

STATEMENT OF MORTIMER L. DOWNEY, ASSISTANT SECRETARY OF  
TRANSPORTATION FOR BUDGET AND PROGRAMS, BEFORE  
THE SENATE COMMITTEE ON COMMERCE, SCIENCE  
AND TRANSPORTATION

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Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you this morning on S. 1480, the Senate's Superfund bill. As requested, my testimony will concentrate on the transportation implications of S. 1480. Further Administration comments on this legislation will be reflected in the EPA testimony scheduled for tomorrow.

Let me begin by affirming our strong support for what has commonly become known as "Superfund" legislation. Passage of legislation to deal comprehensively with the problems of oil and chemical spills as well as with the clean-up of abandoned chemical dump sites, is needed--and it is needed urgently. Recent events have made us all aware of the dangers that releases of toxic substances pose--to property, to the environment and its natural resources, and ultimately and most importantly to our personal health and safety. Eliminating such substances is not the solution, nor is it possible. These chemicals are the raw materials for the products of modern technology upon which our livelihood grows increasingly dependent. What can be done, and must be done, is to create a scheme that induces the maximum amount of care to be taken in handling and disposing of these materials and that provides for emergency response and readily available compensation for damage in the event of releases from spills of oil or toxic substances into the environment.

The reason for the Department's interest and concern regarding this subject is self-evident. Releases of oil and toxic chemicals, and resultant questions about liability and compensation, are not limited to disposal sites or other fixed facilities. Transportation is usually needed to get raw

materials from the point of production to the point of use and waste materials from the point of generation to the point of disposal. Any Superfund proposal should cover releases and subsequent damages that occur while chemicals are in transportation. However, any proposal should be sensitive to the distinctions between transport vehicles and fixed facilities. These distinctions often make differing statutory treatment imperative.

Before turning to the specific provisions of S. 1480, I would like to review certain of the Department's current programs that relate to the subject of Superfund. Under the Hazardous Materials Transportation Act (HMTA) the Department, through its Materials Transportation Bureau, may designate as hazardous materials those substances which it has found "may pose an unreasonable risk to health and safety or property" when transported in commerce. Regulations pertaining to designated hazardous materials apply to persons who offer these materials for transportation (shippers), those who transport the offered materials (carriers) and those who manufacture and retest the packagings in which the materials are contained. The scope of transportation activity affected includes the packaging of hazardous materials, package marking (to show contents) and labeling (to show hazard), handling procedures such as loading and unloading requirements, care of vehicle and lading during transportation, the preparation and use of shipping papers to show the identity, hazard and amount of each hazardous material being shipped and vehicle placards to provide public notice and emergency response warnings.

The historical focus of these regulations has shifted somewhat as the result of broadened authority provided by the HMTA, and other Congressional mandates. The list of hazardous materials has traditionally contained those posing acute risks to life and property. The Department has recently completed rulemaking, published in the May 22, 1980, Federal Register (45 Fed. Reg. 34560), conducted in coordination with the Environmental Protection Agency (EPA), which, when it takes effect, will add materials that pose latent health and environmental risks to the list of hazardous materials. Specifically, the rulemaking

provides for the addition of hazardous substances (designated by EPA pursuant to the Federal Water Pollution Control Act) and hazardous wastes (designated by EPA pursuant to the Resource Conservation and Recovery Act). This coordinated rulemaking effort was undertaken to avoid the necessity of EPA having to establish a separate regulatory program, largely duplicative of DOT's, for transportation of these items. Such duplication would not only be inefficient, in terms of the promulgation of additional pages of regulations, but would also require the transportation industry to be aware of, interrelate, and incorporate in tariff structures, provisions contained in two separate volumes of the Code of Federal Regulations.

Another important example of the Department's involvement in programs associated with aspects of Superfund is the Coast Guard's major role in the protection of the marine environment. Under the authority of the Federal Water Pollution Control Act (FWPCA), the Coast Guard responds to actual and potential incidents involving oil or hazardous substances occurring in waters of the United States; and administers the FWPCA section 311(k) revolving pollution fund, the offshore oil pollution compensation fund and the deepwater ports fund. The Coast Guard also enforces regulations designed to prevent pollution from vessels and other transportation-related facilities. Through its National Response Center, the Coast Guard receives reports of certain discharges and incidents. Not only does the Response Center receive these reports, but it is frequently involved more substantively in the early stages of emergency response by providing response-oriented information directly to the first official on the scene and by alerting appropriate government entities charged with emergency response. Additionally, the Coast Guard, under various authorities, issues and enforces requirements relative to the bulk carriage of oil, flammables and combustibles, hazardous substances and hazardous materials aboard vessels.

These illustrations demonstrate, I believe, the Department's significant and substantial role in many of the issues proposed to be included in a Superfund package. From our vantage point it is clear that despite the progress in recent years a major gap remains in the current statutory scheme addressing the release of oil and chemicals into the environment. What is needed, and what Superfund is intended to provide, is a uniform, comprehensive system to assure rapid emergency response and clean up and a readily available remedy to compensate adequately for damages resulting from releases of these materials into any medium.

Mr. Chairman, in turning to the specific provisions of S. 1480, the proposed "Environmental Emergency Response Act," I have attached to the printed copies of my remarks a fairly lengthy list of technical comments on the provisions of S. 1480. Rather than repeating those comments here, I would request that they be made part of the record so that I may address the Department's concerns more generally.

As I have stated, the Department supports the concept of Superfund. Although there are particular problems with this bill, I do not believe these problems are insolvable. With appropriate amendments, S. 1480 would be the basis for acceptable legislation.

The Department's concerns fall into three categories: (1) our desire that one Superfund cover oil as well as toxic chemicals; (2) our specific apprehension about the section entitled "Transportation-Related Provisions" in an earlier draft version of the bill; and (3) our general concerns about the transportation implications of S. 1480, which appear to be either unintended by the drafters or which do not adequately account for the special circumstances involved in transportation.

First, because we would prefer a comprehensive, uniform law and because we perceive similar problems and similar solutions with regard to oil on the one hand and toxic chemicals on the other, we would prefer to see both these substances dealt with in a single bill. Although the present liability and compensation coverage of oil discharges, under the FWPCA, the Trans-Alaska Pipeline Authorization Act, the Deepwater Port Act and the Outer Continental Shelf Lands Act Amendments of 1978, is more pervasive than for toxic chemicals, there are still significant gaps. Under the present system strict liability and third-party recovery schemes are provided for oil spills from certain sources, but not from others. This incongruity underscores the need for a uniform, comprehensive scheme for oil as well as for hazardous substances. We believe this Committee shares this concern about the need for a comprehensive scheme for oil spills, as evidenced by your strong support for such legislation in the previous Congress.

Our second major area of concern is a section contained in a draft of S. 1480 referred to as "Staff Working Paper No. 2." This section, entitled "Transportation-related provisions," was not reported out by the Committee on Environment and Public Works. It is our understanding, however, that it is intended to be offered as a floor amendment to the bill.

Since the provision is not contained in the bill as reported, I have included it, for your reference, in my printed remarks:

(a) Each hazardous substance as listed or designated under section 2[(b)](13) (A) through (F) or section 3(a)(2) of this Act shall within ninety days after enactment of this Act or such listing or designation, whichever is later, be listed as a hazardous material under the Hazardous Materials Transportation Act.

(b) It is the sense of the Congress that (1) tariffs for common carriers and other regulated carriers allow the full transfer of costs associated with the carriage of hazardous substances, reflecting the relative hazards of such

substances, (2) common carriers be authorized to refuse carriage or withdraw from a class of carriage of particular hazardous substances, and (3) common carriers be authorized to charge for special precautions in the handling or carriage of hazardous substances beyond those required by any law or regulation.

This section has two aspects. First, it would require that hazardous substances listed or designated under the provisions of S. 1480 be listed also as a hazardous material under the Hazardous Materials Transportation Act. We fully support such a requirement, which would help to assure clarity and consistency in transportation regulations.

The second aspect of the section, however, is troublesome. The proposed language would, among other things, authorize common carriers to refuse to carry certain hazardous substances and to impose safety precautions beyond those required by law. This could have serious impacts on our common carrier transportation system and on the regulation of transportation of hazardous materials under the Hazardous Materials Transportation Act. Rather than promoting the clarity and consistency that both carriers and shippers need, these provisions could lead to ad hoc decisions by individual carriers with respect to individual commodities, "flagging out" or embargoing of certain commodities altogether, and unnecessarily high freight rates.

These provisions appear to be intended to respond to fears of carriers about the unlimited and in some instances unknown liability that they would be exposed to under S. 1480. I believe these concerns can be addressed positively, without risking the drawbacks of this section. For example, I believe, particularly with respect to transporters, that reasonable liability limits should be specified in S. 1480. In the chain of events from production

to use to disposal of hazardous substances, transporters have a relatively brief involvement with the substances. They should be strictly liable for anything which happens during that period, but that liability should not be so great that responsible owners and operators are forced out of, or precluded from entering, the transportation business because of prohibitive costs associated with insurance covering unlimited liability.

We should recognize too that to the extent that common and contract carriage of hazardous substances is curtailed for economic reasons, the private carriage which replaces it will occur by highway, the transportation mode which maximizes the chances of public exposure to, or involvement in, an accident. Therefore, we would urge that S. 1480 establish strict but limited liability for transporters of hazardous substances.

The last area I would like to address involves provisions that have definite or potential implications, some of them adverse or confusing, on existing transportation programs. I believe that many of these implications were either unintended or indicative of a certain lack of awareness of possible impacts. The technical comments speak to a number of provisions that fall into this category. For purposes of illustration, I would like to provide a few examples.

Several provisions (sections 3(a)(4)(A), 3(b) and 4(g)) would impose requirements on or give EPA authority over a "facility . . . at which hazardous substances are stored . . . ." A literal reading of these provisions could result in their application to transportation situations, although this does not appear to be the intent of the drafters. For example, if "storage" includes hazardous substances in rail cars which are in transit, but temporarily not in motion, the notification and recordkeeping requirements of the bill would place enormous burdens on rail carriers which are unrelated to the purposes of the bill.

As another example, section 3(d) gives EPA and the States broad authority to compel people to act to determine the nature and extent of danger to the public or the environment which they may be causing. It appears to authorize the overriding of other laws. The provision is exceptionally vague and ambiguous. It appears to be a catch-all provision, not intended to grant EPA and the States continuing, substantive authority over the transportation of hazardous substances. However, the authority granted EPA and the States in Section 3(d) with respect to transportation may be, depending on how the language is interpreted and applied, in conflict with that of DOT under the HMTA, the Federal Railroad Safety Act of 1970, the Natural Gas Pipeline Safety Act or the Hazardous Liquid Pipeline Safety Act. The authority granted EPA and the States in Section 3(d) should be stated in such a way that it is evident that this authority over transportation neither duplicates, nor will interfere with existing DOT authority, nor gives authority over transportation more properly placed in DOT.

Another area of particular concern for transporters is that of preemption. Unlike operators of fixed facilities, transporters are often involved in multi-state operations and therefore may be particularly disadvantaged by a proliferating variety of local, State and Federal requirements. In the area of spills, the Administration's Superfund proposal provided for the preemption of State laws to the extent the new Federal law would provide coverage, and I believe S. 1480 should adopt that approach. That would also prevent any conflict between the preemption provisions of S. 1480 and the statutes under which DOT operates.

As I indicated, there are a number of provisions with implications for transportation that are, at least potentially, untoward. In this regard, however, as with the Department's other concerns, S. 1480 is capable of being amended in a manner so that DOT could give it its unqualified support.

Mr. Chairman, this completes my prepared statement. I would be pleased to answer any questions you or the other members of the Committee may have.

