Superfund is swimming with money that could drown your scrap recycling business. Here's what you must know—and what you can do—about this legislative threat.

BY HENRY L. SCHWEICH

Henry L. Schweich is president of Cerro Copper Products Co., Saugeet, Illinois, and a director of the Institute of Scrap Recycling Industries, Washington, D.C.

Meet the menace: a deepening sea of Superfund dollars toying with the scrap industry's survival.

Begun by Congress in 1980 with a $1.6 billion hazardous substance response trust fund for cleaning up abandoned or uncontrolled hazardous waste dumps, the Superfund program as amended in 1986 now has $8.5 billion in its pocket. This is a fivefold increase over the initial funding and almost twice the $5.3 billion maximum the administration said could be spent with Superfund.

This law, passed as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and aptly nicknamed "Superfund," also authorized enforcement action and cost recovery from so-called "potentially responsible parties" ("PRPs"), which have included members of every major sector of the recycling industry. The first five years of CERCLA were characterized by litigation concerning the implementation and constitutionality of the law. Within that time, approximately $500 million in private party cleanups were agreed upon, 580 removal actions were started, 470 remedial investigations and feasibility studies were completed, and 200 lawsuits were filed by the federal government. As of early 1985, the Environmental Protection Agency (EPA) had considered 10 sites for cleanup.

Congress, however, demanded more and faster action and, amid much political conflict and turmoil, passed the Superfund Amendments and Reauthorization Act of 1986. SARA, the source of Superfund's current $8.5 billion balance, extended the program five years and added new provisions. SARA funds were to come from new taxes on petroleum and chemical feedstocks, from a broad-based tax, from general revenues, and from interest and cost recoveries from companies allegedly "responsible" for toxic dumps.

The amendments established deadlines for a broad range of EPA activities. Among these were the requirement that by January 1, 1988, EPA complete preliminary assessments for all facilities listed in the inventory of potentially hazardous waste sites as of October 17, 1986; that the agency commence 275 remedial investigations and feasibility studies (RI/FS) by October 1989; and that if the October 1989 deadline is missed, another 175 RI/FS begin by October 1990, 200 more by 1991, and a total of 650 within five years of enactment. The agency is to add between 1,000 and 2,000 sites to the list within four years, and by 1991 EPA is required by law to initiate cleanup activities at a minimum of 375 Superfund sites.

The role of the Agency for Toxic Substances and Disease Registry (ATSDR), established by the 1980 legislation, was also greatly expanded. EPA and ATSDR were required to prepare a list of the hazardous substances most commonly found at Superfund sites. Within six months of enactment ATSDR was to list at least 100 such substances, within 24 months 100 more substances, and another 25 substances in each of the next three years. ATSDR was required to maintain a minimum of 100 full-time employees at all times. By law it had to spend not less than $50 million in fiscal years 1987 and 1988, $55 million in 1989, and $60 million in 1990 and 1991.

The significance of all of this is
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That Superfund is swimming with money from new taxes, and political pressure bordering on hysteria is aggressively propelling the program.

**You May Hear From EPA**

Because Superfund is potentially life-threatening to your business, it is crucial that you understand it. Any site that currently has any degree of soil or groundwater contamination, regardless of how slight, is a potential Superfund site, no matter when the chemicals causing the contamination were deposited at the site. That is, Superfund covers conduct that occurred years prior to its enactment in 1980, so long as there is evidence of current contamination.

Under the law, EPA has two means available to undertake site cleanup:
- Spend Superfund money and then seek reimbursement from so-called "potentially responsible parties" in a cost recovery action. These costs include investigative, administrative, and cleanup costs, as well as what are called "natural resource damages." To recover its costs, EPA need only establish that (a) there is a release or a "threatened release" of a hazardous substance at or from the cleanup site, and (b) the costs EPA incurred are consistent with the EPA administrative guidance plan called the National Contingency Plan, which provides operating procedures for EPA and "PRPs" to follow in conducting Superfund cleanups.
- Issue administrative orders or file lawsuits in the federal district courts for injunctive relief to compel cleanups. To be successful with this approach, EPA must prove that there is a perceived danger at the site, and that the release or "threat of release" of hazardous substances may present an imminent and substantial danger to public health or the environment.

The following classes of people or companies may be held liable for cost recovery or cleanup:
- Current owners or operators of a facility;
- Past owners or operators of a facility at the time of disposal or release of a hazardous substance;
- Generators—those who created the waste or arranged for its treatment or disposal at the cleanup site (including, at least in EPA's view, those who brokered material to a site); and
- Those who accept or accepted hazardous substances for transport to a facility they selected.

Any site that currently has any degree of soil or groundwater contamination, regardless of how slight, is a potential Superfund site, no matter when the chemicals causing the contamination were deposited at the site.

In addition, individuals and officers of corporations may be held personally liable, as may brokers or successor corporations. EPA need not prove that a "PRP’s" waste is actually present at the site to establish liability. EPA need only prove that the "PRP" sent some hazardous substances to the site and that substances of the same type as those sent by the "PRP" are found at the site.

It is important that you...
understand that even though the SARA amendments provide for an $8.5 billion fund to be raised through new taxes, and the electorate was led to believe the fund was provided to take care of cleanup, neither congressional intent nor EPA intent is to spend the tax money provided. They will, instead, collect the costs of cleanup from among the parties mentioned above, possibly including you and your company.

You should also be aware that the statute takes an Alice-in-Wonderland approach to the English language, deliberately distorting the meaning of common words beyond recognition. For example, there to be a “threatened release” (which establishes liability), nothing needs to have actually happened except the possibility that contamination may be present. For you to be a “potentially responsible party” and liable under the law, you need not have been responsible nor done anything, either negligently or purposefully. The word “responsible” in the statute does not have the usual meaning of responsible. It means legally liable, regardless of whether you are negligent or non-negligent, if you are present or past owner/operator, transporter, generator, or broker. The standard of liability that is applied in Superfund cases is “strict,” which means a party may have been prudent and not negligent and still be liable. Liability is also “joint and several,” which means any individual party may be held liable for all of the costs at a site, regardless of how minimal his degree of contribution to the site’s contamination.

The new cleanup standards under SARA are stricter than under CERCLA. They favor permanent destruction of chemicals. “On-site” remedies include attaining “legally applicable or relevant and appropriate” federal, or more stringent state, standards. Federal standards alone include the provisions of the Toxic Substances Control Act, the Safe Drinking Water Act, the Clean Air Act, the

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You May Need a Lot of Money

EPA’s average cleanup cost under the old law was about $9 million per site. The costs of cleanup under SARA are now estimated by EPA’s Office of Waste Programs Enforcement at between $30 million and $50 million per site—just to start. If groundwater cleanup is factored in, they state, some cleanup costs may be driven to between $320 million and $600 million.

Any “PRP,” even a non-negligent minimal contributor, can be held liable for the entire cost of cleanup under present law. In addition, if you are liable under Superfund and fail, without sufficient cause, to properly provide response action under a formal administrative order, you may be liable for punitive damages at least equal to, and not more than triple the costs incurred by the fund, in addition to the liability for actual cleanup costs. It is obvious that this exposure exceeds the net worth of most individuals and corporations.

EPA’s enforcement and settlement powers have been significantly increased under the SARA amendments. Information-gathering activities about hazardous waste threats have been expanded, with federal or state representatives authorized to require disclosure of chemicals at or sent to a facility, enter premises, inspect and copy documents, and obtain samples. Federal administrative orders and civil suits compel compliance: Courts can impose penalties of up to $25,000 per day for failure or refusal to comply.

EPA is required to prepare an administrative record for the selection of a remedy and to provide for public participation in the selection of a remedy. There is also provision for substantial and meaningful state participation in EPA remedy selection. There is essentially no pre-enforcement review of EPA selection of a remedy or issuance of an administrative order. Judicial review of the remedy is limited to the administrative record. The person challenging the government’s decision bears the burden of demonstrating that the decision was “arbitrary and capricious, or otherwise not in accordance with law.” This is an almost impossible burden of proof for a private party to carry.

What Defenses Have You?

If you are a member of any of the classes defined, the fact that you were not negligent or careless is not a defense. If you are either a present or past landowner or operator, the fact that you may never have disposed of any waste whatever on your land is not a defense. Superfund makes you liable not for what you’ve done, but for who you are.

Defenses provided under the law, which are extremely narrow and limited, cover releases resulting from (1) an act of God; (2) an act of war; and (3) the actions of a third party other than your employee, agent, or contractor, provided you
can prove you exercised due care with respect to the hazardous substance and took precautions against foreseeable action or omissions of such third party that could foreseeably result from such actions. In addition, the law recognizes an “innocent landowner” defense, which is available to a landowner who acquires property after chemicals were disposed of on the property, if he can prove by a preponderance of the evidence that he acquired the facility without knowing or having reason to know of the presence of such hazardous substances. The landowner must prove he undertook all appropriate inquiries at the time of purchase without discovering the substance. Because of the extreme limits of these defenses and the almost insurmountable burden of proof required, they provide little comfort or relief.

So what can you do if you get an indication that you are now or may possibly become a “potentially responsible party”? 

☐ Do not underestimate the severity of your potential liability. Remember that the fact that you have not done anything wrong is not a defense. As fundamentally unfair and as economically destructive as Superfund is, at the present time it is the law of the land.

☐ Immediately obtain the services of the best, most experienced environmental lawyer you can. This is not a do-it-yourself project. It will be in your interest to actively participate in, or at least monitor, all stages of every proceeding.

☐ Keep the Institute of Scrap Recycling Industries informed about what is happening. There is strength in numbers, and the association will provide for its members whatever assistance it can. Maintain a sense of urgency concerning ongoing ISRI programs and activities. Get involved—and stay involved.

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☐ Tell the recycling story every chance you get. Tell it privately and tell it publicly. The recycling industry was removing millions of tons of material from the waste stream and keeping it out of landfills for decades before being an “environmentalist” became de rigueur.

Common sense dictates that it simply is not good national policy to destroy the industry that contributes the most to improving the environment. Once destroyed, the industry will be gone forever.

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"The Moving Finger writes; and, having writ, Moves on: nor all your Piety nor Wit Shall lure it back to cancel half a Line, Nor all your Tears wash out a Word of it."

—The Rubáiyát of Omar Khayyám, pre-eleventh century, as translated in 1859 by Edward Fitzgerald