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How to Save the National Priorities List from the D.C. Circuit — and Itself

JOHN S. APPLEGATE*

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund")\(^1\) seeks to require those who are responsible for creating hazardous waste sites to clean them up. CERCLA combines two very different strategies to accomplish this goal. The process for deciding who shall pay for the clean-up is an innovative adaptation of traditional civil litigation and tort law concepts of strict, joint and several, and vicarious liability. In contrast, the process for deciding which sites need to be cleaned up, how to clean them, and how clean they must be made follows familiar models of administrative decision making.

Because the liability part of CERCLA is so radical in its approach and creates such a broad group of highly exposed responsible parties, the liability issues have been the target of most controversy and the focus of most reform efforts. Senator Max S. Baucus recently took a different position. Baucus believes that the liability system works reasonably well; the problem with Superfund is the byzantine, interminable, and incredibly expensive

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clean-up process.\(^2\) I agree. While it has taken time and the mid-course correction of the Superfund Amendments and Reauthorization Act of 1986 (SARA)\(^8\) for the law of potentially responsible party (PRP) liability to gain some stability, that is hardly a disturbing portrait of a “common law” system for fleshing out the details of general statutory language. The regulatory side of CERCLA has no such excuse. What appears a perfectly rational decisionmaking process has become a rigid, time-consuming, and hugely expensive parade of documents, objections, and litigation.

This Article considers the National Priorities List (NPL) and its fate at the hands of the United States Court of Appeals for the District of Columbia Circuit. The NPL is an announcement from the Environmental Protection Agency (EPA), near the beginning of the clean-up process, that certain hazardous waste sites are likely to require clean-up, and of the sites’ relative dangerousness. I will argue that the statutory structure of CERCLA, its bureaucratic implementation, and its judicial mistreatment have combined to focus enormous resources on the decisionmaking steps along the way, instead of on the actual clean-up. This has contributed substantially to the embarrassingly unproductive and horrendously expensive system whose reauthorization is now before Congress.

Part I of the Article examines the statutorily mandated clean-up process to show how the statute itself creates the problem. Part II reviews the D.C. Circuit’s record of reversal of NPL listing decisions and its effect on CERCLA decisionmaking. Part III offers some suggestions for reform.

I. THE NATIONAL PRIORITIES LIST IN CLEAN-UP DECISION MAKING

The regulatory side of CERCLA — the process for deciding which sites need to be cleaned up, clean-up methods, and the degree of clean-up — follows the traditional regulatory model in which the agency (in this case EPA) gathers and analyzes relevant data and after public comment makes a decision which is

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subject to judicial review. This Part first outlines the clean-up process. It then turns to detailed consideration of the role of the NPL in the regulatory decisionmaking process and the effect of the existing statutory restrictions on judicial review.

A. The Overall Process

CERCLA makes EPA's National Contingency Plan (NCP) the blueprint of the entire clean-up process. It sets the standards for clean-up, as well as the process by which clean-up decisions are to be made. The NCP system bears all the hallmarks of the traditional regulatory process, in which the agency first identifies problems in terms of statutory criteria, sets priorities among the problems it has identified, chooses an appropriate response, and enforces (or implements) that response.

Identification of the problem. The process begins with the discovery and initial evaluation of a site. A site can be identified in any number of ways: governmental inspection, CERCLA release reporting, a citizen's request for a site assessment of a release or threatened release of a hazardous substance, or receipt of other information. All sites are entered in the CERCLA Information System (CERCLIS). A preliminary assessment (PA) based on existing information (visual inspection and documentary research) is performed for all CERCLIS sites — now numbering in excess of 30,000 — to determine whether further investigation

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7 See, e.g., CERCLA § 105(d), 42 U.S.C. § 9605(d) (1988).

8 See, e.g., 40 C.F.R. § 300.405 (1992).
is needed. If so, a site investigation (SI) is conducted to determine, among other things, whether a removal action is required. The SI involves the collection of more data, including sampling of waste and environmental media. The PA and SI screen out sites are unlikely to require a clean-up.10

*Setting priorities.* The PA and SI gather the full range of risk information, though not in great detail, including the history of the site, the nature and quantities of hazardous material thought to be present, and the vectors of potential human exposure.11 These data are then applied to the Hazard Ranking System (HRS), a scoring system used to evaluate the relative risk of potential clean-up sites. The HRS assigns a value between 0 and 100 to the site based on the amounts and toxic characteristics of the hazardous substances present, the routes of actual and potential human exposure (soil, air, groundwater, and surface water), and the distance to, and size of, the affected population.12 The risk values for all of the routes of exposure are weighted and added and a total score is calculated. That the HRS measures only relative risk is nicely illustrated by the choice of 28.5 as the listing threshold. There is no intrinsic reason for this value; it was originally chosen solely because it resulted in 400 sites being placed on the first list.13

The NPL is what it sounds like: a list of sites, generally ranked by HRS value,14 that require response action. While it is not a legal prerequisite to private clean-up activity, to abatement actions for imminent hazards, or to recovery of response costs, listing is required for governmental clean-up activity and recovery.

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of costs from the Superfund itself.\textsuperscript{18} Except at federally owned sites, listing does not mean that remedial action must follow. While the HRS is the primary means for adding sites to the NPL, sites can also be added at a state’s request\textsuperscript{16} or because EPA finds an immediate endangerment to public health.\textsuperscript{17} The listing process is procedurally an elaborate rulemaking adding a lengthy comment period and a requirement that EPA respond to comments to the regular notice-and-comment procedures.\textsuperscript{18} As of July 1993, 1270 sites were listed or proposed for listing on the NPL.\textsuperscript{19}

Choosing a remedy. All sites on the NPL are also subject to a health assessment by the Agency for Toxic Substances and Disease Registry (ATSDR).\textsuperscript{20} This assessment is to be a “preliminary assessment of the potential risk to human health” based on toxicity and exposure data, using risk assessments and other tools.\textsuperscript{21} The health assessment assists in the preparation of the site remedial investigation (RI).\textsuperscript{22} The RI, which begins the remedial phase proper, defines the nature and extent of contamination and undertakes a baseline risk assessment.\textsuperscript{23} The RI is usually linked to the feasibility study (FS).\textsuperscript{24} This document adopts a risk level as a “preliminary remediation goal,” and it develops and evaluates alternative remedial actions capable of achieving that goal.\textsuperscript{25}

\textsuperscript{18} See 40 C.F.R. § 300.425(b)(1) (1992). This aspect of the NCP, which is not required by the statute, was upheld in Ohio v. USEPA, 838 F.2d 1325, 1331 (D.C. Cir. 1988). Listing has two minor legal consequences: technical assistance grants to citizens groups are made only for NPL sites, see, e.g., CERCLA § 118(e), 42 U.S.C. § 9617(e) (1988); and listing triggers the remedial process and application of state law federal facilities. See, e.g., CERCLA §§ 117(e), 120(a)(4)(e), 42 U.S.C. §§ 9616(e), 9620(a)(4)(e) (1988 & Supp. IV 1992).


\textsuperscript{17} See Henrichs, supra note 9, at 727-28.

\textsuperscript{18} See, e.g., Karen Breslin, In Our Own Backyards: The Continuing Threat of Hazardous Waste, 101 ENVTL. HEALTH PERSPECTIVES 484, 484 (1993).


\textsuperscript{26} 40 C.F.R. § 300.430(a), .430(e) (1992); 55 Fed. Reg. 8666, 8711-12 (1990).

\textsuperscript{27} See 40 C.F.R. § 300.430(e) (1992).
part of this process, the alternatives identified in the FS are evaluated against criteria derived from the statute and described in the NCP. A remedy must meet the so-called threshold criteria (overall protection of health and compliance with other laws); the other NCP criteria (including cost and long- and short-term effectiveness) may be traded off against each other.

From among the alternatives, the preferred remedy and the justification for it become the proposed plan (PP), which is discussed with the state and is subject to public comment. Public reactions, the "modifying criteria," go into EPA's final decision, which is memorialized in a record of decision (ROD). The ROD responds to public comments, explains EPA's choice of remedy, defines the goals of clean-up, and specifies long-term monitoring.

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The criteria are:

**Threshold**
- overall protection of health and the environment,
- compliance with ARARs and other laws,

**Balancing**
- long-term effectiveness,
- risk reduction through treatment,
- short-term effectiveness,
- implementability,
- cost,

**Modifying**
- state acceptance, and
- community acceptance.

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40 C.F.R. § 300.430(f)(i)(i) (1992). There are other substantive directions in CERCLA and the NCP. The statutory preference for permanent solutions means that those balancing factors will receive most emphasis. See 40 C.F.R. § 300.430 (f)(i)(ii)(E) (1992); 55 Fed. Reg. 8666, 8725 (1990). Moreover, there is a clear preference for remedies that treat waste, instead of isolating untreated waste. 40 C.F.R. § 300.430(f)(i)(ii)(e) (1992); 55 Fed. Reg. 8666, 8721 (1990). The NCP even establishes "management principles" to structure remedies (into operable units permitting early action) and "expectations" for types of remedies that will be adopted at most sites, though of course each particular site may be different. 40 C.F.R. § 300.430(a)(1)(ii)-(iii) (1992). EPA also sought to structure more carefully the role of cost in its deliberations, by giving it a specific place and limited function in the balancing process. 40 C.F.R. § 300.430 (f)(1)(ii)(D) (1992). It can also be used to screen out alternatives where "grossly excessive" costs are involved. 40 C.F.R. § 300.430 (e)(7)(i)(i) (1992). There are limits to the extent to which EPA can be clear on this since the statute itself is delphic on this point requiring both permanent solutions and cost-effectiveness. CERCLA § 121(b)(1), 42 U.S.C. § 9621(b)(1) (1992). See generally The 1990 National Contingency Plan, supra note 4, at 10,237-41.

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Enforcement or implementation. It should be emphasized that none of the foregoing makes any physical difference to the hazardous waste site. Before spade hits dirt, the remedial plan in the ROD is further developed in the remedial design and remedial action (RD/RA) phase. Significant changes in the final remedial plan require revision of the ROD and a published explanation. Then the site is actually cleaned up. After completion of the remedial work, EPA turns the site over to state supervision for operations and maintenance and reviews the site for recategorization and ultimately delisting from the NPL.

B. Priority Setting in CERCLA

Priority setting plays an unusually important role in CERCLA decision making, and the implementation and judicial review of the NPL share no small part of the blame for CERCLA’s deficiencies. This phenomenon can be traced to two statutory factors: (1) the structure and substance of CERCLA have elevated priority setting from a system of internal management to a goal in itself (the subject of this section), and (2) listing has become an outlet for obtaining judicial review in a scheme that is otherwise notable for its absence (the subject of section C). As a result, the NPL and HRS are the focus of much critical attention in the current reauthorization debate, and may be abolished altogether.

1. Disparity of Goals and Resources

Because Congressional aspirations always exceed regulatory resources, priority setting is always an integral part of environ-

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mental control schemes. This function is even more crucial in CERCLA because of the unusually large disparity between what the statute wants to accomplish and the resources available to accomplish it. The statutory predicate for taking action — a release or threatened release of a small quantity of any of a large number of hazardous substances — implicate a huge number of sites, while the targeted clean-up standards for each site are extremely stringent. In terms of the above phases of the regulatory process, CERCLA identifies many problems and demands very ambitious remedies; therefore, priority setting — which mediates between the two — assumes great significance. Congress expressly recognized this disparity in drafting the statute, which is why, unlike other resource-poor environmental statutes, CERCLA includes an explicit provision for priority setting. The statute makes it "abundantly plain that EPA is required to serve as the protector and distributor of scarce government resources devoted to this program."

The NPL serves three purposes in the statute. First, it is a threshold test or screening device for the expenditure of public monies, both remedial administration and the Superfund. While it is not a prerequisite to private cost recovery, NPL listing is required before the Superfund can be used. The NPL process also assures that a health assessment has been completed and that a certain risk level has been reached before public clean-up resources are used. Second, it is a detailed internal management tool for rationally allocating scarce resources after the threshold level has been met. Without a coherent priority setting system, a regulator can lose focus, lack direction, diffuse effort, and expend resources unproductively. Third, the NPL informs EPA itself of the relative degree of concern of various sites and it provides the

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36 See Worst Things First, supra note 5, at 287-89.
37 For a more detailed description of this terminology, see id. at 305-07.
41 See Unreasonable Risk, supra note 5, at 291-95; Worst Things First, supra note 5, at 287-89, 318-28.
public with important information about the existence and status of hazardous waste sites.\footnote{42}

2. Statutory Attention

Given the foregoing, it is not surprising that the NPL and HRS receive so much attention in the statute itself. CERCLA sets out guidance for the creation of and ranking within the NPL. It specifies general criteria such as risk, environmental damage, and exposure, as well as particular criteria such as effects on the food chain, drinking water supplies, and combustion waste.\footnote{43} The HRS is formally sanctioned by the statute. It was not mentioned (because it did not exist) in the 1980 CERCLA, but the 1986 SARA required EPA to make a number of specific amendments to it. The most important is that the HRS "to the maximum extent feasible, [assure] that the hazard ranking system accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities."\footnote{44} The Congressional concern for accuracy can be overstated, however. The apparently general interest in the accuracy of the HRS\footnote{45} was in reality aimed at its high ranking of mining wastes.\footnote{46} The SARA conference report noted that the HRS need not be "equivalent to detailed risk assessments."\footnote{47}

CERCLA's interest in priority setting is all the more striking when compared with other environmental statutes. Priority setting typically is a purely internal process for EPA to allocate its scarce resources, done with little Congressional guidance and less judicial interference. Even where Congress has recognized the problem of priorities and the courts have been drawn into priority setting, the

\footnotesize{42} See National Oil and Hazardous Substances Pollution Contingency Plan, 50 Fed. Reg. 47912, 47931 (1985); Eagle-Picher Indus. v. EPA, 759 F.2d 905, 919-22 (D.C. Cir. 1985); see also Bradley Mining Co. v. EPA, 972 F.2d 1356, 1357 (D.C. Cir. 1992).


\footnotesize{46} See Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1303 (D.C. Cir. 1991) (citing the legislative history). "Our review of the legislative history reveals no other congressional concerns about the fairness of the original HRS." Id.

legislative direction has been very general and the judicial review correspondingly deferential. The Occupational Safety and Health Act, for example, reserves the agency's power to set its own priorities, and cases interpreting the OSH Act have at most required the agency to explain its decision to pursue or to defer a particular issue. Other priority setting recognized by statute, such as the Interagency Testing Committee list in the Toxic Substances Control Act, is so purely advisory as to be practically immune from judicial enforcement. The relative flood of statutory and administrative ink devoted to the NPL and HRS combines with the accuracy language to create an environment in which the priority setting process becomes an end in itself (employing a whole set of bureaucratic procedures and goals), instead of an early and tentative step in a much larger decision making process leading to actual clean-up.

3. Regulatory Rationalism

The underlying reason for the attention given the NPL and HRS is that the entire structure of the NCP is an exercise in an approach to administrative decisionmaking known as comprehensive rationality. The idea of comprehensive rationality is to develop a synoptic system that will take account of all relevant aspects of a problem, fully analyze them, and come to the best solution. Classically stated, this proceeds in four stages: specification of goals, identification of all reasonable alternatives to achieve those goals, analysis of all alternatives, and selection of the alternative that will make the most progress toward the goals. The

NCP's process for remedy selection matches the comprehensive model exactly: The FS establishes clean-up goals at individual sites by reference to nine criteria and data gathered in the RI. The FS also identifies a range of remedial alternatives which are analyzed in terms of the technical criteria; the preferred alternative then is identified in the PP. Final remedy selection in the ROD is based on EPA's evaluation of all of the relevant statutory criteria.

In theory, this process makes perfect sense. It establishes a clear relationship between statutory goals and administrative action, identifies information that is used and that is unavailable, and allows for technical policy management. Comprehensive rationality is also a good way to approach problems in a proactive way, to keep an eye on the big picture, to develop long-term coherent strategies, and to be able rationally to allocate scarce resources. In practice, too, a thoughtful planner would go through the steps of gathering information, identifying alternatives, evaluating them, and finally choosing the best one. The problem occurs when the decisionmaking process itself becomes rigid and each otherwise logical step becomes both a set of information demands and an end in itself. It is natural for bureaucracies to fasten upon defined stages of a project to measure accomplishment (a current term is "milestones"), especially since actual clean-up is too hard to measure and too long-term to use to evaluate bureaucratic productivity. The stages set out under CERCLA can be such milestones, and the lavishly detailed NPL makes a particularly good one. If a measure of productivity is document generation (e.g., PAs, SIs, HRSSs, RIs, FSs, RODs) then listing will take on a life of its own. Professor McGarity has recently decried the "ossification" of rulemaking by, among other things, the imposition of statutory requirements for comprehensive analysis.

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64 Thus, knowledgeable reformers endorse the basic decision making process but call for more flexibility. See, e.g., CLEAN SITES, IMPROVING REMEDY SELECTION: AN EXPLICIT AND INTERACTIVE PROCESS FOR THE SUPERFUND PROGRAM (1990).
The NPL and HRS implicate another important aspect of the rationalist approach in that they are quantitative, and regulatory rationalism emphasizes quantification as a way of objectifying the decisionmaking process. EPA increasingly uses quantifiable risk as the basis for its regulatory policy and requirements in all of its programs. Quantitative risk assessment—assigning numerical values to toxicity and exposure—is central to the entire process, from the initial analysis of sites and health assessments, to determining clean-up levels. The HRS creates the NPL by giving a quantitative risk value to sites. It is a simplified version of quantitative risk assessment, the current method of choice in regulation of toxic substances, and it is viewed as “a method to objectively evaluate the danger posed by a hazardous waste site.”

Both the comprehensiveness paradigm and its quantification corollary can be severely criticized on a number of grounds. Professor Lindblom originally explicated the model principally to argue that it should be replaced because it requires far more information and analytical capacity than realistically exists. Professor McGarity similarly views comprehensive systems as theory unrelated to actual practice. And Professors Gillette, Krier, and Hornstein have developed more fundamental critiques of the whole idea of quantified risk as the basis for regulatory action. For our purposes, however, the rationalist model reinforces the demand for “accuracy” in SARA and further contributes to the tendency to make the NPL an end in itself.

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66 See Worst Things First, supra note 5, at 292 and sources cited therein.
72 See, e.g., McGarity, supra note 51, at 1257-58, 1276-84, 1287-92, 1303-08.
73 See, e.g., Hornstein, supra note 57, at 584-629.
C. Judicial Review

The other major reason for the NPL's dysfunction is less a matter of statutory structure than of judicial reception. The immediate legal reason for the visibility of the NPL and HRS is that, unlike the rest of the clean-up process, they are subject to preenforcement judicial review. The fact that listing itself has negative financial consequences only increases the pressure for review at this point.

1. Statutory Preclusion of Review

Like Conan Doyle's dog in the night-time, one of the most striking features of the CERCLA process is what is missing from it. The judicial involvement that is so central to the liability side of CERCLA and so much a part of most other areas of environmental law is not really part of clean-up decisionmaking. This is further evidence of the rationalist approach of the NCP, an additional characteristic of which is broad agency discretion. Discretion elevates the power of the expert agency, resulting in the position, either implicit or explicit, that clean-up involves the resolution of technical issues which judicial involvement does little to advance.

Before SARA, the availability of preenforcement judicial review was in some dispute. A majority of courts favored delaying review until actual clean-up efforts were required or liability was imposed, citing the need for swift, undistracted response action by

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64 [Inspector Gregory:] "Is there any point to which you would wish to draw my attention?"

[Holmes:] "To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.


66 See, e.g., Worst Things First, supra note 5, at 296-98. The same phenomenon can be seen in the substance of the NCP. While the 1990 revisions were intended to bring more structure to the remedy selection, the nine criteria do not create an automatic result at each site. They are hardly self-explanatory in themselves, and they are often contradictory among each other (for example, cost versus long-term effectiveness). As a result it is nearly impossible to exercise judicial control over remedy selection; the court must defer to the agency. See The 1990 National Contingency Plan, supra note 4, at 2, 20-25. And in case the point was still unclear, the statute goes out of its way to state explicitly that the court should be hesitant to overturn the agency's remedy selection. CERCLA § 113(j), 42 U.S.C. § 9613 (j) (1988 & Supp. IV. 1992).
EPA. SARA clarified Congress' intention to preclude judicial review. Under section 113(h), no review of remedy selection may be obtained until EPA enforces it against a private party, either through injunctive action or recovery of response costs. Congress specifically cited the need to avoid the delay and disruption of early review.

2. The Consequences of Preclusion

The late timing of judicial review is a high-risk proposition for the courts, for EPA, and for the potentially liable parties. It requires the court to invalidate an extremely lengthy and elaborate decisionmaking process if it is to overturn the decision at all. From the liable party's point of view, it is very dangerous to wait to comply until actual costs and/or penalties accrue. Finally, the late review creates an irresistible additional incentive for the EPA to spend substantial resources on decisionmaking to avoid reversal of all of its remedial choices. Into this extremely uncomfortable situation, then, comes NPL listing, which being a rulemaking is open to preenforcement review.

It is little wonder that the NPL gets so much attention. Once listing decisions were determined to be appropriate subjects of judicial review, it was only a matter of time until listing

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68 See Solid State Circuits, Inc. v. USEPA, 812 F.2d 383, 389 (8th Cir. 1987) (describing this dilemma and upholding its constitutionality). See also ALAN J. TOPOL & REBECCA SNOW, 1 SUPERFUND LAW & PROCEDURE § 2.5, at 113-14 (1992) (noting an "imbalance of power" created by the delayed judicial review). Topol and Snow point out that preenforcement review would not result in a significant marginal delay in an already very lengthy process. Id.
SARA expressly restates the burden of proving arbitrary or capricious remedy selection is on the challenger. CERCLA § 113(j)(2), 42 U.S.C. § 113(j)(2) (1988 & Supp. IV 1988). In a procedurally unusual case, the Second Circuit assumed jurisdiction despite § 113(h) preclusion to deal with what it found to be the far easier question of rejecting a challenge to a CERCLA order on the merits. CERCLA § 113(h), 42 U.S.C. § 113(h) (1988 & Supp. IV 1992). It was an easier question, the court said, because courts must be very deferential in scientific and technical areas. See Browning-Ferris Indus. v. EPA, 899 F.2d 151, 160, 163-64 (2d Cir. 1990).
became an important locus of litigation, especially since it is one of the few possible areas of review. The financial consequences of listing also greatly intensify the pressure for review. While listing per se has few legal consequences, and none of them immediate, it has definite short-term and extremely negative economic consequences. For many sites, the main effect is the "stigma" of hazard. In fact, one site owner sued EPA not to delist the site but to rename it to avoid perceived association with it. More tangibly, the chance that a site could be the source of huge liability to its owner greatly restricts the owner's practical ability to transfer, develop, or borrow against it. Listing drastically reduces the value

70 See Kent County v. EPA, 963 F.2d 391, 394 (D.C. Cir. 1992).
Placement on the NPL does not impart the "negative stigma" claimed by the plaintiff. The priority lists serve primarily informational purposes, identifying for the states and the public those facilities and sites or other releases which appear to warrant remedial actions. Inclusion of a facility or site on the list does not require those persons to undertake any action, nor does it assign liability to any person. Subsequent government action will be necessary in order to do so.

The courts considering early listing challenges decided that there need be no hearing before listing because judicial review was available after listing. Under the familiar Matthews v. Eldridge, 424 U.S. 319, 335 (1976), balancing test, the immediate negative effects of listing were outweighed by the importance of avoiding delay. See, e.g., Borment Aluminum Court v. Thomas, 730 F. Supp. 771, 773 (W.D. Ky. 1990), aff'd 927 F.2d 289 (6th Cir. 1991); SCA Services of Indiana v. Thomas, 634 F. Supp. 1355 (N.D. Ind. 1986); D’Imperio v. U.S., 575 F. Supp. 248 (D.N.J. 1983); cf. Environmental Waste Control, Inc. v. ATSDR, 763 F. Supp. 1576, 1582-83 (N.D. Ga. 1991) (rejecting Matthews-based due process challenge because the reputational damage from an ATSDR health assessment was outweighed by the needs of the agency). These courts also cited the scientific nature of the decision and the goal of minimizing participation and delay, but it is unclear why these apply more strongly to the pre-listing period than to the post-listing period, when listing itself has little immediate significance.

72 D’Imperio, 575 F. Supp. at 253-54 (D.N.J. 1983) (holding that the court lacked subject matter jurisdiction under CERCLA § 113(a)).
73 Daniel R. Hansen, Environmental Regulation and Just Compensation: The National Priorities List as a Taking, 2 N.Y.U. Envtl. L.J. 1, 9-19 (1993) (arguing that, nevertheless, listing should not be considered a taking); Getting Off EPA's Blacklist: Opposing National Priorities List Designations, SONREEL News (Section of Natural Resources, Energy, and Environmental Law, American Bar Association) Nov./Dec. 1993, at 4 (asserting that listing has forced some companies to close).

The courts have recognized that the practical consequences of listing are dire. See, e.g., Kent County v. EPA, 963 F.2d 391, 394 (D.C. Cir. 1992); B&B Tritech, Inc. v. EPA, 957 F.2d 882, 885 (D.C. Cir. 1992); Tinkham v. Reagan, 13 Envt'l Rep. (BNA) 20553 (D.N.H. 1983) (but finding lack of subject matter jurisdiction to review).
of the land and may also depress property values around the site.\(^{74}\)
The financial impact, in sum, makes listing worth litigating.

II. THE D.C. CIRCUIT

A. The Record of Reversals

As several observers have noted,\(^{76}\) the National Priorities List has recently experienced some rough treatment in the D.C. Circuit, where all rulemaking review actions must be lodged.\(^{76}\) The box score on challenges to the listing of specific sites still favors EPA. EPA's record stands at eight wins, five losses and two ties.\(^{77}\)

However, the current trend is toward reversals. More importantly, any reasonable prospect for pinioned site owners to extricate themselves from the NPL must realistically be seen as an invitation to litigate.

The D.C. Circuit reviews the NPL in two different procedural settings. The first group of cases is preenforcement review of the NCP itself. These cases do not challenge the listing of a par-

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On the other hand, as Hansen notes, the devaluation may more accurately have been seen as the reaction to the underlying condition of the property, i.e., contaminated with hazardous substances. Therefore, it is not the listing per se but the existence of hazardous wastes that reduces the values. Hansen, supra note 73, at 12.

\(^{76}\) See Getting off EPA's Blacklist, supra note 73, at 4; George B. Wyeth, Trends & Insights: Hazardous Waste, 8 NAT. RES. & ENV'T 46 (Summer 1993).


\(^{78}\) I classify the cases as follows:


Losses (remand or reversal): Tex Tin Corp. v. EPA, 935 F.2d 1321 (D.C. Cir. 1991) [Tex Tin I]; Kent County v. EPA, 963 F.2d 391 (D.C. Cir. 1992); Anne Arundel County v. EPA, 963 F.2d 412 (D.C. Cir. 1992); National Gypsum Co. v. EPA, 968 F.2d 40 (D.C. Cir. 1992); Tex Tin Corp. v. EPA, 992 F.2d 353 (D.C. Cir. 1993) [Tex Tin II].

Draws (EPA wins but with a stern warning against further action): Linemaster Switch Corp. v. EPA, 938 F.2d 1299 (D.C. Cir. 1991); B&B Tritech, Inc. v. EPA, 957 F.2d 882 (D.C. Cir. 1992).
National Priorities List

the particular site, but instead take issue with EPA’s announced procedures and criteria for listing all sites. The NCP has sailed through judicial review with minimal scrutiny and with little of substance being overturned. These cases are studies in the classical justifications for deference to agency expertise. They emphasize the complexity of CERCLA and the priority setting process, the legislative commitment of these issues to the EPA, and the need to resolve technical and often conflicting policies. Not surprisingly, the opinions rely heavily on *Chevron* deference to agency interpretation of the statute. In the most recent case, the court reviewed a virtual laundry list of issues and dismissed eighteen (five on ripeness grounds) out of nineteen separate challenges.

Systemic challenges to the HRS fared no better. *Eagle-Picher I* is a model for judicial review of priority setting. It clearly recognizes the limited purposes of the HRS and its limited regulatory consequences. The court agreed with EPA that it was entirely proper for EPA to deliberately sacrifice accuracy in what is essentially a matter of internal management: “The EPA considers the HRS to be a useful tool for sifting through a large number of sites in a relatively expeditious and inexpensive manner.” It is an “informational tool,” “helpful to the Agency” in deciding which sites require more careful study. On the merits, the court relied on *Chevron* and the usual ideas of deference to reasoned administrative decisionmaking. A later challenge was met with similar unwillingness to impose upon the HRS a degree of accuracy beyond that necessary for the internal management function.

The second group of cases, challenges to individual listing decisions, has met a very different fate. Based on the systemic chal-

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76 The major exception is natural resources damages, a part of the NCP which was worked out between the EPA and the Department of the Interior. The D.C. Circuit found that the agencies had misinterpreted the law in permitting recovery only of the “lesser of” the restoration cost or the diminution of use value. See *Ohio v. Dep’t of the Interior*, 880 F.2d 432 (D.C. Cir. 1989).


80 *Id.* at 919 (emphasis supplied).

81 *Id.* at 919-20.

82 *Id.* at 920-22.

83 *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1303-05 (D.C. Cir. 1991) (permitting use of old HRS after date that revisions were to be in place).
lenges, one would have expected the kind of response that an early listing challenge received in *Eagle-Picher II*:

The NPL is simply the first step in a process — nothing more, nothing less. . . . [w]e must keep firmly in mind the modest and limited purposes of the list. In our view, it is well within EPA's discretion to decide that, for a determination of "imminent and substantial danger" at a site to have any degree of reliability, that assessment would have to be based upon a more detailed, complex and thus rather expensive study all out of proportion to the limited, threshold-like goals of the NPL.

Other early cases upheld individual listings and emphasized the intended quickness and inexpensiveness of the NPL and HRS process. The NPL is a measure of relative and not absolute risk. It is used for informational and not remedial purposes. "It is not necessary that EPA's decisions as to what sites are included on the NPL be perfect, nor even that they be the best. . . . Certainly they may not always be based on the best possible methodology."

The same types of challenges to EPA's methodology, to the accuracy and adequacy of its data, and to its explanation of its calculations, all of which were uniformly rejected through 1990, began to find success in 1991. 1992 was the "annus horribilis" for both Queen Elizabeth and the National Priorities List. The court's justification for reversal was in most cases EPA's asserted failure to explain its actions. In some cases, there were inconsistencies in methodological policies; in others, EPA made assumptions that seemed to defy common sense. In *National Gypsum*, Judge Mikva angrily began with the accusation that in "yet another case . . . EPA seems unwilling to support its decisions with the necessary scientific findings."

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87 See, e.g., City of Stoughton v. EPA, 858 F.2d 747, 751, 756 (D.C. Cir. 1988); Eagle-Picher Ind. v. EPA, 822 F.2d 132, 146 (D.C. Cir. 1986).

86 City of Stoughton, 858 F.2d at 755-56 (the EPA need not make a "house-by-house" determination).

89 See Nadine Brozan, Chronicle, *N.Y Times*, November 25, 1992, p. B4 (final ed.). Her Majesty was referring, of course, to the fire at Windsor Castle and her children's love lives.

90 See, e.g., Kent County v. EPA, 963 F.2d 391, 392 (D.C. Cir. 1992); Anne Arundel County v. USEPA, 963 F.2d 412, 416-17 (D.C. Cir. 1992).


While these later cases pay lip service to the necessary inaccuracy of the HRS, opinions like *National Gypsum* clearly demand additional scientific support from EPA in the form of more testing, analysis, and other data gathering,\(^9\) despite earlier affirmations that the HRS is not to be informationally taxing.\(^8\) In *Tex Tin II* the court concluded that EPA's inference of airborne exposure to arsenic in tin slag was simply wrong.\(^6\) While these conclusions are couched in the appropriately deferential language of merely requiring explanation,\(^8\) it is hard to escape the conclusion that they represent precisely the kind of substantive judicial involvement to which commentators have attributed much administrative timidity.\(^7\) Moreover, in *B&B Tritech*, the court, despite upholding the listing, worried: "The record does not disclose whether the B&B site poses any real risk to the public, because EPA did not address that question."\(^9\) The court's concern in *B&B Tritech* completely misses the point of the HRS, which was explained so eloquently a year earlier by the same court: The HRS is not the definitive statement on the need for actual remediation to prevent health risks, but rather is an initial screening phase. The court, it seems, forgot in the listing challenges what it had said in the systemic challenges to the NCP and HRS.

**B. The Effects of the Reversals**

On their own terms, the reversal cases are open to criticism as judicial overreaching and as inconsistent with the minimal-scrutiny approach to the systemic review cases. Of considerably greater concern are the implications of these reversals for the functioning of the overall clean-up process. They undermine a valuable attempt to allocate environmental resources rationally. None of the identified purposes of the NPL demands more than approximate accuracy, or requires large amounts of supporting data. The NPL should be a tool of internal management, hence

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\(^9\) *Id.* at 46-47; accord *Kent County*, 963 F.2d at 392 ("The agency does not plausibly contend that performing both tests [it had performed only one of the pair] would be too burdensome, economically or otherwise.").

\(^8\) *See*, e.g., Eagle-Picher Ind. v. EPA, 759 F.2d 905, 922 (D.C. Cir. 1985).

\(^6\) *Tex Tin Corp.* v. EPA, 992 F.2d 353, 355-56 (D.C. Cir. 1993).

\(^*\) *See* Wyeth, * supra* note 75, at 47.

\(^7\) *See* McGarity, * supra* note 55, at 1387-1396. As McGarity also points out, the legal basis of the initial demand for detailed explanation is uncertain at best. *Id.* at 1444.

relatively speedy and inexpensive, and not a major outlet for substantive judicial review. As the D.C. Circuit at one time recognized, the NPL is not "definitive," it is not a final or even tentative decision on remediation, and it does not purport to identify "the most hazardous sites." As an initial screening device with few regulatory consequences, absolute accuracy is of minimal concern since errors can be corrected later. Even the detailed priority setting function should not be a major source of information demands. Finally, the public information function at best gives only the most general notice of the existence of a site of concern.

Within the priority-setting phase of the regulatory process, the court incorrectly focused intensive review on individual listing decisions. The D.C. Circuit paid little attention to the NCP and HRS and yet proceeded to attack their results. More careful attention should be paid to the priority setting system itself (specifically, the HRS and NCP) and less to the choices made by the system concerning individual listings, if the system is to work efficiently. A major justification for preenforcement review, and one that the court expressly relied on in the systemic HRS challenge, is avoidance of piecemeal litigation over a general rule through numerous cases of individual application. General rules such as the HRS often apply imperfectly in individual cases, but this imperfection is an expected and worthwhile price for the fairness and efficiency that generality can achieve.

As a result of the reversals, the practicing bar has recognized a legitimate opportunity to avoid the dire practical consequences of listing. Such litigation, however, makes priority setting anything but speedy and inexpensive. For example, two litigators correctly advise, given the case law, that "challenging NPL listings involves relatively little 'big picture' analyses and requires minute focus on details," since error in just one of many "sub-decisions" in the HRS can result in remand or reversal. Even when the

99 Eagle-Picher Ind. v. EPA, 759 F.2d 905, 919 (D.C. Cir. 1985).
100 See Worst Things First, supra note 5, at 324-28. The functions of the NPL are discussed, supra at text accompanying notes 40-42.
101 See Worst Things First, supra note 5, at 309-10, 348-49 (advocating "directed priority setting").
103 Judge Posner elegantly explained this trade-off in American Hospital Ass'n v. NLRB, 899 F.2d 651 (7th Cir. 1990), aff'd, 111 S.Ct. 1539 (1991).
104 Getting Off EPA's Blacklist, supra note 73, at 5-6.
court upholds a listing, the EPA must have carefully justified each sub-decision and the court must elaborately analyze the conflicting claims regarding each decision. This result is completely at odds with the comprehensive ordering which was intended by the drafters of the NPL.

Perhaps the most insidious effect of the reversals is to exacerbate, and indeed legitimate, the bureaucratic tendency to treat the NPL as an end in itself. This tendency is created by the elaborate administrative process established in the NCP, the detail in the statute itself, the need for short-term benchmarks of bureaucratic accomplishment, the ethos of quantification embodied in the HRS, and the existence of preenforcement judicial review which is unavailable elsewhere in the process. When listing decisions are repeatedly remanded, the cautious regulator can only conclude that the NPL is an end in itself, and a major source of occupational embarrassment. When listing is a source of judicial rebuke, the court is also making this early phase of the decisionmaking process an end in itself, and even the most intrepid administrator would be foolish to treat it otherwise. To the extent that the rest of the decisionmaking process (in particular remedy selection) has become an inflexible maze of many steps, each treated as an end in itself, the cumulative effect of the reversals at the earliest stages is disastrous. Critical judicial review of a relatively minor phase in the process thus exacerbates the problems of delay and bureaucratic rigidity.

III. RESOLVING THE LISTING IMPASSE

A. In Theory

As shown in Part I, the NPL and HRS exemplify the comprehensive rationalistic approach of the regulatory side of CERCLA. A resolution of the NPL and HRS problem might be found by taking the opposite approach, incrementalism. An incremental system makes decisions through continuous small adjustments. It is remedial and piecemeal but it can also be dynamic and flexi-

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107 See McGarity, supra note 55, at 1410-26 (providing numerous examples of the chilling effect of intrusive judicial review on agency activity).
108 This is a frequent criticism of the Superfund program. See, e.g., Hansen, supra note 73, at 1-2.
Moreover, instead of demanding more and more new data, incrementalism makes the maximum use of existing knowledge, because it relies on small departures from the status quo. Professor Diver has pointed out that there are certain circumstances under which the incremental approach is distinctly preferable. These circumstances include: (1) when the agency must accommodate conflicting values; (2) when relatively little information is available; (3) when the agency is operating in an unstable environment; and (4) where the regulatory regime itself is immature. These characteristics fairly describe most CERCLA remediation decisions. Knowledge of the degree and nature of contamination, of the capacity of the technologies available to do the remediation, and of future remedial needs has evolved over the course of a decades-long clean-up period and such decisions are probably unsuitable for a final comprehensive solution. Thus, EPA seems to be considering doing away with the NPL-HRS process and replacing it with a region-by-region workplan developed in coordination with the states. Presumably, the idea is to replace the process-encrusted and highly litigated NPL with a more informal and politically responsive list. With a severe scarcity

108 Diver, supra note 51, at 399-401; Lindblom, Muddling Through, supra note 51, at 79-81.

109 Lindblom, supra note 51, at 85, 87.

110 Diver, supra note 51, at 430-33. The liability side of CERCLA fits this description rather well, and it seems fair to say that incrementalism has on the whole worked well in that context. As noted by the court in U.S. v. Chem-Dyne Corp., 572 F. Supp 802 (S.D. Ohio 1983), the statute was vaguely drafted and left much to “common law” development of a virtually unprecedented regulatory scheme and that is exactly what happened. Issues such as strict and joint and several liability were decided by a combination of divining statutory intent, combing legislative history, drawing on statutory analogies, and basic tort law analysis. For example, the decision to impose joint and several liability was justified by a close reading of the legislative history to discover that the deletion of a specific reference to joint and several liability was not intended to be a disapproval of it and by consideration (taken from the Restatement (Second) of Torts) of the implications of placing burdens of proof on indivisible injury.


112 For example, environmental equity concerns could be addressed more easily than under the current HRS, which has been criticized for failing to take account of environ-
of resources available for actual clean-up, it seems that resources devoted to an imprecise and expensively contentious priorities list could be better spent.113

On the other hand, not all of the virtues of incrementalism translate directly into the listing process. Priority setting is essential to any rational regulatory scheme, especially with a statute displaying such a disparity of goals and resources. Therefore, even though priority setting is not openly dealt with by statute or regulation, it will have to be done. Lindblom specifically acknowledged that even in an incremental system an administrator needs "some direction."114 Priority setting is an inherently comprehensive task.115 McGarity, despite his skeptical view of the value of elaborate analysis, specifically recognizes its value "in setting long-term priorities."116 Other scholars, and recently Lindblom himself, have developed a middle-level approach that combines some broad thinking at the initial stages, followed by detailed, incremental analysis at a later point.117 Solution to the NPL's problems would seem to be moderation of the NCP's rationalistic approach, along with recognition that the NPL itself must be treated as strictly provisional, based on limited information, and for a limited use only.

B. In Statutory Language

Abolition of the NPL and HRS is throwing the baby out with the bathwater. The problem with the NPL and HRS is that, like the RI/FS and other processes, they have become ends in themselves and not means to an end. The focus should be on improving the NPL-HRS process, not dispensing with it. As a first step, listing decisions should be subject to review only for the most egre-

113 See Topol & Snow, supra note 68, § 2.4, at 101.
gious misconduct, such as not following the HRS at all. Debates on methodology and data quality must be kept out of the courts. Of course the data are likely to be insufficient at the listing stage, but there is no need for a high degree of accuracy. Except at the cusp of 28.5 HRS points, the sites are dangerous and will be cleaned up anyway.

Textually, this requires two changes in CERCLA. First, Congress must clarify its attitude toward accuracy. Eagle-Picher I understood the limited role of the NPL and HRS, but then SARA added the phrase "to the maximum extent . . . accurate" to cover mining wastes. Congress should delete or qualify this overly broad language. Second, Congress should adopt a section reviewing individual listing decisions, which is similar to the provision for remedy selection, emphasizing the deferential role of the courts.\(^{118}\)

CONCLUSION

To the extent that judicial review of priority setting is warranted, the HRS and NCP systems should receive the careful attention of the D.C. Circuit. If they are acceptable in terms of the language and purposes of the statute, then the results of the systems should be acceptable if they are reasonably closely followed. It is wholly consistent with a rationalist approach that criteria, a hierarchy of those criteria, preferences, and parameters should be established up front as the key determinants of later decisions.\(^{119}\) Systematic review of the HRS and NCP would necessarily be deferential because the courts would have few specific facts on which to base objections, but that is to be expected. Review should be deferential for an administrative management tool.

The Clinton Administration's Superfund reauthorization bill\(^{120}\) would accomplish many of these goals. It would remove the basis for judicial review of NPL listings by allowing listing to be accomplished "administratively, and without rulemaking"\(^{121}\) and

\(^{118}\) Cf. McGarity, supra note 55, at 1453-54 (suggesting the adoption of statutory language to clarify deferential review).

\(^{119}\) Cf. Worst Things First, supra note 5, at 347-49 (viewing the NPL and HRS as directed priority setting).

\(^{120}\) H.R. 3800, 103d Cong., 2d Sess. (1994).

\(^{121}\) H.R. 3800, 103d Cong., 2d Sess. §206(a) (amending CERCLA §105(a)(8)(B)).
by substituting public and state involvement for judicial involvement.\footnote{H.R. 3800, 103d Cong., 2d Sess. §§ 206(b), 207 (adding CERCLA §105(a)(C)(D)).}

Finally, to relieve pressure on listing decisions as an outlet for judicial review, Congress should improve public participation, and perhaps permit preenforcement judicial review of remedy selection.\footnote{Suggestions of this nature are made in Clean Sites, supra note 54, and Topol & Snow, supra note 68, at 113-14.} This recommendation raises issues well beyond the scope of this Article, but it also serves as a reminder that the source of the problem with the NPL is that it is an overly litigated part of a larger decisionmaking system. The solution lies in the recognition that the regulatory side of the CERCLA system must be reformed.