denied 403 U.S. 923 (1971), Judge Leventhal remarked that judicial review:

combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a "partnership" in the furtherance of the public interest and are "collaborative instrumentalities of justice". The court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance.

See also *National Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (challenging NLRB adjudication); *American Pub. Health Ass'n v. Veneman*, 349 F. Supp. 1311 (D.D.C. 1972)

only a relatively narrow legal question. In the case of hazardous waste, despite outside party suits such as by the Environmental Defense Fund,<sup>118</sup> judicial and public oversight also fell short.

The failure of congressional and outside efforts to push EPA into compliance with the letter and spirit of the hazardous waste laws can be explained by looking at the forces driving each side. The Administration interpreted President Reagan's overwhelming reelection victory as a mandate to continue his regulatory philosophy, which includes contracting the role of the federal government.<sup>119</sup> At the same time, every poll showed that Americans cared deeply about protecting the environment and felt that government should do more, not less, to protect it.<sup>120</sup> Congress' political sensitivity to the need to move forward with efforts to protect the environment further demonstrated that the Administration's philosophy of environmental regulation was not shared by most Americans.

Many years of frustration with EPA left lawmakers with no choice but to assume the role of regulator, however reluctantly.<sup>121</sup> In the reauthorizations of the hazardous waste laws the frustrations produced technically detailed design specifications and strict schedules and procedures for the administration of federal remedial activities, in stark contrast to the broad delegations of power to the Agency's technical and administrative experts in the original legislation. The RCRA reauthorization, for example, called for the submission of permits that met required conditions and banned the land disposal of specified wastes by statutorily-set dates. The same pattern

(challenging FDA's delay in implementation of efficacy requirement for new drugs). See generally S. MENICK, *REGULATION AND THE COURTS* 351-52 (1983).

118. For a discussion of EDF's suit against EPA for uniform national standards for Superfund site cleanups, see *supra* notes 74 and 75. When an agency is resisting Congress on every front, however, lawsuits are relatively ineffective as disciplinary devices. The suits focus only on the relatively narrow issues of a particular agency decision or rulemaking. Courts are unable to give effective warnings to agencies that have a broad "attitude problem."

In addition, lawsuits have become so commonplace as agency-forcing devices that certain administrative agencies, such as the EPA, are examining alternate methods of rulemaking which incorporate the concerns of interested parties at less cost in time and resources. See Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 *YALE J. ON REG.* 133 (1985) (documenting successful negotiated rulemaking demonstrations carried out by EPA).

119. For poll data showing discrepancies between support for the President and support for policies associated with him, see Ferguson & Rogers, *The Myth of America's Turn to the Right*, *ATLANTIC*, May 1986, at 43.

120. See *id.* and *supra* note 5.

121. Senator Lloyd Bentsen accurately described Congress' reluctant role as regulator during the Senate's consideration of its version of the Hazardous and Solid Waste Amendments of 1984:

It is a troubling dilemma when Congress must address detailed technical problems as a matter of public policy. Unfortunately, we do not have the expertise to acquire and assess the information on these problems in the same fashion as a regulatory agency. Generally, we are not scientists, we are not engineers, we do not have the detailed experience in the design, construction and operation of various technical alternatives. Nevertheless, when public policy demands it, Congress must be prepared to squarely confront these difficult decisions.

130 *CONG. REC.* S9153 (daily ed. July 25, 1984).

of statutory specificity is reflected in the pending Superfund bills. The House has made it clear, for instance, that actual on-site cleanup work must begin according to a prescribed schedule. For Congress to fail to respond with these kinds of specific requirements is to abandon hope of cleaning up the environment in the face of the Administration's noninterventionist philosophy.

*B. Institutional Disadvantages of Congress as Regulator and Administrator*

As a matter of institutional capabilities, administrative agencies are better suited than Congress, both substantively and procedurally, for the implementation of complex statutes. In theory, an administrative agency acts with the expertise, speed, flexibility, proactive perspective, and political insulation needed to ensure that regulatory programs are designed and implemented most effectively. Congress, in comparison, is poorly suited institutionally for the task of detailed rulemaking and program administration.

Congress is also an overtly political institution which does not pretend to have the scientific or technical expertise of agencies established to perform regulatory functions. When issues are brought before Congress, disagreements quickly become political, and sensible environmental policy may be lost in the process.<sup>122</sup> Technical judgments arrived at through political compromise may lack a sound scientific foundation, with results that neither side can anticipate. Science becomes a political tool rather than a key to difficult technical judgments about how best to protect the environment. Even when Congress can summon the necessary expertise for effective decisionmaking on technical issues, it is questionable whether such expertise, once summoned, can survive the political process of legislating.

Because of the need for political accommodation and consensus building, the legislative process is typically slow. With a great number of complex problems competing for congressional attention, only the most urgent decisions are made by statute. As the RCRA and CERCLA experiences illustrate, it often takes years for Congress to address perceived problems, even when the problems at issue have clear public importance. Detailed statutes lack the flexibility provided by agency rules. The rulemaking process allows the agencies to modify the rules in response to

122. For one observer's example of how Congressional politics may lead a statute to represent political trade-offs between interest groups more than a unified attempt to resolve a national problem, see B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* 55 (1981) (discussing a tie between passage of the Clean Air Act Amendments and the Panama Canal Treaty).

changes in technology and problems encountered in implementation. Agencies can be relatively responsive to the needs of both the regulated parties and the beneficiaries of the regulation. In contrast, if a detailed requirement is contained in the statute itself, the proponents of modifying the requirement must overcome the inertia and limited attention span of Congress to get relief. As a result, a congressionally-regulated program is likely to be characterized by long periods of stagnation, infrequently broken by sweeping changes.

Not only is congressional action subject to delay, but it is also reactive in nature. Congress responds best to the "squeaky wheel" and has traditionally resolved immediate problems more effectively than it has set out careful plans for future regulatory implementation. The time, resources, and political insulation needed to construct a long-term and complex regulatory system are not available to a legislative body.<sup>123</sup> The administrative agencies have traditionally managed the complex interrelationships between the various parts of a regulatory system to maximize effectiveness and minimize sudden shifts in regulatory policy. Given all of the above-mentioned institutional limitations on Congress, the interest of the public is probably best served by Congress' customary reluctance to immerse itself in the details of implementation.

### C. *A Generalized Approach to Congressional Intervention*

The experience with the RCRA and CERCLA reauthorizations suggests the importance of several factors in determining when Congress should set aside its usual role and delve into the detailed policy and implementation questions normally left to the discretion of the agencies. First, Congress should not use statutory cures to the problem of an uncooperative agency if less drastic alternatives might be effective. If the discipline provided by oversight, budget control, and private party litigation do not achieve the desired result, Congress should weigh the disadvantages of statutory rulemaking against the benefits of correcting the malfeasance or nonfeasance of the regulatory agency.

Where the alternative mechanisms for influencing agency implementation fail, Congress must face the issue of recalcitrant agencies head on. Several factors should guide the congressional decision on how to proceed. First, if the subject of regulation is technically complex and responsible

123. In fact, when the legislature has attempted to lay out specific regulatory strategies in the past, some critics believe it has forced the agencies into promulgating unrealistic regulations against their better judgment and capabilities. See Peltzman, *Toward a More General Theory of Regulation* in *THE POLITICS OF REGULATION* 321 (Wilson ed. 1980).

judgment requires understanding of specialized fields, the involvement of an agency is preferable.

Second, in areas where the population of regulated parties is large and diverse, the staff and flexibility of an administrative agency are valuable in tailoring regulations to respond to individual situations. The blunt instrument of legislation is less well suited to handling variations over time or among the regulated parties.

Third, Congress should consider its suitability to perform the actions required to correct perceived agency wrongdoing. Congress is better able to step into the void created by agency inaction if the agency's tasks are primarily rulemaking rather than administration. For example, Congress could reasonably establish pollutant limits by statute, but it has no effective means for hiring staff, receiving and evaluating bids, and letting contracts for the remedial cleanup work at Superfund sites.

Fourth, Congress should consider the significance of the public harm resulting from the executive agency's unresponsiveness. In the case of hazardous waste regulation, where the risks to the public created by failure to implement the statute as desired by Congress are potentially great, there is increased justification for congressional intervention.

Though all these factors are important, the most significant factor in any congressional decision to get involved in the implementation of a regulatory system is the determination of the agency to resist the intent and language of the statutory directives. If it becomes clear, as it had in the RCRA and Superfund programs, that the agency will continue on its course despite the statute and congressional and other pressure to follow the law, Congress is essentially left with two choices: step into the regulatory role or wait for a change in administration. Congress' choice must include weighing whether its perception of public needs and preferences argues for assuming the role of regulator abandoned by the agency. In the case of hazardous waste policy, where the risks to the public are significant, the choice was clear. The drawbacks of detailed statutory regulation can be weighed abstractly against the benefits, but the ultimate choice is to abandon protection of the environment or to involve Congress in the difficult details. In the long run, the best hope may be that the system will return to equilibrium with Congress setting goals and the agencies implementing them. In the short run, it is likely that specific congressional directives will increase rather than decrease. Similar to the RCRA and Superfund experience, in other areas of regulation the dogmatic insistence on minimizing the role of the federal government has also led to additional confrontation with Congress. Once again, the only satisfactory response has been for Congress to increase its participation in the more technical

aspects of regulation.<sup>124</sup> When Congress, supported by public opinion, sets out a policy through which the federal government must act, the administrative enforcement arm must carry out its congressional mandate. If the philosophical opposition of the Administration weakens traditional enforcement and implementation roles, then Congress must amend statutes to restrict the extent of agency discretion. Only in this way can Congress ensure that the public's desire for a clean environment will be given effect.

### Conclusion

Congressional attempts to mandate a regulatory system for environmental policy have just begun, and, although the immediate result has been to improve the control of hazardous waste disposal practices, the ultimate impact on the regulatory process is still unknown. Complex and costly scientific and technical decisions are intricate enough when handled by a regulatory agency. When these decisions are thrown into the overtly political process of legislating, sensible decision-making becomes much more difficult.

The shift in responsibility for environmental decision-making is the unfortunate, but inevitable product of an uncompromising political philosophy. Although congressional assumption of EPA's regulatory role has its shortcomings, its intervention is still preferable to the continued reliance on an agency uninterested in environmental protection.

124. For example, H.R. 4311, pending in the House and S. 2083, pending in the Senate provide express and detailed requirements for EPA to address the environmental hazards associated with asbestos in public schools, an area in which EPA has done very little. In the area of air safety, Representative Norman Y. Mineta, chairman of the House Aviation Subcommittee, has said that "the philosophical bent of this administration is to get the government out of everything. . . But safety is not something you leave to the marketplace to be bartered." CONG. Q. WEEKLY REP., Nov. 9, 1985, at 2294.