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A LEGISLATIVE HISTORY OF THE MINNESOTA “SUPERFUND” ACT

ALAN C. WILLIAMSTM

Growing public concern about environmental contamination and public health problems caused by improper disposal of chemical wastes spurred enactment of the federal “Superfund” Act in 1980. The federal Act was the first statute to comprehensively address liability for the cleanup of chemical contamination. However, federal law alone proved inadequate to achieve state goals for cleaning up waste sites and it failed to address the question of legal responsibility for concomitant injuries to persons and property. With the enactment of the Minnesota Superfund Act in 1983, Minnesota has taken the lead in providing the legal basis needed to achieve site cleanup and to determine liability for injury to persons and property. The Minnesota Act addresses three essential aspects of the chemical contamination problem: it imposes strict liability for cleanup costs and other damages, it authorizes cleanup action by the state and recovery of cleanup costs and civil penalties, and it establishes a funding mechanism for cleanup activities. Mr. Williams provides invaluable insight into the legislative history of Minnesota’s comprehensive and highly controversial legislative response to the chemical waste contamination problem.

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† Special Assistant Attorney General, State of Minnesota; former Senate Counsel, Minnesota State Senate; B.A. College of St. Thomas; J.D. Yale Law School. This Article is dedicated to the authors of the Environmental Response and Liability Act, Senator Gene Merriam of Coon Rapids and Representative Dee Long of Minneapolis, in recognition of their work to protect the environment and the health of the citizens of Minnesota.
I. **INTRODUCTION**

The Minnesota "Superfund" Act (Act) is the popular name for the Environmental Response and Liability Act passed by the Minnesota Legislature at the 1983 regular session. The name is borrowed from the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), commonly referred to as the "Superfund" law. CERCLA authorizes the Environmental Protection Agency (EPA) to clean up sites contaminated by hazardous chemicals at federal expense, and creates a statutory cause of action to recover the expenses of the cleanup and the costs of restoring damaged natural resources. Like CERCLA, the Act provides public funding and statutory authority to clean up contaminated sites and a cause of action to recover cleanup costs and natural resource damages. In addition, the Act

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provides a cause of action for the recovery of damages for personal injury and economic loss caused by the release of hazardous chemicals into the environment.

This Article provides an overview of the origins, purposes, and provisions of the Act, and a history of the legislative development of the major issues addressed in the Act, with particular attention paid to the liability provisions.

II. ORIGINS OF THE MINNESOTA SUPERFUND ACT

A. The Hazardous Waste Problem in Minnesota

The Act addresses one of the most controversial public issues of the late 1970's and early 1980's: the effects of exposing individuals and the environment to dangerous commercial and industrial chemicals, and the legal responsibility for injuries to health, property, and the environment caused by exposure to those chemicals. The need for improved management of chemical wastes in Minnesota was recognized in the 1970's. By the early 1980's the need for action on the question of legal responsibility for the effects of chemical contamination of the environment became urgent.

The state's greatest cause for concern stemmed from the discovery of many chemically contaminated sites, with potentially harmful effects on drinking water supplies. In 1980, the state Pollution Control Agency (PCA) established its so-called "Strike Force" to investigate contaminated sites and to build a foundation for legal and regulatory action to protect public health and safety.

Along with the establishment of the Strike Force, the PCA began regular publication of a log of contaminated sites. The first log, published in January 1981, listed thirty-one potentially contaminated sites. The number of sites had increased to forty-nine.

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5. The PCA logs of hazardous waste sites listed all sites actively under investigation by the PCA including a summary of the problems posed by the site and the actions taken or needed at the site.

by February 1982,\(^7\) and to sixty-one sites by the time the Act became law in 1983.\(^8\) Publication of the hazardous waste site logs led to greater awareness of the scope of the contamination problem in the state. The logs also led to an acknowledgment that the legal tools available to the PCA were inadequate to assure a prompt response to the public health dangers posed by the contaminated sites.\(^9\)

Concern about the past and future disposal of hazardous chemicals in the state was expressed by the Minnesota Legislature in 1974, when it enacted a law directing the PCA to develop a comprehensive regulatory system for the storage, transport, treatment, and disposal of hazardous waste.\(^10\) The PCA adopted rules to implement this program in 1979.\(^11\) Regulation of hazardous waste, however, addressed only part of the problem. Proper management of hazardous waste also depended on the availability and use of environmentally sound waste disposal and treatment technologies. Recognizing the importance of improving hazardous waste management, the legislature established the Joint Legislative Committee on Solid and Hazardous Waste (Joint Committee) in 1978.\(^12\)

The Joint Committee's efforts resulted in enactment of the Waste Management Act of 1980,\(^13\) which addressed the planning, siting, and development of hazardous waste processing and disposal facilities in Minnesota. Legal responsibility for harm caused by hazardous waste disposal facilities was one of many issues considered by the Joint Committee.\(^14\) Liability remained an unresolved

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10. Act of Mar. 28, 1974, ch. 346, 1974 Minn. Laws 582 (codified at MINN. STAT. §§ 116.01-45 (1982)).
14. Liability for injuries caused by hazardous waste was discussed in Part X of a report prepared for the Joint Committee by the Minnesota State Planning Agency. MINNESOTA STATE PLANNING AGENCY, REPORT TO THE JOINT LEGISLATIVE COMM. ON
issue in the Waste Management Act of 1980, but the newly created Waste Management Board (WMB) was directed to report to the legislature on the issue in January 1981. The report by the WMB and other materials produced for the Joint Committee provided the legislature with important information about legal responsibility for harm caused by hazardous waste. These materials, other legal articles, and a recent congressional study indicated that the common and statutory law of the early 1980's inadequately addressed the issue of harm to health, property, and the environment caused by exposure to dangerous chemicals.

B. The Influence of Federal Legislation

Although several states had enacted statutes dealing with legal responsibility for chemical contamination before enactment of the Minnesota Superfund Act, federal legislation was much more influential in shaping the Minnesota Act. The first comprehensive


Florida has enacted two additional liability provisions since Minnesota enacted its Superfund Act. See Act of July 1, 1983, ch. 83-310, 1983 Fla. Laws 3874, 3994-95 (to be codified at FLA. STAT. § 376.65 (liability for cleanup, abatement and damages paid by
statute to tackle the subject of liability for chemical contamination was the federal Superfund Act, CERCLA.\textsuperscript{19} CERCLA imposed legal responsibility for a harmful release of hazardous substances on all parties contributing to the release. These parties include the owners of the hazardous substance who sent it for disposal or treatment (waste generators), the owners or operators of the facilities from which the release occurred, and the transporters of the substance to the facilities.\textsuperscript{20} The cause of action created by CERCLA addressed only liability for cleaning up contaminated sites and for losses related to natural resources.\textsuperscript{21} Under a separate provision of CERCLA,\textsuperscript{22} liability for personal injury and economic loss became the focus for a study group composed of representatives of the American Bar Association, the American Law Institute, and the National Association of Attorneys General (301(e) Study Group), of which Warren Spannaus, then attorney general of Minnesota, was an active member.

The enactment of CERCLA had a significant influence on the introduction of the first Minnesota Superfund bill. First, it provided a model for a state legislative response to the problems caused by contaminated hazardous waste sites in the state. Second, CERCLA highlighted the need for state action because the available federal funds appeared insufficient to clean up more than two contaminated sites in Minnesota.\textsuperscript{23} Third, omission of provisions clarifying legal responsibility for harm to persons and property encouraged state tort law reform. The publication of the 301(e) Study Group Report, although it came almost eighteen months after introduction of the Minnesota Superfund bill, had an important influence on the Minnesota legislative debate.\textsuperscript{24} The re-

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\textsuperscript{19} 42 U.S.C. §§ 9601-9657 (Supp. V 1981); see supra note 2 and accompanying text.


\textsuperscript{23} Memorandum from Louis J. Breimhurst, supra note 9, at 2.

\textsuperscript{24} F. Grad & A. Porter, 97th Cong., 2d Sess., Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies: A Report to Congress by the "Superfund Section 301(e) Study Group" (Ser. No. 97-12, Comm. Print 1982) [hereinafter cited as 301(e) REPORT]; see also Memorandum from Alan C. Williams, Senate Counsel, to Senator Gene Merriam and Representative Dee Long
port concluded that existing common law and statutory remedies inadequately addressed harm caused by hazardous substances. The report recommended reforms, including tort law changes similar to those proposed in the Minnesota Superfund bill.25

Thus, the Act's origin can be traced to a variety of sources. The legislature's ongoing interest in hazardous waste regulation and management, the discovery of a large number of contaminated sites that threatened public health, and the inadequacy of existing law, including CERCLA, were strong incentives for legislative action. Minnesota's first Superfund bill was introduced in March 1981.26


25. 301(e) REPORT, supra note 24, 130-32, 255-71 app.


A comment on the importance of legislative history is appropriate at this point. Legislative history is one relevant factor used in construing legislative acts in Minnesota. See MINN. STAT. § 645.16 (1982) (legislative intent controls). Legislative history has been a crucial or determinative factor in the outcome of several important cases involving Minnesota legislation. See, e.g., County of Freeborn v. Bryson, 309 Minn. 178, 243 N.W.2d 316 (1976). In Bryson, the Minnesota Supreme Court found that language in the Minnesota Environmental Rights Act was derived from a federal statute and interpreted the Minnesota law in the same manner that the United States had interpreted the federal law. Id. at 186-87, 243 N.W.2d at 320-21. In Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981), the United States Supreme Court made extensive use of quotations from the floor debates of the Minnesota Legislature in holding that Minnesota's ban of the sale of plastic milk containers was constitutional. Id. at 465, 467-70.

While legislative history is recognized as a legitimate tool in ascertaining legislative intent, it is not so highly developed or sophisticated an instrument of statutory construction in Minnesota as it is at the federal level. This is partly because no readily available, standardized source of legislative history exists in Minnesota. The Minnesota Legislature and its committees do not publish detailed reports summarizing the purposes, effects, and intent of bills under consideration.

Many materials are available, however, for use in constructing Minnesota legislative history. Official legislative records include copies of bills as introduced and as amended by legislative committees; daily journals of the proceedings of both houses of the legislature, including bill amendments adopted in committee and on the floor; committee minutes; and verbatim tape recordings of committee and floor sessions. These materials are available from the Legislative Reference Library, from the Clerk of the House or Secretary of the Senate, or from the staff of the legislative committees. Other materials, such as
C. Purposes and Essential Elements of the Act

During the two and one-half years of legislative debate, substantial amendments were made to the Minnesota Superfund bill and the focus of the debate frequently shifted; nevertheless, the fundamental purposes of the legislation remained constant throughout its history. These purposes can be summarized as follows: (1) to impose strict liability for harm caused by release of a hazardous substance, placing financial responsibility on those responsible for the release rather than on the injured parties or the public; (2) to authorize the state to clean up contaminated sites and recover cleanup costs in court—that is, to clean up first and litigate later; and (3) to fund state cleanup activity and match cleanup money provided under CERCLA.27

These purposes can be traced from the original bill introduced in 1981 to the final version enacted in 1983. Both versions imposed strict, joint and several liability on generators, transporters, and disposal site owners and operators for cleanup costs, natural resource losses, personal injury, and economic loss.28 Both authorized PCA cleanup of contaminated sites when responsible parties were unable or unwilling to do so, and recovery of the cleanup costs in later litigation.29 Both versions also included substantial state funding for cleanup costs, although the proposed methods of funding differed substantially.30 Other important provisions ap-

written testimony received by committees, as well as summaries, research memos, and background reports prepared by legislative staff, state agencies, and other parties are sometimes available. These materials are, however, often more difficult to locate. Some of these materials may be filed with the minutes of legislative committees.


28. Compare S.F. No. 1031, as introduced, §§ 3, 4 with MINN. STAT. §§ 115B.03-.05 (Supp. 1983).


30. Senate File Number 1031, sections 14-16, created a cleanup fund and appropriated money from the state's general revenues for that purpose. The 1982 version of Senate File Number 1031 proposed a tax on solid waste landfill operators in addition to a hazardous waste generator tax. See Report of the Agriculture and Natural Resources Comm. on
pearing in the original and final bills included: provisions easing the proof of causation for personal injury claims;\textsuperscript{31} modification of joint and several liability through contribution and apportionment provisions;\textsuperscript{32} clarification of the statute of limitations for personal injury claims;\textsuperscript{33} prohibition of liability transfer and double recovery;\textsuperscript{34} preservation of other legal remedies;\textsuperscript{35} and broad definitions of the events giving rise to liability,\textsuperscript{36} the persons legally responsible for those events,\textsuperscript{37} and the cleanup costs and personal injury, economic loss, and natural resource damages for which those persons were liable.\textsuperscript{38}

The continuity in the legislative purposes and essential provisions of the Superfund bill throughout the legislative debate represent only one aspect of the bill’s history. During the three sessions of legislative debate, discussion shifted from one major set of issues to another and substantial amendments were made to almost every element of the bill. The legislative development and resolution of these issues, especially the highly controversial liability issues, will be discussed in depth following an overview of the major provisions of the Act.

\section*{III. Overview of the Act’s Provisions}

For analytical purposes, the Act can be divided into three major areas: (1) provisions establishing statutory causes of action and procedures for recovery of cleanup costs and damages for personal injury, economic loss, and harm to natural resources caused by releases of hazardous substances;\textsuperscript{39} (2) provisions establishing the PCA’s authority to spend state money to clean up contaminated S.F. No. 1031, §§ 17-21, reprinted in 1982 MINN. S.J. 3409. Minnesota imposes taxes on generators of hazardous waste and appropriates the tax revenues and money from the state’s general revenues to a cleanup fund. See MINN. STAT. §§ 115B.19-24, .32 (Supp. 1983).

\begin{enumerate}
\item Compare S.F. No. 1031, § 5 with MINN. STAT. § 115B.07 (Supp. 1983).
\item Compare S.F. No. 1031, § 6 with MINN. STAT. §§ 115B.08, .09 (Supp. 1983).
\item Compare S.F. No. 1031, § 10 with MINN. STAT. § 115B.11 (Supp. 1983).
\item Compare S.F. No. 1031, §§ 8, 12 with MINN. STAT. §§ 115B.10, .13 (Supp. 1983).
\item Compare S.F. No. 1031, § 11 with MINN. STAT. § 115B.12 (Supp. 1983).
\item Compare S.F. No. 1031, § 2, subds. 6, 8, 9, 11 with MINN. STAT. § 115B.02, subds. 5, 8, 9, 15 (Supp. 1983) (definitions of “facility,” “hazardous substance,” “hazardous waste,” and “release”).
\item Compare S.F. No. 1031, § 3, subd. 2 with MINN. STAT. §§ 115B.02, subds. 11, 12, 115B.03 (Supp. 1983).
\item Compare S.F. No. 1031, § 2, subds. 4, 12, 13, 14, § 3, subd. 1 with MINN. STAT. §§ 115B.02, subds. 16, 17, 18, 115B.04, subd. 1, 115B.05, subd. 1 (Supp. 1983).
\item MINN. STAT. §§ 115B.01-15 (Supp. 1983).
\end{enumerate}
sites and to take legal action against parties responsible for the sites;\(^\text{40}\) and (3) provisions for financing the PCA’s cleanup fund.\(^\text{41}\) These areas will be characterized generally as the liability, cleanup, and financing provisions of the Act.

**A. Liability Provisions**

The Act establishes a comprehensive statutory scheme of liability for cleanup costs, damage to natural resources, personal injury, and economic loss resulting from the release of a hazardous substance into the environment. The key event triggering liability under the Act is a “release of a hazardous substance from a facility.”\(^\text{42}\) Persons who are legally responsible for a release\(^\text{43}\) generally include generators and transporters of hazardous substances and owners and operators of treatment and disposal facilities for those substances. They are liable strictly, jointly and severally for cleanup costs and natural resource losses under section 4 of the Act,\(^\text{44}\) and for damages for economic loss and personal injury under section 5.\(^\text{45}\)

Liability under sections 4 and 5 is limited by various defenses and limitations.\(^\text{46}\) Section 5 liability is subject to an additional defense if the substance was placed in the facility from which it was released wholly before January 1, 1973.\(^\text{47}\) Under this defense, the

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\(^{40}\) *Id.* §§ 115B.17, 18.

\(^{41}\) *Id.* §§ 115B.19-24.

\(^{42}\) *Id.* §§ 115B.04, subd. 1, 115B.05, subd. 1. Although section 115B.04, subdivision 1 also imposes liability for a “threatened release” of a hazardous substance, liability for a threatened release is limited under subdivision 3 of that section to recovery by the PCA of the costs incurred in responding to the threatened release. No party other than the PCA may recover damages caused by a threatened release. The terms “release,” “hazardous substance,” and “facility” are defined in Minnesota Statutes section 115B.02, subdivisions 15, 8, 5. See *id.* § 115B.02, subds. 15, 8, 5.

\(^{43}\) *Id.* § 115B.03. The term “person” is defined in Minnesota Statutes section 115B.02, subdivision 12. *Id.* § 115B.02, subd. 12.

\(^{44}\) Specific costs and damages for which liability is imposed are set forth in Minnesota Statutes section 115B.04, subdivision 1. *Id.* § 115B.04, subd. 1. In addition, “response” is defined in Minnesota Statutes section 115B.02, subdivision 18, to include removal and remedial action taken in response to a release of a hazardous substance. *Id.* § 115B.02, subd. 18. “Remedy,” “removal,” and “natural resources” are defined in subdivisions 16, 17, and 10 respectively. *Id.* § 115B.02, subds. 16, 17, 10.

\(^{45}\) Specific damages for which liability is imposed are set forth in Minnesota Statutes section 115B.05, subdivision 1. *Id.* § 115B.05, subd. 1.

\(^{46}\) These defenses and limitations are set forth in Minnesota Statutes section 115B.04, subdivisions 2-12, and Minnesota Statutes section 115B.05, subdivisions 2-10. *Id.* §§ 115B.04, subsds. 2-12, 115B.05, subsds. 2-10.

\(^{47}\) *Id.* § 115B.06, subd. 1(a). For a discussion of the retroactivity issue, see Part IV of this Article.
responsible person may escape liability for personal injury or economic loss if the person shows that placing or keeping the substance in the facility was not an abnormally dangerous activity. 48 In addition, no statutory liability for personal injury or economic loss attaches if the substance was placed in the facility wholly before January 1, 1960. 49

The Act also contains special provisions concerning proof of causation 50 and statutes of limitations 51 for claims of personal injury. The procedures governing apportionment of liability and contribution among parties held jointly liable under the Act vary depending upon whether the claim is brought under section 4 52 or section 5. 53 The Act prevents persons responsible for a release from using certain legal mechanisms to avoid liability for the release, 54 preserves other statutory and common law remedies, 55 prohibits double recovery of costs and damages, 56 and allows the court to award litigation costs to a prevailing party. 57 Finally, the Act provides that statutory strict liability applies only to releases of hazardous substances occurring on or after the Act’s effective date, July 1, 1983, including releases that began before that date and continued after it. A release that has been entirely cleaned up and eliminated before the Act’s effective date is not covered by the liability provisions. 58

48. MINN. STAT. § 115B.06, subd. 2 (Supp. 1983).
49. Id. § 115B.06, subd. 1(b).
50. Id. § 115B.07.
51. Id. § 115B.11.
52. Minnesota Statutes section 115B.08 applies to claims under section 4 for cleanup costs and natural resource losses. Id. § 115B.08. Damage awards may be reduced by the amount of any liability apportioned to plaintiffs. Defendants remain jointly and severally liable for the remaining portion of the award. Id.
53. Minnesota Statutes section 115B.09 applies to claims under section 5 for personal injury or economic loss. Id. § 115B.09. Under this section, liability for personal injury and economic loss is subject to the Minnesota comparative fault statute, id. § 604.01. Minnesota Statutes section 604.02, subdivisions 1 and 2 apply to payment and collection of damage awards. Id. § 604.02, subsds. 1, 2. However, if fault can be apportioned to a joint defendant, that defendant cannot be required to pay more than two times that proportion of the total damages recoverable in the action. Id. § 115B.09.
54. Minnesota Statutes section 115B.10 provides that liability cannot be avoided by entering an indemnification or hold harmless, or similar agreement, or by a conveyance of an interest in real property. Id. § 115B.10.
55. Id. § 115B.12.
56. Id. § 115B.13.
57. Id. § 115B.14.
58. Id. § 115B.15. This provision should not be confused with the additional defense available for personal injury and economic loss claims, which is based on the date when
B. Cleanup Provisions

The Act authorizes the PCA to clean up sites contaminated by releases of hazardous substances and to take legal action against responsible persons including actions to compel site cleanup, abate the releases, obtain reimbursement for agency cleanup costs, and impose civil penalties. Under these provisions, the PCA is able to take a two-pronged approach to achieve cleanup of contaminated sites. The legal remedies provided by the Act give the PCA powerful tools to encourage responsible parties to take the necessary cleanup actions with their own funds. Under the Act's liability provisions, if the responsible parties fail to take the actions requested by the PCA or the responsible parties cannot be found, the PCA can do the cleanup work itself and attempt to recover its costs, including legal and enforcement costs. The PCA must adopt rules describing how it will establish priorities among the various sites eligible for cleanup, and must adopt and publish a list of priority sites. The PCA also has the authority to determine whether cleanup expenditures by private parties and local units of government can be recovered under the liability provisions of the Act; recovery of these expenses depends on PCA authorization of the cleanup actions. Other state agencies are also given a role in site cleanup under the Act. The attorney general is authorized to recover damages for injury to the state's public natural resources. The Departments of Agriculture, Health, and Labor and Industry are also authorized to respond in various ways to hazardous substance releases.

C. Financing Provisions

The Minnesota Superfund Act also provides financing for the cleanup and enforcement activities of the PCA. The principal

the hazardous substance was placed or came to be located in a facility, not on the date of a release of that substance from the facility. See id. § 115B.06.
59. Id. § 115B.17, subds. 1-5, 13.
60. Id. § 115B.18, subd. 2.
61. Id. § 115B.18, subd. 4.
62. Id. § 115B.17, subd. 6.
63. Id. § 115B.18, subd. 1.
64. Id. § 115B.17, subd. 6.
65. Id. § 115B.17, subd. 13; see infra note 263 and accompanying text.
66. MINN. STAT. § 115B.17, subd. 12 (Supp. 1983).
67. Id. § 115B.17, subd. 7.
68. Id. § 115B.17, subds. 8-10.
69. Id. §§ 115B.19-24.
element of the financing provisions is the Environmental Response, Compensation and Compliance Fund. All public money intended for cleanup purposes is deposited in the fund, including revenue from a hazardous waste generation tax, appropriations by the legislature from the state's general revenues, cleanup expenses and civil penalties recovered by the PCA, and any interest earned on investment of the fund. The PCA may use money from the fund for its cleanup and related enforcement activities, subject to regular biennial appropriations from the legislature. Although the fund is available for purposes other than cleanup of contaminated sites, the initial appropriation from the fund made by the legislature was entirely for cleanup purposes. The legislature carefully constructed the hazardous waste generator tax and the cleanup fund to avoid any problem with federal preemption of the state tax.

IV. HISTORY OF LEGISLATIVE ACTION ON THE MINNESOTA SUPERFUND ACT

After two and one-half years of intense legislative activity the Act became law in 1983. The Superfund bill provoked strong responses from commercial and industrial interests, environmentalists, communities affected by contaminated sites, local governments, the insurance industry, and other groups and individuals. The bill followed a tortuous path to final enactment. Introduced in 1981, the bill was substantially amended and passed in

70. Id. § 115B.20.
71. Id. § 115B.20, subd. 4.
72. Id. § 115B.20, subd. 2.
74. Title 42 of the United States Code section 9614(c), as enacted in CERCLA, supra note 2, provides in part that "[e]xcept as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." 42 U.S.C. § 9614(c) (Supp. V 1981). The Act attempts to avoid any adverse effect of this federal law on the imposition of the state hazardous waste generation tax by two separate provisions. Minnesota Statutes section 115B.20, subdivision 3 requires the PCA to determine whether the costs of any of its cleanup actions may be compensated under CERCLA before making any cleanup expenditures from the Fund. MINN. STAT. § 115B.20, subd. 3 (Supp. 1983). Minnesota Statutes section 115B.23 provides that if the state generator tax is found to be invalid because of the purpose for which the proceeds of the tax have been appropriated and made available to the Fund, the tax shall remain in effect but the revenue must be made available for other purposes. Id. § 115B.23. Thus, there would be little incentive for a generator of hazardous waste to challenge the state tax on grounds of federal preemption under CERCLA.
1982, but was vetoed by Governor Quie. Unsuccessful efforts were made to revive the bill in a form acceptable to the Governor at the 1982 first special session. A redraft of the bill was introduced in 1983. After winding its way through the entire committee process again in the 1983 legislative session, the bill was passed and signed into law by Governor Perpich.

The following history of legislative action on the Superfund bill reviews the major issues and amendments which were debated and acted upon by the legislature. The discussion is not exhaustive for every issue and amendment. Emphasis is given to the major issues relating to the liability provisions of the bill. Discussion of the major amendments to the bill focuses on the amendments made in Senate Committees, on the Senate Floor, and in House-Senate Conference Committees.

A. The 1981 Legislative Session: Bill Introduction and Fact-Finding Hearings

When the Superfund bill was first introduced in 1981, the legislature was largely unprepared for the issues that it raised. Although many legislators understood the need to clean up contaminated sites, they were sometimes confused by the arguments about the potential effects of the bill's liability provisions and the relationship of those provisions to existing common and statutory law. The bill was heard in draft form before its introduction in 1981 by the Legislative Commission on Waste Management (LCWM). Senate File Number 1031, the original version of the bill, was introduced in March 1981 and referred to the Sen-

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75. As former legal counsel to the Senate Agriculture and Natural Resources Committee and principal legislative staff for the Senate on the Superfund bill, the author is more familiar with the details of Senate and Conference Committee consideration of the bill than with the details of House Committee consideration. In general, similar issues were debated in both the Senate and the House, and the Senate and House authors coordinated their response to these issues to an extent that is uncommon with complex and controversial legislation. Thus, review of Senate actions together with the actions of House-Senate Conference Committees provides a representative though not complete picture of the legislative development of the Act.

76. The Legislative Commission on Waste Management (LCWM) was created by the Waste Management Act of 1980. Waste Management Act of 1980, ch. 564, 1980 Minn. Laws 786 (codified at MINN. STAT. § 115A.14 (1982)). The LCWM has broad authority to review implementation of that Act and to recommend new legislation relating to waste management. The LCWM heard the Superfund bill in draft form on March 24, 1981. Minutes of LCWM (Mar. 24, 1981) (minutes of all legislative committee meetings available at Minnesota Legislative Reference Library).
ate Agriculture and Natural Resources Committee, which held one hearing on the bill during that session. By a vote of nine to eight, the committee amended the bill by deleting all of the language in the bill as introduced and substituting provisions that simply established a state cleanup fund to match federal money provided by CERCLA. The author, who also chaired the committee, laid the bill over, postponing further action until the 1982 legislative session.

During the interim between the 1981 and 1982 legislative sessions, the Senate Agriculture and Natural Resources Committee visited many of the sites of chemical contamination discovered by the PCA Strike Force, and held hearings on the bill in communities near those sites. In addition, the authors of the bill and legislative staff participated in meetings to discuss issues raised by industry, environmental groups, local government, and other groups and associations. Industry representatives voiced particularly strong objections to several essential provisions of the bill including strict, joint and several liability, statutory liability for personal injury and economic loss, modification of causation requirements in adjudicating personal injury claims, and the PCA's cleanup authority. Industry also objected to the lack of certain defenses to liability, unclear liability insurance provisions, and PCA cleanup procedures. Representatives of local government voiced concern about the potentially unlimited liability of political subdivisions under the bill, a departure from statutory limits that

77. See supra note 26. Part II.C of this Article contains a brief discussion of the essential elements of Senate File Number 1031.


79. "Ulland" amendment to Senate File Number 1031. See id.


82. These objections were later addressed by amendments included in the redraft submitted by the authors for legislative consideration in 1982. See infra note 85.
typically applied to other claims against local government units. Finally, the Governor spurred additional debate by withdrawing support for a general fund appropriation and calling for a new revenue source to fund site cleanups.

B. The 1982 Regular and Special Legislative Sessions

The redraft of Senate File Number 1031 that was submitted for legislative consideration in 1982 reflected several concessions to industry and local units of government. It also imposed taxes on landfill operators and hazardous waste generators to provide funds for cleanup, and included provisions such as an "innocent property owner" defense, PCA authority to enter and inspect property, and other provisions to enhance the fairness and ef-

83. The limits on tort claims against political subdivisions under Minnesota Statutes section 466.04 would not have applied to claims under Senate File Number 1031, as introduced, because of the language of section 3, subdivision 1, which stated that liability is imposed under the bill "notwithstanding any other provision or rule of law." S.F. No. 1031, § 3.


86. Concessions to industry included a defense to liability for releases caused solely by acts or omissions of a third party, id. § 3, subd. 3(c); a defense to liability for releases specifically permitted by a federal or state agency, id. § 4(c); clarification of causation provisions regarding ultimate burden of proof, id. § 5, subd. 2; deletion of punitive damages for failing to provide cleanup action and insertion of a civil penalties provision, id. § 7; clarification of right to insure for risks of loss for which the bill imposes liability, id. § 8; and additional procedures to assure fairness in PCA exercise of new cleanup authority, id. § 14.

87. The 1982 Redraft, section 3, subdivision 8 and sections 23 and 24, limited the liability of local units of government for tort claims arising out of the release of hazardous substances. The limits applied to any action whether brought under the Superfund bill or another law. The limits set by these provisions were higher than limits set for other types of tort claims against local units of government. Id.

88. Id. §§ 15-21.

89. See 1982 Redraft, supra note 85, at § 3, subd. 4. For a discussion of the problem addressed by this provision, see 301(e) REPORT, supra note 24, at 47-53, 258-59, 86-97 app. The issue of the liability of owners of property acquired without knowledge that hazardous substances had been deposited there was brought to the attention of the Senate Agriculture and Natural Resources Committee during its hearings in the 1981-1982 Interim.

90. See 1982 Redraft, supra note 85, at § 14, subds. 4-5.

91. For example, section 3, subdivision 5, of the 1982 Redraft, see supra note 85, limited liability for claims which fall under the Workers' Compensation Act. Under section 12 of the 1982 Redraft, the application of the liability provisions to continuing releases of hazardous substances was clarified.
fectiveness of the bill.

I. Agriculture and Natural Resources Committee

The first legislative hearing on the 1982 redraft of Senate File Number 1031 was in the Senate Environmental Protection Subcommittee. The bill survived this subcommittee substantially intact, despite the presentation of twenty-six amendments on behalf of business and industry groups.\(^\text{92}\) Subcommittee debate centered on the liability provisions and PCA cleanup authority. An industry-drafted amendment to delete statutory liability for personal injury and economic loss was defeated,\(^\text{93}\) while discussion of other amendments relating to apportionment and contribution, proof of causation, and the statute of limitations was deferred to the Judiciary Committee. The subcommittee adopted several amendments, including one that allowed courts to award litigation costs to the prevailing parties in actions to recover cleanup costs or damages,\(^\text{94}\) and recommended that the full Senate committee pass the bill.

Debate in the full Senate Agriculture and Natural Resources Committee also focused on the liability provisions of the bill. Industry representatives presented amendments to delete strict joint and several liability, statutory liability for personal injury and economic loss, and provisions modifying proof of causation.\(^\text{95}\) These amendments were not adopted. The committee adopted an author's amendment,\(^\text{96}\) however, which limited the liability of employees who were responsible for releases occurring during the course of their employment.\(^\text{97}\) The committee then recommended

\(^\text{92}.\) See Minutes of the Environmental Protection Subcomm., “MACI Amendments” (Feb. 4, 1982) [hereinafter cited as MACI Amendments] (on file at William Mitchell Law Review office). “MACI” is the acronym for the Minnesota Association of Commerce and Industry. The amendments were drawn from the language of the redraft prepared by Lee H. Sheehy, see supra note 81.

\(^\text{93}.\) For an example of the defeated measure, see MACI Amendments, supra note 92, amendment 2.

\(^\text{94}.\) SUBCOMM. REP. ON S.F. NO. 1031, § 3, subd. 9; Minutes of Agriculture and Natural Resources Comm. (Feb. 4, 1982).

\(^\text{95}.\) Industry representatives presented eleven amendments which were arranged into three categories entitled “Amendments To Preserve Common Law,” “Technical Amendments Preserving Fundamental Fairness Of The Law,” and “Amendments To Insure Certainty And Predictability.” Each amendment was accompanied by a brief explanatory statement. See Attachments to Minutes of Senate Agriculture and Natural Resources Comm. (Feb. 9, 1983) (on file at William Mitchell Law Review office).

\(^\text{96}.\) An “author’s amendment” is an amendment proposed by the principal author of the bill. It is always considered a “friendly amendment” to the bill, and is often considered before less friendly amendments are proposed in a legislative committee hearing.

\(^\text{97}.\) See REPORT OF THE AGRICULTURE AND NATURAL RESOURCES Comm. ON S.F.
passage of the bill and referred it to the Judiciary Committee.  

2. 

Judiciary Committee

The Senate Judiciary Committee heard Senate File Number 1031 on February 16, 1982. Debate in the Judiciary Committee focused on the provisions relating to proof of causation for personal injury claims and the apportionment of liability among multiple jointly liable defendants. In addition, author's amendments were adopted providing for additional "permitted release" defenses to liability, clarifying the treatment of data collected by the PCA, and requiring coordination of cleanup efforts between the PCA and the state Health Department.

On the questions of proof of causation and apportionment of liability, the Judiciary Committee rejected the alternatives proposed by the author and industry representatives and fashioned its own language to resolve these issues. The bill considered by the committee contained three provisions that would have changed the law relating to proof of causation: first, certain specified types of evidence were admissible to prove causation; second, after the plaintiff showed certain types of evidence tending to prove causation, the burden of producing further evidence shifted to the defendant; and third, evidence to a reasonable medical certainty was not necessary to determine that the hazardous substance caused the injury.


98. See id. at 3431.


100. See REPORT OF THE COMM. ON JUDICIARY ON S.F. NO. 1031, reprinted in 1982 MINN. S.J. 3559, 3560 (the amendment to page 9, deleting lines 20-24, and inserting new material) [hereinafter cited as 1982 JC REPORT].

101. See id. at 3561 (the amendment to page 17, deleting lines 22-24, and inserting new material).

102. See id. at 3561 (the amendment to page 18, after line 32, inserting new material).

103. See 1982 ANR REPORT, supra note 97, at 3414-15. Section 5 of Senate File Number 1031 as amended by the Agriculture and Natural Resources Committee contained these provisions related to causation. Section 5, subdivision 1 provided:

[A]ny evidence having a tendency to make it more probable or less probable, that the hazardous substance causes, contributes to or increases the risk of injury or disease of the sort suffered by the plaintiff is relevant evidence on the issue of causation including:

(a) Evidence concerning the incidence of that sort of injury or disease in the population exposed to the release of that substance;

(b) Evidence of epidemiological studies;

(c) Evidence of animal studies;

(d) Evidence of tissue culture studies; and
The committee completely rejected the language concerning the types of evidence admissible to prove causation and deleted the language shifting the burden of producing evidence on causation to the defendant. The only remaining provision that would have affected proof of causation dealt with the need to show evidence to a reasonable medical certainty.\(^{104}\)

On the issue of apportionment of liability among multiple defendants, the Judiciary Committee adopted language substantially limiting joint and several liability. Section 6, subdivision 2, of the bill allowed an exception to joint and several liability for the defendant who could show that his share of liability was an insignificant factor in causing the release. The liability of a defendant who made such a showing would be limited to his proportion of liability.\(^{105}\) Other defendants would remain jointly and severally liable.

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\(^{104}\) Evidence of laboratory or toxicologic studies. 

\(\text{Id.}\)

Section 5, subdivision 2 provided:

> [T]he burden of producing evidence related to causation shifts to the defendant and the question shall be submitted to the trier of fact if the plaintiff shows evidence sufficient to enable the trier of fact to find that:

- (a) There is a reasonable likelihood that the plaintiff was exposed to the hazardous substance found in the release;
- (b) There is a reasonable likelihood that exposure to the hazardous substance causes or significantly contributes to injury or disease of the sort suffered by the plaintiff; and
- (c) There is a reasonable likelihood that the quantity or duration of the plaintiff's exposure to the hazardous substance is sufficient to cause or significantly contribute to injury or disease of the sort suffered by the plaintiff.

\(\text{Id.}\)

The provisions of Section 5 were drawn from the language of the version of the federal Superfund bill reported to the floor of the United States Senate as Senate bill 1480, section 4(c)(2) and (3). See S. 1480, 96th Cong., 2d Sess. § 4(c)(2), (3) (1980). Similar provisions are found in legislation currently pending in Congress which would establish a federal cause of action to recover damages for personal injury and economic loss caused by the release of a hazardous substance. See H.R. 2482, 98th Cong., 1st Sess. § 102 (1983); S. 917, 98th Cong., 1st Sess. § 5(a)(2) (1983).

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\(^{105}\) 1982 ANR REPORT, supra note 97, at 3415-16 (section 6 of S.F. No. 1031 as amended by committee). This provision was drawn from Senate bill 1480 section 4(f)(12). See S. 1480, 96th Cong., 2d Sess. § 4(f)(12) (1980); see also 301(e) REPORT, supra note 24, at
even if they could show that a relatively small proportionate share of liability should be attributed to their activities. The Judiciary Committee amendment provided that, if the proportionate amount of liability attributable to any defendant could be determined, that defendant would be liable for no more than two times his proportionate share. To the extent that apportionment of liability was impossible, full joint and several liability would apply.

The opponents of the bill were very vocal about their opposition to the joint and several liability and causation provisions in the original version of the bill and in the 1982 redraft. The amendments on causation and apportionment fashioned by the Senate Judiciary Committee brought an element of compromise to the bill. The limitation of joint and several liability adopted by the Committee was important in the final resolution of that issue in 1983.

3. Tax Committee

In the Senate Tax Committee, the focus of attention turned to the landfill operator tax designed to raise up to $7.5 million per year to clean up chemically contaminated sites. Local governments, waste haulers, and solid waste disposal facility operators objected strongly to the landfill tax. They argued that the tax would raise solid waste disposal costs to an unacceptable degree and that taxation of solid waste landfills to pay for cleanup of improperly disposed hazardous waste was inappropriate. These arguments carried the day. The Tax Committee removed the landfill tax from the bill and substituted a "products tax" which consisted of an excise tax on products "whose production . . . re-

53, 258, 261-62 (for a discussion of the so-called "de minimus exception" or "one-drum defense").

106. 1982 JC REPORT, supra note 100, at 3560 (the amendment to page 11, lines 13-19).

107. The concept of limiting liability to some multiple of the proportionate share of a defendant's liability, if a proportionate share can be determined, was incorporated in the 1983 Redraft of the Superfund bill. The Act, MINN. STAT § 115B.09 (Supp. 1983), applies this principle to liability for personal injury and economic loss, when the percentage of fault attributable to a defendant can be determined under the Minnesota comparative fault statute, id. § 604.01 (1982).

108. The bill was heard in the Senate Tax Committee on February 25, 1982. See Minutes of Senate Tax Comm. (Feb. 25, 1982).

suits in the generation . . . of hazardous waste.”

The adoption of the products tax was a clear signal from the Tax Committee that it favored the enactment of a tax to finance site cleanup. The circumstances of the committee’s action, however, indicated that it was more concerned with expressing its opposition to the landfill tax than carefully designing an alternative revenue measure. The committee received virtually no testimony regarding the amount of revenue to be raised by the products tax or its potential impact on the businesses subject to the tax. The products tax, therefore, could not be taken seriously as a solution to cleanup financing. Rather, the need to find a solution became even more urgent as a result of the committee’s action.

4. Finance Committee

Because the products tax adopted by the Senate Tax Committee did not resolve the issue of financing the cleanup of contaminated sites, the Senate Finance Committee was forced to deal with two questions: the source of revenue for cleanup activities and the amount that should be appropriated for that purpose. The Finance Committee resolved these questions by deleting the products tax, increasing the rates of the hazardous waste generator tax, and, with the support of the governor, appropriating an additional four million dollars for cleanup from the general revenues of the state. No liability issues were debated in this committee.

5. Consideration by the Full Senate

Debate by the full Senate began as soon as the House of Representatives passed its version of the bill and transmitted it to the Senate. The House companion bill, House File Number 1176, was reported to the Senate on March 11, 1982, after passing the

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110. REPORT OF THE COMM. ON TAXES AND TAX LAWS ON S.F. NO. 1031, reprinted in 1982 MINN. S.J. 3834, 3836 (the amendment to page 33, after line 16, inserting new material). The products tax was proposed by the Minnesota Waste Association, representing persons in the business of collecting and hauling solid waste and operating solid waste landfills.

111. The Senate Finance Committee heard the bill on March 5, 1982. Minutes of Senate Finance Comm..(Mar. 5, 1982).


113. The bill was required to originate in the House of Representatives under article IV, section 18 of the Minnesota Constitution, because it included a revenue raising measure. See MINN. CONST. art. IV, § 18.

114. 1982 MINN. S.J. 4679.

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House on a vote of one hundred and three to twenty-two. After amending House File Number 1176 by substituting the language of Senate File Number 1031, the Senate began floor debate on its version of the bill.

The debate again focused on the liability provisions. The strict liability standard for personal injury and economic loss came under strong attack. An amendment that allowed a determination of liability under “applicable state and federal laws, including common law” if the defendant acted “reasonably under the circumstances,” was adopted on a vote of thirty-four to twenty-nine. But the amendment was later reconsidered and defeated on a vote of twenty-seven to thirty-five. Two amendments that limited the dollar amount of any liability claim under the bill were rejected. The Senate also defeated an amendment to remove liability limits of local governments. Finally, an amendment limiting recovery for personal injury to “actual economic loss” and eliminating the right to recover for noneconomic losses such as pain and suffering was adopted. The bill passed the Senate as amended by a vote of fifty-one to twelve.

6. 1982 Conference Committee

After passage by the Senate, the bill was sent to a House-Senate Conference Committee to resolve the differences between the two versions of the bill. Few major differences required resolution. The most substantial differences concerned the scope of recovery for personal injury, and the application of joint and several liabil-

115. The House debated and passed House File Number 1176 on March 10, 1982. 1982 MINN. H.J. 6986-91. Amendments to remove the strict liability standard from the bill and to set dollar limits on any liability claims under the bill were defeated during that debate.

116. 1982 MINN. S.J. 4711. For the text of the amendments, see id. at 4711-14, 4731-36.

117. Id. at 4713-14 (the “Wegener amendment”).

118. Id. at 4731-32.

119. Id. at 4732 (the “Sieloff amendment”); id. at 4733 (the “Ulland amendment”).

120. Id. at 4735 (the “Ulland amendment”).

121. Id. at 4733-34 (the “Davies amendment”). The amendment was intended to reduce the likelihood of very large recoveries by plaintiffs by eliminating their ability to recover for intangible or noneconomic losses. The effect would be to soften the impact of the liability provisions of the bill without changing the strict liability standard.

122. Id. at 4736.

ity to claims where liability could be apportioned among multiple jointly liable parties. The Senate version limited recovery for personal injury to actual economic loss and disallowed recovery for noneconomic losses such as pain and suffering;\(^\text{124}\) the House version contained no similar limitation. The Senate bill provided that multiple jointly liable defendants who could prove their proportionate share of liability could limit their liability to twice that proportionate share;\(^\text{125}\) the House bill contained no similar provision.

The Conference Committee compromised on the scope of recovery for personal injury by allowing recovery for loss of earning capacity, physical impairment, and death, but otherwise limiting recovery to actual economic loss as the Senate had provided.\(^\text{126}\) On the issue of joint and several liability, the committee adopted the principle of limiting liability to a multiple of a defendant’s apportioned share of the common liability. The committee raised the multiple, however, from two to three times the defendant’s proportionate share.\(^\text{127}\)

The only other substantial difference between the House and Senate bills was in the provisions for financing hazardous waste site cleanup. The two bills provided different rates for the hazardous waste generator tax and a different appropriation from the state’s general revenues.\(^\text{128}\) To resolve these differences the committee increased the highest bracket of the hazardous waste generator tax to a level higher than that proposed in either version of the bill,\(^\text{129}\) and compromised on a level of $3.2 million in general fund appropriations.\(^\text{130}\)

Both Houses repassed the bill in the compromise version worked out by the Conference Committee on March 13, 1982. The vote in the House was seventy-nine to forty-five\(^\text{131}\) and in the Senate,

\(^{124}\) See supra note 121 and accompanying text.

\(^{125}\) See supra note 106 and accompanying text.

\(^{126}\) 1982 CC REPORT, supra note 123, at 5437, § 3, subd. 1(d), (e).

\(^{127}\) Id. at 5440, § 6, subd. 2.

\(^{128}\) The Senate version included a $4 million general fund appropriation while the House version appropriated $2.7 million. The Senate version provided hazardous waste generator tax rates of $2, $8, and $20 per cubic yard, depending upon final disposition of the waste, while the House version provided rates of $8, $16, and $20 per cubic yard.

\(^{129}\) 1982 CC REPORT, supra note 123, at 5449, § 18, subd. 2. The Conference Committee adopted tax rates of $8, $16, and $32 per cubic yard. Id.

\(^{130}\) Id. at 5452-53, § 25.

\(^{131}\) 1982 MINN. H.J. 7915.
Although he had never threatened such action during the legislative debate, on March 19, 1982, Governor Al Quie vetoed the bill. In his veto message, the Governor stated that his greatest concern was the imposition of strict liability on persons who had generated, transported, and disposed of hazardous substances in the past and had “acted reasonably and in accordance with the laws and scientific knowledge which existed many years ago.” According to the Governor, the actions of these persons “should be judged by the standards of negligence established in our common law.”

In addition, the Governor expressed doubt about “whether persons involved in the generation and disposal of hazardous wastes would have the opportunity to adequately insure against the tremendous potential liabilities imposed by House File Number 1176.” Finally, the Governor expressed concern about the effect of the bill as “another disincentive for businesses to remain and grow in Minnesota.” After an unsuccessful attempt by the House to override the veto, the legislature adjourned the 1982 regular session without enactment of a Superfund law.

The Governor’s veto message focused attention on three issues: the fairness of retroactive strict liability, the ability of businesses to insure for the liabilities imposed under the bill, and the effect of the bill on the state’s business climate. None of these issues had generated much debate before the veto. After the veto, they became the dominant issues in the continuing legislative and public debate over the bill.

8. The Retroactivity Issue and the 1982 First Special Session

In his veto message, the Governor contended that the Superfund bill passed by the legislature was unfair. He felt that it imposed

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132. 1982 MINN. S.J. 5454.
134. Id. at 8226.
135. Id.
136. Id. at 8227.
137. Id.
138. Id. at 8228. There were eighty-two votes to override the veto, eight votes short of the ninety required to override a veto in the House (two-thirds of the one hundred thirty-four House members).
strict liability for releases of hazardous substances caused by past activities that were carried out under standards considered legal and proper at that time. Under the bill, strict liability for personal injury, economic loss, cleanup costs, and natural resource losses applied to any person responsible for a release of a hazardous substance "occurring on or after July 1, 1982, including any release which began before July 1, 1982, and continued after that date." An action could be brought under the bill within six years of the date of discovery of the injury or loss. These provisions allowed a claim to be brought under the bill regardless of the date when the hazardous substance was disposed of, when the release began, or when the plaintiff was first exposed to the release. The date when the hazardous substance was disposed of became the key date in the debate over the bill's retroactivity.

The first attempt to resolve the retroactivity issue took place during the 1982 first special session. After negotiations with the Governor, the authors drafted a compromise which provided that there would be no strict liability under the bill for personal injury or economic loss if the substance which caused the harm was disposed of before April 1, 1982. Under the compromise, strict liability for cleanup and restoring natural resources would continue to apply regardless of the date when the hazardous substance was disposed of. The compromise bill also included a provision limiting the recovery of cleanup costs by private persons and polit-
ical subdivisions to those costs authorized by the PCA,\textsuperscript{143} and a provision modifying an earlier provision which preserved other legal remedies for harm caused by the release of hazardous substances.\textsuperscript{144}

By addressing the question of fairness in applying strict liability to those who had disposed of hazardous substances in the past, the authors raised the question of fairness to the potential victims of past disposal practices. The compromise bill troubled those who believed that past disposal practices had not always been carried out according to appropriate legal and scientific standards existing at that time. It also troubled those who believed that the cost of injuries should fall on persons who profited from activities related to hazardous substances rather than on the victim of hazardous substance releases. Because the House Majority Caucus feared that the bill had been weakened to an unacceptable degree, the "compromise" bill was not introduced in the House and no action was taken on the bill during the one-day 1982 first special session.

C. The 1983 Session: Redraft and Final Enactment

After a majority of the House of Representatives refused to consider the compromise bill during the 1982 special session, the authors of the bill faced the problem of finding a new compromise position. The polar positions were the exclusively prospective application of statutory liability for personal injury and economic loss and full retroactive application of strict liability provisions, regardless of when and how the injurious substances were disposed of.\textsuperscript{145} In drafting the bill for introduction in the 1983 session, the authors attempted to resolve the retroactivity question and simultaneously balance potential advantages to defendants by enhancing plaintiffs' chances of recovery in claims still covered by the bill.

The 1983 redraft of the Superfund bill\textsuperscript{146} attempted to resolve

\textsuperscript{143} See S.F. No. 2, § 3, subd. 3, 72d Leg., 1st Spec. Sess.

\textsuperscript{144} See id. § 10. The authors did not want the legislative "compromise," which provided for prospective strict liability for personal injury and economic loss, to be construed to limit the application of strict liability under common law theories for releases of substances disposed of before April 1, 1982.

\textsuperscript{145} By this time, opponents of the bill had generally abandoned the idea that liability for cleanup costs should be limited by a provision based on the time when hazardous substances were disposed of.

\textsuperscript{146} H.F. No. 76, 73d Leg., 1983 MINN. H.J. 64; S.F. No. 220, 73d Leg., 1983 MINN. S.J. 122. Both authors proposed identical author's amendments to the bill when it received its first committee hearing in each house of the legislature. The unofficial engrossment of those amendments is the most accurate reflection of the authors' initial 1983
the retroactivity question by allowing an additional defense to liability for personal injury and economic loss: a showing that the hazardous substance in question had been disposed of before April 1, 1982, and that the activities with respect to the substance were not abnormally dangerous. The determination of the abnormally dangerous character of an activity was to be based on the Restatement (Second) of Torts and Minnesota case law. In effect, this provision created a statutory presumption of strict liability for past activities involving hazardous substances, but allowed rebuttal of that presumption if the activities would not give rise to strict liability under common law principles. In the authors’ view, this provision eliminated the question of unfairness in imposing statutory strict liability for past activities.

To balance this concession to potential defendants, the 1983 redraft included several important provisions that enhanced an injured party’s chances for recovery under the bill. The 1983 redraft allowed recovery for the full scope of personal injury damages, in-

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148. Section 6 of the 1983 Redraft contained six factors for a court to consider in determining whether an activity with respect to a hazardous substance was abnormally dangerous. See id. Three of these factors were drawn from Minnesota’s common law on strict liability for abnormally dangerous activities. Those factors and the cases from which they were drawn were: (1) “The character of the substance, including the tendency of the substance to cause harm if it escapes from the control of the person who had possession of it . . . .” 1983 Redraft, supra note 146, at § 6(1); Berger v. Minnesota Gaslight Co., 60 Minn. 296, 62 N.W. 336 (1895); (2) “Whether harm to persons or property would necessarily result from the activity regardless of the reasonable precaution with which it is conducted . . . .” 1983 Redraft, supra note 146, at § 6(2)(a); Sachs v. Chiat, 281 Minn. 540, 162 N.W.2d 243 (1968); and (3) “Whether the activity is of a type which, despite its social utility, should not be permitted without liability for serious harm resulting from its performance . . . .” 1983 Redraft, supra note 146, at § 6(2)(e); Sachs, 281 Minn. at 540, 162 N.W.2d at 243.

The remaining three factors were drawn from section 520 of the Restatement (Second) of Torts: (1) “Inappropriateness of the activity to the place where it is carried out . . . .” 1983 Redraft, supra note 146, at § 6(2)(b); RESTATEMENT (SECOND) OF TORTS § 520(e) (1977); (2) “The extent to which the activity is not a matter of common usage . . . .” 1983 Redraft, supra note 146, at § 6(2)(c); RESTATEMENT (SECOND) OF TORTS § 520(d) (1977); (3) “Likelihood that the harm that results from the activity will be serious . . . .” 1983 Redraft, supra note 146, at § 6(2)(d); RESTATEMENT (SECOND) OF TORTS § 520(b) (1977).

The Minnesota Supreme Court has not formally adopted the principles of the Restatement (Second) of Torts with respect to strict liability for abnormally dangerous activities, Mahowald v. Minnesota Gas Co., 344 N.W.2d 856, 860-61 (1984). However, it has cited with approval a preliminary draft of sections 519 and 520 of the Second Restatement in Ferguson v. Northern States Power Co., 307 Minn. 26, 32 n.2, 239 N.W.2d 190, 193-94 n.2 (1976).
cluding pain and suffering, \(^{149}\) which had been excluded from recovery under the bill passed in 1982. The redraft also included more liberal provisions concerning proof of causation\(^{150}\) and the statute of limitations\(^ {151}\) for personal injury claims. The new causation provision applied not only to claims brought under the bill but also to claims brought under any other law for personal injury caused by hazardous substances.\(^ {152}\)

Other major changes in the 1983 redraft included greater protection from liability for so-called "innocent owners" of real property where hazardous substances had been released\(^ {153}\) and additional authority for the PCA to encourage responsible parties to clean up contaminated sites.\(^ {154}\) Finally, the 1983 redraft substantially reorganized the first seventeen sections of the bill including the provisions on liability and PCA cleanup authority. The organizational changes included separation of the liability provisions, thereby creating two distinct causes of action: one for cleanup and natural resource losses, and one for personal injury and economic losses.\(^ {155}\) With the two distinct causes of action, the applicable defenses and other procedural provisions also were

\(^{149}\) See 1983 Redraft, supra note 146, at § 5, subd. 1(b)(3).

\(^{150}\) See id. § 7. The new causation provision did not alter the burden of producing evidence or the burden of proof on the causation question. Rather, it stated that the court could not direct a verdict against a plaintiff and that the causation question must go to the jury if the plaintiff:

produces evidence sufficient to enable a reasonable person to find that:

(a) The hazardous substance was released from a facility under circumstances which could reasonably result in exposure of the person to the substance;

(b) The person was exposed to a hazardous substance which is the same as that released from the facility; and

(c) It is more likely than not that the death, injury or disease suffered by the person is caused or significantly contributed to by exposure to the hazardous substance in an amount and duration experienced by that person.

Id. Section 7 also included the provision that evidence to a reasonable medical certainty was not required to prove the causal link between exposure to a hazardous substance and the plaintiff's injury or disease. See id.

\(^{151}\) See id. § 10.

\(^{152}\) Thus, the new causation requirements could be applied to common law actions arising out of hazardous substance related injuries, including injuries not covered by the Minnesota Superfund bill because of any limitation on the bill's retroactive application.

\(^{153}\) 1983 Redraft, supra note 146, § 3, subd. 3. For a discussion of this issue in the Senate Judiciary Committee, see infra note 202.

\(^{154}\) Id. § 17. In addition to imposing civil penalties on responsible parties who refused to take cleanup actions requested by the PCA, as provided in the 1982 vetoed version of the bill, the 1983 Redraft empowered the PCA to compel performance of requested cleanup actions and to enjoin any release of a hazardous substance or pollutant or contaminant as a public nuisance. Id.

\(^{155}\) Id. §§ 4-5.
clearer. Another important organizational change resulted in the collection of all provisions relating to persons responsible for a release into one section of the bill.

In redrafting the Superfund bill for the 1983 session, the authors attempted to achieve several goals. They tried to resolve the most important issue raised by the Governor's veto message in 1982—the application of strict liability to past actions of hazardous waste generators, transporters, and disposers. To balance the changes related to retroactivity, the authors attempted to strengthen the protection that the bill afforded persons injured by hazardous substances. They also restructured the liability provisions to clarify the often complex relationship among the provisions.

1. Impact of the Federal Superfund 301(e) Study

The 1983 redraft of the Superfund bill found important new support in the 301(e) Study Group Report, published in September 1982. The 301(e) Study Group concluded that existing statutory and common law remedies for injuries caused by hazardous substances were inadequate. Its recommendations included a federal administrative compensation scheme and state tort law reform. With respect to state tort law reform, the 301(e) Study Group recommended that states "enhance and develop common law remedies, and that they remove unreasonable procedural and other barriers to recovery for personal injuries resulting from exposure to hazardous waste." Specifically, the group recommended that states impose strict liability for the generation, transportation, and disposal of hazardous waste, joint and several liability for contributors to injuries from hazardous waste, apportionment mechanisms which place the burden on defendants to allocate among themselves their proportionate fault for an injury, and liberal statutes of limitations for injuries caused by hazardous sub-

156. For example, section 6 of the 1983 Redraft, relating to liability for past actions, applied only to liability for personal injury and economic loss under section 5 of the bill. Section 7 relating to proof of causation, applied only to personal injury liability under section 5. But see supra note 152 and accompanying text.
157. 1983 Redraft, supra note 146, § 3.
158. See supra note 24 and accompanying text.
159. 301(e) REPORT, supra note 24, at 130-32, 193.
160. Id. at 196-283.
161. Id. at 255.
162. Id. at 260.
163. Id. at 258.
164. Id. at 261-62.
stances. On the issue of causation, the 301(e) Study Group found that proof of the causal connection between exposure to a hazardous substance and injury was an "almost overwhelming barrier to recovery," but recommended that legal mechanisms designed to ease the burden of proving causation "be left to the development of the law in the several states." The 301(e) Study Group made no recommendation on whether state tort law reform should apply to substances disposed of before the effective date of any statutory reform.

The 301(e) Study Group also examined the adequacy of insurance to cover claims of injuries caused by hazardous substances. The report cautioned that "it would be unreasonable to make changes in the law that create or enlarge legal obligations or liabilities without considering insurability and the availability of insurance protection at affordable rates." Nonetheless, the 301(e) Study Group noted that "insurability is not the sole or even the dominant factor that ought to determine whom the law protects and how."

The authors of the Superfund bill viewed the 1983 redraft as consistent with the recommendations of the 301(e) Study Group. The authors also drew support for the bill from proposed federal legislation on hazardous substance liability and a recent report of the Environmental Law Institute recommending the imposition of strict joint and several liability for toxic torts. With this new and important support for their proposals, the authors submitted the 1983 redraft of the Superfund bill for committee consideration at the 1983 legislative session.

165. Id. at 255-56.
166. Id. at 71.
167. Id. at 260.
168. The Report recommended that the proposed federal administrative compensation scheme apply to all claims regardless of when the injurious substances were disposed of. The federal government would, however, be subrogated only to those claims caused by substances disposed of after the effective date of the compensation scheme. Id. at 249. While the Report did state that "a prospective strict liability theory is the most appropriate theory for a private litigant," the Report's recommendations on state tort law reform were silent on the question of retroactive application of new state statutes imposing strict liability. Id. at 130.
169. Id. at 185.
170. Id.
172. See Trauberman, supra note 24.
2. Agriculture and Natural Resources Committee

Senate File Number 220 was introduced in the Senate on February 10, 1983, and was heard by the Senate Agriculture and Natural Resources Committee. Before taking testimony, the committee first adopted an authors’ amendment in order to consider the 1983 redraft of the bill rather than the introduced version of Senate File Number 220.

Insurance issues dominated the first hearing on February 10. The impact of the bill’s liability provisions on the cost and availability of insurance for persons handling hazardous substances was an issue first raised by the Governor’s 1982 veto message. The testimony and other information available to the legislature in 1983 presented conflicting views from the insurance industry.

One view held that applying strict joint and several liability for personal injury and economic loss to past waste disposal practices, and modifying the rules for proving causation, would make insurance either unavailable or unaffordable. Another view held that adverse effects on insurance costs and availability could be avoided if the committee adopted four specific amendments which would modify certain of the causation provisions; remove the

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173. See supra note 146.
174. Minutes of Senate Agriculture and Natural Resources Comm. (Feb. 10, 15, 22, and 24, 1983).
175. This approach was taken by Leslie Cheek, III of the Crum and Forster Insurance Companies in written testimony to the Committee. See Testimony of Leslie Cheek, III (Feb. 10, 1983) (on file at William Mitchell Law Review office); see also Letter from Leslie Cheek, III to Lee E. Sheehy, Esq. (Feb. 11, 1983) (on file at William Mitchell Law Review office); Letter from Mr. Robert S. Faron of Lane and Mittendorf, attorneys representing various unnamed insurance interests, to Susan Robertson, Director of the LCWM (Feb. 7, 1983) (on file at William Mitchell Law Review office); Minutes of Senate Agriculture and Natural Resources Comm. (Feb. 10, 1983) (on file at William Mitchell Law Review office).
176. This view was represented by Mr. Charles Humpstone, president of a risk assessment firm serving the insurance industry, in his testimony to the committee on February 10, 1983. See Transcript of Testimony of Mr. Charles Humpstone Before the Senate Agriculture and Natural Resources Comm. (Feb. 10, 1983) [hereinafter cited as Testimony of Mr. Charles Humpstone] (on file at William Mitchell Law Review office).
177. Mr. Humpstone argued that the three factors necessary to get the causation question to the jury under section 7 of the 1983 Redraft, supra note 150, did not take into account whether the amount and duration of the release were sufficient to cause the amount and duration of the plaintiff’s exposure. Under Mr. Humpstone’s reading of section 7, the source of a very small release of hazardous substance, that could reasonably result in some exposure to the plaintiff, could be held liable for the plaintiff’s injury from that substance even though the injury could only have been caused by a much larger release which must have come from another separate source. Mr. Humpstone characterized the result of this literal reading as an “absurd” result not intended by the author, and
retroactive application of strict liability for personal injury and economic loss; remove the power of the court to award costs to prevailing parties in a liability action; and clarify the scope of the PCA's authority to enter and inspect property in carrying out its cleanup responsibilities. These and other views expressed by the insurance industry made the insurance issue a particularly controversial part of the 1983 legislative debate.

On February 15, the committee heard testimony from representatives of business, industry, and agriculture who opposed particular parts of the bill. Discussion again focused on retroactive application of personal injury liability and modification of causation requirements. The committee also heard testimony concerning the impact of the liability provisions on haulers of solid waste and on farmers. The procedure for imposing civil pen-

178. Insurers represented by Mr. Humpstone believed that the provision of the bill which allowed a court to award costs, including legal fees, to a prevailing party was likely to be used to provide attorney's fees to prevailing plaintiffs but not to prevailing defendants. Insurers preferred the traditional contingent fee arrangement in tort cases in which the plaintiff's attorney is paid a percentage of the plaintiff's recovery. Testimony of Mr. Charles Humpstone, supra note 176, at 15-16.

179. Insurers feared that the PCA authority to enter property and inspect records as part of a site cleanup action would allow it to enter insurance company offices and inspect company records concerning persons responsible for a hazardous substance release. The Committee was urged to limit the scope of that authority to the property and records of those responsible for a release or those whose cooperation was necessary so that the PCA could take cleanup actions. Testimony of Mr. Charles Humpstone, supra note 176, at 17-18.

180. See Memorandum from Rodney J. Taylor to Joe Steman (Mar. 24, 1983) (prepared on behalf of the Minnesota Waste Association) (on file at William Mitchell Law Review office); Schmalz, Superfunds and Tort Law Reforms: Are They Insurable?, 38 BUS. LAW. 175 (1982); 301(e) REPORT, supra note 24, ch. III-B.

181. Opponents of the bill testifying at this meeting included: Becky Comstock, Attorney representing the Reilly Tar and Chemical Co.; G. Robert Johnson, Attorney representing the 3M Company; Ted Shields, representing a coalition of business and industry leaders known as the Outdoors Committee; Don Gunderson, representing the Minnesota Agrigrowth Council; and Vern Ingvalson, representing the Minnesota Farm Bureau Federation. Minutes of the Senate Agriculture and Natural Resources Comm. (Feb. 15, 1983) (on file at William Mitchell Law Review office).


183. See Written Testimony of Vern Ingvalson before the Senate Agriculture and Natural Resources Comm. (Feb. 15, 1983) (representing the Minnesota Farm Bureau Federation) (on file at William Mitchell Law Review office).
alties for failure to take cleanup actions requested by the PCA was also a subject of testimony.\textsuperscript{184}

On February 22 and 24, the committee heard from proponents of the bill. The proponents included the Director of the PCA, the attorney general, several environmental organizations,\textsuperscript{185} the Minnesota Association of Counties, the Minnesota AFL-CIO, and a number of other organizations and individuals. On February 24, after a final opportunity for testimony from the bill's supporters, the committee began to consider amendments.

The amendments adopted on February 28 included tightening the evidentiary requirements for proof of causation,\textsuperscript{186} limiting the PCA's right to enter and inspect property while carrying out its cleanup duties,\textsuperscript{187} and substituting a limit on legal fees for the court's power to award costs to prevailing parties in liability actions.\textsuperscript{188} Other amendments adopted by the committee tended to

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\item See Written Testimony of Becky Comstock before the Senate Agriculture and Natural Resources Comm. (Feb. 15, 1983) (representing Reilly Tar and Chemical Co.) (on file at William Mitchell Law Review office).
\item Environmental organizations supporting the bill included the Minnesota Izaak Walton League, the Sierra Club, and the Minnesota Audubon Council.
\item REPORT OF THE COMM. ON AGRICULTURE AND NATURAL RESOURCES ON S.F. NO. 220, 1983 MINN. S.J. 263, 266 [hereinafter cited as 1983 ANR REPORT]. This amendment responded to the testimony given to the Committee by Mr. Charles Humpstone on February 10, 1983, supra note 177. The Committee rewrote two of the three factors required under section 7, supra note 150, for a plaintiff to get the causation question to the jury. Under the amendment, clauses (a) and (b) of section 7 required a plaintiff to show evidence that he "was exposed to the hazardous substance" and that "under all of the circumstances, the release could reasonably have resulted in plaintiff's exposure to the substance in the amount and duration experienced by the plaintiff." 1983 ANR REPORT, supra, at 266.
\item 1983 ANR REPORT, supra note 186, at 268 (the amendment to page 22, deleting lines 1 to 9 and inserting a new subdivision 4). The amendment made clear that the PCA could only enter the premises and examine the records of those parties who were responsible for the release of a hazardous substance or were owners of property where the release occurred or response actions were to be taken. Id.
\item This amendment was the subject of debate in several committees in both houses of the legislature in 1983. The amendment substituted the following language for the provision which allowed courts to award costs to prevailing parties:
\begin{quote}
No claim for legal services or disbursements pertaining to any demand made or suit or proceeding which includes a cause of action brought pursuant to section 5 is an enforceable lien against any award, settlement, or judgment in favor of claimant or is valid or binding in any other respect unless approved in writing by a court. No claim made or paid for legal services, costs, and disbursements pertaining to any demand made or suit or proceeding brought pursuant to section 5 shall be more than 15 percent of the total award, settlement, or judgment in favor of claimant. Application to exceed this limitation upon a showing of extraordinary circumstances may be made by claimant's attorneys to the judge who presided over the suit or proceeding.
\end{quote}
1983 ANR REPORT, supra note 186, at 267 (the amendment to page 18, after line 9). This
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soften the impact of the liability provisions on certain types of defendants such as farmers using pesticides, waste haulers, employees responsible for releases occurring during the course of their employment, and the petroleum industry. The committee also added new defenses to liability for releases caused solely by vandalism or sabotage and reduced the civil penalties which could be imposed for failure to take cleanup actions.

The principal subject of the committee debate, however, was the retroactivity issue. It soon became clear that the authors' proposed resolution of this question in the 1983 redraft had not satisfied

and the preceding two amendments addressed three out of the four issues which Mr. Charles Humpstone had urged the Committee to consider in his testimony on February 10, 1983. See supra notes 176-79 and accompanying text.

189. 1983 ANR REPORT, supra note 186, at 263 (the amendment to page 4, deleting lines 14-16). Under Section 2, subdivision 13(d) of the 1983 Redraft, the definition of "release" did not include a release resulting from the application of fertilizer or agricultural or silvicultural chemicals or disposal of emptied pesticide containers or residues from a pesticide as defined in [Minn. Stat.] section 18A.21, subdivision 25, if the containers are triple rinsed and the residues are disposed of in a manner consistent with instructions on the pesticide label.

190. 1983 ANR REPORT, supra note 186, at 264 (the amendments to page 6, lines 31 and 32). Under this amendment, a waste transporter could not be held liable for the release of a hazardous substance unless the transporter had actual or constructive knowledge that the waste was a hazardous substance. This amendment was suggested in testimony to the Committee on behalf of the Minnesota Waste Association. See supra note 182.

191. Under this amendment, an employee who was responsible for a release in the course of his employment could only be held liable under the bill "if his conduct with respect to the hazardous substance was negligent under circumstances in which he knew that the substance was hazardous and that his conduct, if negligent, could result in serious harm . . . ." 1983 ANR REPORT, supra note 186, at 264 (the amendment to page 7, deleting lines 3 to 5 and inserting new material).

192. Id. at 263 (the amendment to page 2, line 36). Under this amendment, petroleum and certain petroleum derivatives were excluded from the definition of hazardous substance unless they also constituted a hazardous waste as defined by the bill.

193. Id. at 264-65 (the amendments to page 8, after line 23, and to page 11, after line 34). For a similar defense to civil penalties for violations of pollution control laws and rules, see MINN. STAT. § 115.071, subd. 3 (Supp. 1983).

194. The Committee reduced the maximum civil penalty from $25,000 as provided in section 17, subdivision 1 of the 1983 Redraft, supra note 146, to $10,000 as provided in Senate File Number 220 as introduced. Thus, no amendment on this subject was required in the committee report on Senate File Number 220.

195. See supra note 146 and accompanying text (discussing the retroactivity issue and explaining the authors' approach to a resolution of that issue in the 1983 Redraft).
the opponents of the bill. Rather than allowing defendants to rebut the presumption of strict liability when releases resulted from past disposal practices, the opponents proposed an absolute cut-off date for strict liability for past practices. Under this proposal, the release of a substance which was disposed of before the absolute cut-off date would not give rise to any liability for personal injury or economic loss. The debate on this question was long and intense. In the end, an amendment to set an absolute cut-off date at January 1, 1979, was defeated on a tie vote of nine to nine, with all committee members present and voting. The committee then passed the bill and sent it to the Judiciary Committee.

3. Judiciary Committee

The Senate Judiciary Committee heard the bill on March 3, 1983, and adopted several significant amendments. These amendments dealt with retroactive application of strict liability, standards for proof of causation, liability of owners of real property, allocation of liability among plaintiffs and defendants, and municipal tort liability limitations. On the retroactivity issue, the committee adopted an absolute cut-off date, April 1, 1963, for the application of statutory strict liability for personal injury and economic loss. If hazardous substances were disposed of before that date, the release of such substances would not give rise to liability under the bill. If substances were disposed of after April 1, 1963, strict liability applied under the bill with no opportunity for a defendant to argue that his activities were not abnormally dangerous.

The Judiciary Committee debated and adopted several amendments on questions relating to the liability of owners of real prop-

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196. The amendment was offered by Senator Stumpf. The original “Stumpf Amendment” provided a cut-off date of April 1, 1982, which was amended to January 1, 1979 on a voice vote. The amended version of the “Stumpf Amendment” was then defeated on a roll call vote.


198. Id. at 364 (the amendment to pages 14 and 15, deleting Section 6 and inserting new material). The amendment was offered by Senator Sieloff and passed on a vote of seven to six. An earlier attempt to set a cut-off date of 1970 failed on a vote of five to eight. Minutes of Senate Comm. on the Judiciary (meeting of Mar. 3, 1983). The text of the “Sieloff Amendment” was the same as the “Stumpf Amendment” defeated in the Agriculture and Natural Resources Committee, supra note 196.

199. The “Sieloff Amendment,” see supra note 198, deleted this additional defense from the 1983 Redraft.
erty. One amendment protected persons with nonpossessory interests in real property from liability for hazardous substances present on the property. This amendment also allowed certain written warranties or representations made by sellers of real property to be introduced as prima facie evidence of the buyer’s knowledge of hazardous substances present on the property. The committee also adopted an amendment giving further protection to so-called “innocent owners” of property where releases of hazardous substances occurred.

The committee debated the bill’s causation provisions at length and modified the list of evidentiary factors which a plaintiff must show to avoid a directed verdict and present the case to a jury. The committee also decided that a plaintiff’s actions should receive limited consideration in determining whether a defendant should be held liable. The committee also adopted a major

200. 1983 JC REPORT, supra note 197, at 363 (the amendments to S.F. No. 220, page 3 (except for the amendment to page 3, line 18), page 6, line 25, and page 7). This amendment was drafted by members of the practicing real estate bar to protect from liability persons holding nonpossessory interests in real property incident to financing the purchase of the property. See Letter from John J. Taylor to Senator William P. Luther (Apr. 19, 1983) (discussing issues addressed by the amendments) (on file at William Mitchell Law Review office); Memorandum attached to Letter from John J. Taylor (Feb. 8, 1983) (on file at William Mitchell Law Review office); Unattributed Memorandum attached to Letter from John J. Taylor (n.d.) (on file at William Mitchell Law Review office).

201. 1983 JC REPORT, supra note 197, at 363 (the amendment to S.F. No. 220, page 7, after line 36, the first paragraph).

202. As amended by the Senate Agriculture and Natural Resources Committee, Senate File Number 220, section 3, subdivision 3(d) provided that an owner of real property was a person responsible for a release of a hazardous substance from a facility if the person “knew or reasonably should have known that a hazardous substance was located in or on the facility at the time he acquired the property.” 1983 ANR REPORT, supra note 186, at 280 (the amendment to page 7, after line 9, inserting new material). The Judiciary Committee added a further requirement to subdivision 3(d) by providing that, in addition to having knowledge at the time of acquisition, the person must have “engaged in conduct by which he associated himself with the release.” This language was derived from the case of Philadelphia Chewing Gum Corp. v. Commonwealth, 387 A.2d 37 (Penn. 1978) (applicability of section 316 of the Clean Streams Law).

203. 1983 ANR REPORT, supra note 197, at 362-64 (the amendments to S.F. No. 220, page 15, deleting lines 14 to 18 and inserting new material, and page 15, line 32). The Committee’s amendments made it explicit that, to get a personal injury claim before a jury, the plaintiff must show that “there was a release of a hazardous substance” and that the “[d]efendant was a responsible person with respect to the release.” Id. The amendments did not substantially change the factors required to show the causal connection between a release of a hazardous substance and the plaintiff’s injury or disease.

204. Id. at 364 (the amendment to S.F. No. 220, page 9, line 21 and page 12, line 32). The Committee amended the so-called “third party defense” provision of section 4, subdivision 7, and section 5, subdivision 6, by excluding from liability any release caused solely by the act or omission of the plaintiff.
amendment affecting the apportionment of liability among jointly liable defendants.

The 1983 redraft of the bill allowed apportionment of liability among defendants held jointly and severally liable for any costs or damages under the bill. The defendants had the burden of showing how liability should be apportioned based on a set of factors set forth in the bill. If a defendant could show his proportionate share of liability under this provision, his total liability would be limited to three times that proportionate share.

The Judiciary Committee replaced this apportionment provision with a new provision which applied a modified form of comparative fault to claims for personal injury and economic loss. The amendment included a provision limiting a defendant's liability to the proportionate share allocated to him under the comparative fault determination. The amendment had several important effects: first, it allowed damages for personal injury or economic loss to be reduced by any percentage of liability attributable to a plaintiff, although it limited the circumstances in which a plaintiff might be required to bear some part of the liability.

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205. 1983 Redraft, supra note 146. Section 8 provided that the trier of fact must consider the following factors in apportioning a defendant's liability:

(a) The extent to which that defendant's contribution to the release of a hazardous substance can be distinguished;
(b) The amount of hazardous substance involved;
(c) The degree of toxicity of the hazardous substance involved;
(d) The degree of involvement of and care exercised by the defendant in manufacturing, treating, transporting, and disposing of the hazardous substance;
(e) The degree of cooperation by the defendant with federal, state, or local officials to prevent any harm to the public health or the environment; and
(f) Knowledge by the defendant of the hazardous nature of the substance.

Id. This language originated in Senate Bill 1480, supra note 21, the Senate version of CERCLA, with certain exceptions, notably the addition of the words "and care exercised" in clause (d), and the addition of clause (f).

206. 1983 Redraft, supra note 146, § 8, subd. 2.

207. 1983 JC REPORT, supra note 197, at 365 (the amendment to S.F. No. 220, pages 15 and 16, deleting section 8 and inserting a new section 8).

208. Id. (note especially the new section 8, subdivision 4).

209. Under this amendment, the types of fault that could be attributed to a plaintiff were limited to "(a) Voluntary assumption of a known risk; or (b) Knowingly and unreasonably subjecting himself to a risk which results from the special or unusual character of the hazardous substance." Id. The amendment provided further that "[a] plaintiff does not assume a risk for purposes of clause (a) if, in order to avoid assuming the risk, the plaintiff would be required to forego the exercise of a valuable right or privilege." 1983 ANR REPORT, supra note 186, at 365 (the new section 8, subdivision 2). These provisions were largely based upon the principles of assumption of risk and contributory negligence discussed in the Restatement (Second) of Torts sections 523 and 524 in the context of strict liability for abnormally dangerous activities.
second, the amendment eliminated the application of joint and several liability in any case where an individual defendant's share of liability could be determined; and third, the amendment left defendants with no legal mechanism to seek apportionment of liability for cleanup costs or natural resource losses or to limit their liability for such claims.210

The manner in which the issues of retroactivity and apportionment of liability were addressed by the committee set a pattern for the final resolution of those issues by the House-Senate Conference Committee. An absolute cut-off date for past actions, comparative fault, and a significant limitation of joint and several liability for claims of personal injury and economic loss all found their way into the final version of the bill as passed in 1983.

4. Tax Committee

After passage by the Judiciary Committee, the Senate Tax Committee heard the bill on March 14, 1983.211 The issues debated by the committee were confined to tax and fee issues. Amendments by the author to modify the collection procedure for the hazardous waste generator tax and to exempt certain wastes from the tax were adopted.212 The effective date of the tax was advanced from January 1, 1984 to July 1, 1983,213 and an amendment was adopted to require the LCWM to review the generator tax in light of recommendations and objectives of the Hazardous Waste Management Plan to be developed by the WMB under section 115A.11 of the Minnesota Statutes.214 With these amend-

210. It was assumed by the authors of the bill that statutory provisions on comparative fault, apportionment of damages, and contribution among joint tortfeasors, which apply to tort actions generally under Minnesota Statutes sections 604.01 and 604.02, would not apply to liability under the State Superfund bill unless expressly stated in the bill. This understanding was based on the language of the liability provisions of the bill which stated that strict, joint and several liability was imposed "notwithstanding any other provision or rule of law." See 1983 Redraft, supra note 146, § 4, subd. 1, § 5, subd. 1. This "notwithstanding clause" was included in the original version of the bill as introduced in 1981. S.F. No. 1031, supra note 26, § 3, subd. 1. This clause was modified only once in the three legislative sessions in which the bill was debated. The "Davies amendment," supra note 121, adopted on the Senate floor in 1982, deleted the clause, but the conference committee report that year reinserted the language when the "Davies amendment" was modified by that committee.


213. Id. at 443 (the amendment to page 39, line 22).

214. Id. at 441-42 (the amendment to page 33, after line 16).
ments, the Tax Committee recommended passage of the bill and sent it to the Senate Finance Committee.

5. Finance Committee

By the time the bill was heard in the Senate Finance Committee, the House version, House File Number 76, had passed the House of Representatives and been transmitted to the Senate.\(^{215}\)

The Finance Committee amended House File Number 76 by substituting the language of Senate File Number 220 as passed by the Tax Committee. Debate in the Finance Committee was limited to the financing of the programs established under the bill. The committee approved an appropriation of $5 million from the state's general revenues for cleanup activities. Added to the estimated $900,000 of revenue to be raised annually by the new hazardous waste generator tax,\(^{216}\) a total of $6.8 million was made available for cleaning up sites contaminated by hazardous waste during the 1984-1985 fiscal biennium.\(^{217}\) An amendment to suspend collection of the generator tax when the cleanup fund achieved a balance of $10 million was defeated.\(^{218}\) The committee recommended passage and sent the bill to the Senate floor.

6. Debate on the Senate Floor

The bill was debated on the Senate floor on April 26, 1983.\(^{219}\) The dominant issue was the retroactive application of the bill. As reported to the Senate floor, the bill contained the April 1, 1963 cut-off date for liability for personal injury and economic loss which had been adopted in the Senate Judiciary Committee. The bill imposed no liability for personal injury or economic loss

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\(^{215}\) The House bill was heard by the Senate Finance Committee on April 20, 1983, after it was passed by the House on April 18, 1983, by a vote of ninety-seven to twenty-eight. 1983 MINN. H.J. 2158-59 (1983). The bill was reported by the Senate and referred to the Finance Committee on April 20, 1983. 1983 MINN. S.J. 1565-66 (1983). Because the bill contained a revenue raising measure—the hazardous waste generator tax—the Minnesota Constitution required that the bill originate in the House of Representatives. See MINN. CONST. art. IV, § 18.

\(^{216}\) This was the amount of revenue estimated by the Minnesota Department of Revenue. See Analysis of H.F. 76, Minnesota Dept. of Rev., Revenue Analysis Summary (Mar. 11, 1983, rev. Mar. 19, 1983) (on file at William Mitchell Law Review office).

\(^{217}\) REPORT OF THE COMM. ON FINANCE ON H.F. NO. 76, reprinted in 1983 MINN. S.J. 1764-65, § 27. $1,076,400 of the $6.8 million was appropriated for administrative costs of the cleanup program and generator tax, and for enforcement by the Attorney General.

\(^{218}\) Amendment of Sen. Dean Johnson, Minutes of Senate Finance Comm. (Apr. 20, 1983).

\(^{219}\) 1983 MINN. S.J. 1753-63.
caused by the release of any substance disposed of before April 1, 1963. For a hazardous substance disposed of after April 1, 1963, strict liability applied without any opportunity for a defendant to show that his activities were not abnormally dangerous.

The first amendment offered on the Senate floor advanced this cut-off date to April 1, 1982. The amendment failed on a vote of thirty-one to thirty-three. Later in the debate, the cut-off date provision was amended so that liability for personal injury and economic loss would apply to any hazardous substance release listed on the CERCLA national priority list regardless of the date when the substance was disposed of. A list of the Minnesota sites on this national priority list showed that the amendment would result in statutory strict liability applying to at least two sites where disposal of hazardous substances had ceased before 1963.

Still later in the debate, another amendment was proposed to change the April 1, 1963 liability cut-off date to June 30, 1978. This amendment was adopted by a vote of thirty-four to thirty-two. The amendment was defective, however, because it amended language deleted from the bill upon adoption of the amendment referring to the national priority list. When the same 1978 cut-off date amendment was offered in correct form, it failed by a vote of thirty-two to thirty-three.

Finally, an amendment changing the April 1, 1963 date to June 30, 1976 passed by a vote of thirty-six to thirty. A separate amendment to remove the exception for the national priority list sites failed on a vote of twenty-seven to thirty-seven. The version as finally passed by the Senate thus excluded statutory liability for personal injury and economic loss caused by the releases of a hazardous substance if the substance was disposed of before June

220. Id. at 1755 (the "Wegsheid amendment" to page 15, line 8). An amendment to this amendment to change 1982 to 1933 failed on a vote of twenty-two to forty-three.
221. Id. at 1756 (the "Pehler amendment" to page 15, deleting lines 6 to 11 and inserting new material).
223. 1983 MINN. S.J. 1759 (the second "Wegsheid amendment" to page 15, line 8).
224. Id. at 1762 (the "Wegsheid amendment" to the "Pehler amendment").
225. Id. at 1763 (second "Wegsheid amendment" to the "Pehler amendment").
226. Id. at 1762 (the "Sieloff amendment" to the "Pehler amendment").
30, 1976. Nevertheless, it imposed liability for releases from at least six known contaminated sites where substances were disposed of before that date.227

Other important amendments adopted on the Senate floor included restoration of municipal tort liability limits for personal injury and economic loss resulting from hazardous waste releases;228 a defense to liability for a release aggravated by PCA or EPA cleanup actions at a contaminated site or for a second release of hazardous substances removed from a contaminated site by the PCA or EPA and transferred to another disposal site;229 and further clarification of the liability of persons holding nonpossessory interests in real property.230 Amendments setting a negligence standard for liability of farmers231 and small businesses232 and placing dollar limits on recovery for personal injury and economic loss233 were defeated. Upon completion of the amendment process, the bill was passed by the Senate sixty-five to one.234

7. 1983 Conference Committee

Unlike the Conference Committee in 1982, the 1983 Conference Committee on the Superfund bill235 had several very substantial differences to resolve between the House and Senate versions of the bill.236 The more important differences involved the retroactive application of strict liability for personal injury and economic loss, and the apportionment of liability among plaintiffs and jointly liable defendants. The House version of House File Number 76 preserved the original provisions of the 1983 redraft on both subjects. On the retroactivity issue, the House version allowed an additional

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227. See List of Hazardous Waste Sites, supra note 222. In addition to the sites described in note 222, disposal ceased at the following sites before June 30, 1976: the Waste Disposal Engineering site in Andover, the Twin Cities Arsenal site in New Brighton, the FMC site in Fridley, and the LeHillier/Mankato site.

228. 1983 MINN. S.J. 1753-54 (the "DeCramer amendment" to page 12, line 12).

229. Id. at 1758-59 (the "Sieloff amendment" to page 9, line 2).

230. Id. at 1756-57 (the "Luther amendment" to page 3, line 17).

231. Id. at 1758 (the "Frederickson amendment" to page 7, line 27).

232. Id. at 1760-61 (the "Storm amendment" to page 7, after line 27).

233. Id. at 1754 (the "Bertram amendment" to the "Decramer amendment").

234. 1983 MINN. S.J. 1763.

235. The Conference Committee on House File Number 76 was appointed by the House on April 27, 1983. 1983 MINN. H.J. 2605. The Conference Committee was appointed by the Senate on April 29, 1983. 1983 MINN. S.J. 1860.

"abnormally dangerous activity defense" for releases of hazardous substances disposed of before April 1, 1982.237 The Senate version contained a cut-off date for liability resulting from substances disposed of before June 30, 1976, but it applied statutory liability to releases at sites listed on the EPA's national priority list regardless of the disposal date.238

On the liability apportionment issue, the House version allowed multiple jointly liable defendants to apportion all liability, and limited the liability of any defendant to three times his proportionate share.239 The Senate version allowed plaintiff's recovery for personal injury and economic loss to be reduced for certain types of contributory fault. In addition, if a defendant showed his proportionate fault, his liability was limited to that proportionate share. For cleanup and natural resources claims, however, the Senate version provided no method for defendants to apportion liability, to limit their joint and several liability, or to establish a plaintiff's contributory fault.240

The Conference Committee resolved the retroactivity and apportionment issues by combining the approaches in the two versions of the bill.241 On the retroactivity issue, the committee adopted a "three-tiered approach" to the standard of liability applied to personal injuries and economic losses caused by hazardous substances disposed of before the effective date of the bill.242 The first tier consisted of claims resulting from substances disposed of in whole or in part on or after January 1, 1973. These claims were subject to strict liability as were claims resulting from substances

237. Id. at 2. For a discussion of the issue of retroactive application of strict liability as it was addressed in the 1983 Redraft of the Superfund bill, see supra notes 147-48 and accompanying text.

238. COMPARISON OF SUPERFUND BILL, supra note 236, at 2; see supra notes 220-27 and accompanying text (discussion of the Senate floor amendments on the issue of the retroactive strict liability).

239. COMPARISON OF SUPERFUND BILL, supra note 236, at 3. This was the same as the apportionment provision in the 1983 Redraft. 1983 Redraft, supra note 146, § 8, subd. 2; see supra notes 205-06 and accompanying text.

240. COMPARISON OF SUPERFUND BILL, supra note 236, at 3. The apportionment provisions of the Senate version were the result of amendments in the Senate Judiciary Committee. See supra notes 207-10 and accompanying text.


242. Id. at 2126, § 6. Regardless of the date that the hazardous substance was disposed of, the liability provisions of the bill applied only to releases occurring "on or after July 1, 1983 including any releases which began before July 1, 1983 and continued after that date." Id. at 2129, § 15.
disposed of in the future.\textsuperscript{243}

The second tier consisted of claims resulting from substances disposed of in whole or in part after January 1, 1960, but wholly before January 1, 1973. These claims were also subject to strict liability, but a defendant could defend against that liability by showing that "the activity by which the substance was kept, placed, or came to be located in or on the facility was not an abnormally dangerous activity."\textsuperscript{244} The bill contained no specific legal criteria for determining when an activity involving a hazardous substance was abnormally dangerous.\textsuperscript{245}

The third tier of the Conference Committee's approach to retroactive strict liability contained the absolute cut-off date included in the Senate version of the bill. The Conference Committee decided that releases of hazardous substances introduced into the environment wholly before January 1, 1960 would not be subject to

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\item \textsuperscript{243} \textit{Id.} at 2126, § 6, subd. 1(a). 1973 was a year of heightened legislative and public concern about a clean environment. Among the laws enacted by the Minnesota Legislature that year was one establishing the Environmental Quality Council and another setting procedures for environmental review of governmental actions adversely affecting the environment. Act of May 19, 1973, ch. 342, 1973 Minn. Laws 689 (establishing council); Act of May 19, 1983, ch. 412, 1973 Minn. Laws 895 (providing for environmental policy and program of review); Minnesota Power Plant Siting Act, ch. 591, 1973 Minn. Laws 1343; Act of May 24, 1973, ch. 748, 1973 Minn. Laws 2243 (regulation of waste disposal and encouragement of recycling); Critical Areas Act of 1973, ch. 752, 1973 Minn. Laws 2258 (special protection of the environment of designated areas, including regulation of deposit of liquid or solid waste).
\item \textsuperscript{244} 1983 CC Rep., \textit{supra} note 241, at 2126, § 6, subds. 1(a), 2. In the House version, the activity which was subject to the defense was "the activity in which the defendant was involved with respect to the substance." 1983 Redraft, \textit{supra} note 146, at § 6. Under section 6 of the Conference Committee Report, the defense applies to "the activity by which the substance was kept, placed, or came to be located in or on the facility." 1983 CC Rep., \textit{supra} note 241, at 2126, § 6, subd. 2. By focusing on the activity at the site of the release, the Conference Committee Report significantly changed the abnormally dangerous activity defense. For example, under the House version, a waste generator, who transferred waste to a transporter who took it to a disposal site where it later released and caused harm, would have to show that the activity of producing the waste and transferring it to the transporter was not abnormally dangerous. Under the Conference Committee language, however, the generator must show that the activity of disposing of the substance and keeping it at the disposal site was not abnormally dangerous.
\item \textsuperscript{245} 1983 CC Rep., \textit{supra} note 241, at 2126, § 6, subd. 2. The use of the term "abnormally dangerous activity" and the Conference Committee Report's assignment of the determination of an abnormally dangerous activity to the court indicate legislative approval of the principles of the Restatement (Second) of Torts, sections 519 and 520, setting forth the doctrine of strict liability for abnormally dangerous activities. In particular, the comment to section 520, states in part that "[w]hether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all of the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence." \textit{Restatement (Second) of Torts} § 520 comment 1 (1977).
\end{itemize}
strict liability under section 5 of the bill.\footnote{246}

On the apportionment of liability issue, the committee adopted two different approaches for the two causes of action in the bill. Liability for cleanup and natural resources was apportioned as in the House version, with the addition of language allowing apportionment of some liability to the plaintiff.\footnote{247} The Conference Committee also removed the language limiting a defendant’s liability to three times his apportioned share, and provided for contribution by jointly liable parties under Minnesota Statutes section 604.02, subdivisions 1 and 2.\footnote{248} These actions restored full joint and several liability for cleanup and natural resources claims. With respect to claims of personal injury and economic loss, the committee applied the comparative fault statute,\footnote{249} and limited the liability of any jointly liable defendant, whose share of fault could be determined under the statute, to no more than twice that share.\footnote{250}

Finally, the Conference Committee considered whether to create a state hazardous waste victims compensation fund. This issue surfaced very late in the 1983 legislative debate, but occupied a large part of the Conference Committee’s deliberations.\footnote{251} As it

\footnote{246. 1983 CC REP., supra note 241, at 2126, § 6, subd. 1(b). The House author of the bill, Representative Long, explained the 1960 cut-off date in a memorandum to the House. Memorandum from Rep. Dee Long to Members of the House of Representatives (May 3, 1983) [hereinafter cited as Long Memorandum] (on file at William Mitchell Law Review office). In that memo, Long stated that the 1960 date would include all contaminated sites listed on the EPA national priority list, thus accomplishing the goal of the Senate version of the bill as amended by the “Pehler Amendment,” supra text accompanying note 221. In addition, Representative Long stated that the 1960 date was “fair, because by 1960, there was broad public awareness of the problems of pollution caused by improper disposal of chemicals, and by at least that time, any responsible corporate manager knew or should have known that indiscriminate dumping of toxic wastes was improper.” Long Memorandum, supra, at 1. To demonstrate the national attention which had been given to the chemical pollution issue before 1960, Representative Long provided a second memorandum, also addressed to the House giving a “chronology of events regarding pollution control in Minnesota, relative to a 1960 cutoff date.” Memorandum from Rep. Dee Long to Members of the House of Representatives (n.d.) (on file at William Mitchell Law Review office).

247. 1983 CC REP., supra note 241, at 2127, § 8. For the language and origin of the apportionment criteria, see supra note 205.

248. 1983 CC REP., supra note 241, at 2127, § 8, subd. 2.

249. MINN. STAT. § 604.01 (1982).

250. 1983 CC REP., supra note 241, at 2127-28, § 9. Because section 8 of the Conference Committee Report explicitly provides a different method for apportioning liability and for the reasons discussed above, supra note 210, the comparative fault statute would not apply to liability for cleanup costs and natural resource losses under section four of the bill.

251. The first recorded amendment on this subject was offered by Representative Ol-
became more apparent that the personal injury liability provisions would not apply to releases of hazardous substances that had been disposed of in the distant past, the idea of an administrative compensation remedy for victims of those releases became more attractive. Opponents of all retroactive coverage of the personal injury liability provisions saw the victims compensation idea as a possible substitute for retroactive liability. Although the victims compensation idea attracted a number of supporters, including Governor Rudy Perpich, it was too late to develop the concept into a workable program and incorporate it into the bill. Amendments to establish a program failed in the Conference Committee. However, the committee adopted an amendment directing the LCWM to study the matter and report to the legislature by July 1, 1984.

With these and other issues resolved, the Conference Committee reported the amended bill to the House and Senate for repassage. Debate over the lack of a victims compensation fund in the Conference Committee report led to motions in both Houses to reject the report and return the bill to Conference Committee. In the House of Representatives, this motion failed on a vote of forty-nine to seventy-eight and the bill was repassed on a vote of one hundred twelve to eighteen. In the Senate, the motion to reject the report failed on a tie vote of thirty-three to thirty-three. The Senate then repassed the bill on a vote of fifty-five to eleven.

On May 10, 1983, Governor Perpich signed House File 76 into law as chapter 121 of the 1983 Minnesota Laws. The liability provisions and most of the other provisions of chapter 121 became effective on July 1, 1983.
V. POSTSCRIPT: IMPLEMENTATION AND UNRESOLVED ISSUES

In the year following enactment, implementation of the Act’s cleanup provisions has begun under vigorous leadership by the PCA.\(^{261}\) A proposed temporary list of cleanup site priorities was published by the agency in June 1983,\(^{262}\) and was adopted on July 27, 1983.\(^{263}\) Using its authority under sections 17 and 18 of the Act, the PCA has won cleanup agreements with parties responsible for six contaminated sites.\(^{264}\) Over $19 million of private funding has been committed to site cleanup under these agreements.\(^{265}\) An additional $367,074 has been recovered by the PCA and deposited in the state cleanup fund as reimbursement for the agency’s enforcement, investigative, and administrative costs.\(^{266}\) The PCA has authorized the expenditure of $571,000 from the state Environmental Response, Compensation and Compliance Fund to prepare for the cleanup of several additional sites and for a program to remove and properly dispose of arsenic stored at many locations in Minnesota since the 1930’s when government agencies distributed it to farmers for use as a pesticide.\(^{267}\)

The impact of the new law on claims of personal injury and economic loss caused by hazardous substances cannot yet be assessed.\(^{268}\) It will probably take several years before enough cases

\(^{261}\). See State’s Young “Superfund” Law Produces Results, Minneapolis Star & Trib., Dec. 6, 1983, at 1A, col. 1.
\(^{264}\). Interview with Gary Pulford, Chief of the Site Response Section, Minnesota Pollution Control Agency (Mar. 29, 1984); see also Discussion of Status of Superfund Implementation, Minnesota Pollution Control Agency, Board Agenda Item #18 (Jan. 24, 1984) (on file at William Mitchell Law Review office).
\(^{265}\). Interview with Gary Pulford, supra note 264.
\(^{266}\). Discussion of Status of Superfund Implementation, supra note 264, at 15.
\(^{267}\). Id. at 3-7, 15.
will be settled or adjudicated under the Act to be able to evaluate its impact. The Act’s effect on private claim settlement before trial may be particularly difficult to evaluate.

Study and debate continue on several issues which the Act did not address. Those issues include the need for a hazardous substances victims compensation fund and the need to reconsider the way that liability is allocated among users, owners, and operators of any new disposal facility established by the WMB under the Waste Management Act of 1980. The Waste Management Act required a study of both the compensation and allocation of liability questions. The LCWM, which is responsible for the victims compensation study, expects to complete the study in 1984 and draft any recommended legislation for the 1985 legislative session. Debate on victim compensation continues in the Minnesota Legislature and in Congress.

Onan argued that it was an innocent owner of property under section 115B.03, subd. 3(d) and (e) of the State Superfund Act, because it had purchased the property without knowledge of the release and had taken no action associating itself with the release or significantly contributing to it. Onan also argued that Boise and two railroad companies which sent their own ties and creosote to the facility for treatment were responsible persons under the Act. Onan claimed damages from all three parties for diminution of the value of the property because of the creosote contamination. Liability was argued both on the grounds of the State Superfund Act and the common law of strict liability for abnormally dangerous activities.

Applying the Act to these facts, the jury found that Boise was a person responsible for the release and that Onan was, in effect, an innocent owner of the property and not responsible for the release. The jury also found that the two railroads were not responsible persons under the Act because they had not arranged by contract or otherwise for the disposal of creosote on the site, see MINN. STAT. § 115B.03, subd. 1(b) (1982), but that under common law, the railroads were strictly liable for a portion of the economic loss suffered by Onan. The jury awarded Onan $1,505,000 for its claim of diminution of property value, and apportioned ninety percent of the award to Boise and five percent to each of the railroads.

The Boise case rebuts the argument of the bill’s opponents who stated that the Act imposed absolute liability on anyone with any legal relationship to a contaminated site. The innocent property owner provisions of the Act clearly protected Onan from liability. Furthermore, the jury verdict with respect to the railroads calls into question the argument that the liability provisions of the Act go significantly beyond the common law.

269. In his public statement on signing the State Superfund bill on May 10, 1983, Governor Perpich pointed out three areas in which additional legislation was needed. These areas included victim compensation, allocation of liability at a state-sited hazardous waste disposal facility, and removal of limits on the tort liability of local units of government. See News Release Statement By Governor Perpich on Signing The Superfund Bill, House File 76 (May 10, 1983) (on file at William Mitchell Law Review office).


271. Id. § 29, at 340.

272. Senate File Number 1307, introduced by Senator Wegsheid, would establish a
The WMB has issued its report and recommendations on allocation of liability for new disposal facilities which may be established by the Board.273 The recommendations of the WMB attempt to reconcile the need for safer disposal facilities for hazardous waste, the concern of waste generators about the unpredictable cost of potential liability claims for any release from a disposal facility, and the public demand for assurance of compensation for such releases. The WMB has proposed a system274 by which the facility operator must indemnify all other parties who may be liable for harm caused by releases of hazardous waste from the facility. The amount of indemnification would be set by the PCA as a part of the operator's permit to run the facility. Users of the facility would pay a surcharge based on the waste deposited at the facility to finance a state fund for liability claims not satisfied by the operator. Claims could also be paid by the Federal Post-Closure Liability Fund if it assumes the liability of the owner and operator after facility closure.275 Any claims not satisfied from these sources would revert to all of the parties legally responsible for the claims.

The system recommended by the WMB assures waste generators who use a facility that they will be substantially protected from future liability. It also assures citizens that funds will be available to compensate for harm that may be caused by a new hazardous waste disposal facility. It would accomplish these goals without altering the legal liability of any party under the State Superfund Act or any other law. A bill establishing a system for allocating liability as proposed by the board was enacted at the 1984 legislative session.276

The enactment of the Minnesota Superfund Act is not the final chapter in the legislative effort to protect the public and the environment from the adverse effects of dangerous chemicals. Legisla-
tion enacted in 1984 imposes a moratorium on the selection of a site for a hazardous waste disposal facility in Minnesota and begins to define a new role for state government in promoting improved private management of hazardous waste.277 Meanwhile, business and industry continue to point out the alleged adverse effects of the liability provisions of the State Superfund Act on the economics of doing business in the state.278 The management of dangerous chemicals and the risks which those chemicals pose for society will continue to be major subjects of public and legislative concern.

277. Id. §§ 9-14.
278. See Some 3M Research Will Move to Texas; and Perpich is “Ready to Respond” to 3M Complaints, Minneapolis Star & Trib., Feb. 24, 1984, at 1A, col. 1; Insurer wary of state superfund law, St. Paul Dispatch, Mar. 29, 1984, at 1A, col. 1.