RESOLVED, that the American Bar Association recommends that the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") be amended based on the following principles:

1. Allocation of Responsibility should be amended to reflect that:

   A. New liability not be imposed retroactively on persons who at the time they acted reasonably did not know, or reasonably would not have known, that responsibility for cleanup would arise.

   B. New strict liability not be imposed based on status.

   C. Liability be allocated to responsible parties based on each party's contribution to the harm.

   D. Responsibility be allocated prior to required payment through alternative methods or dispute resolution or other procedures that encourage prompt and efficient compliance.

   E. Responsibility not feasibly or equitably allocated to liable parties be paid through broader-based financing approaches, including taxes which garner revenues from those who benefit or have benefited from activities which produced hazardous waste.

2. Cleanup Procedures should be amended to reflect that:

   A. Sites be selected and cleanup conducted through rational and consistent determinations based on realistic
estimates of risks posed to human health and to ecosystems.  

B. Cleanup guidelines consider economic and technical feasibility and such factors as geography, geology, climate and land use, be specific enough to allow a voluntary cleanup to proceed with reasonable certainty that will satisfy appropriate requirements, yet be flexible enough to assure that remedies selected for a given site are appropriate for that site.  

C. Elimination of unnecessary intergovernmental requirements and creation of incentives for States to hasten cleanup. Only one governmental entity should be responsible for any site. States should be authorized to obtain delegation of Superfund authorities, similar to existing environmental permit programs, and should be given the same flexibility in selecting applicable and appropriate standards that EPA presently has under Superfund.  

D. Innovative public participation and shared decision-making models be encouraged.  

E. Consideration of natural resource damages occur at the same time and in the same proceeding as other cleanup issues. Any damages recovered should be based solely on the reasonable costs of restoration, rehabilitation or replacement in kind of the resource and used only for those purposes. Damages imposed should not be punitive in effect.
The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") needs substantial revision when Congress revisits it this coming year. As presently written, interpreted and enforced, CERCLA results in massive, wasteful and unproductive litigation. In many instances, it has also resulted in imposition of liability grossly disproportionate to the conduct involved, perverting rather than implementing the polluters should pay principle. It has made environmental insurance largely unavailable. In many instances, it has not been cost-effective nor have the social benefits been equal to the costs imposed. Finally, in thirteen years after its enactment relatively few sites have been cleaned up.

These results are not surprising. The original statute reflected a hasty, incomplete compromise that left many policy issues unresolved by Congress. They were left to be resolved through the painful, time-consuming and inefficient process of case by case adjudication.

The time has come for Congress and the Administration to take charge and revise the Act to make it fair, cost-effective and efficient.

To do this, the states should be given a greater role in the overall process, both under federal and state law. Private persons should be encouraged to go forward by fair treatment and greater incentives to proceed with cleanups voluntarily. At the same time, the public should be given opportunity for greater, meaningful participation in this decision process, but in a way that facilitates, rather than delays, efficient, cost justified cleanup. Finally, litigation must become the exception and not the general rule to implementation of cleanup.

The American Bar Association should play a meaningful role in effecting these needed changes. We cannot stand by idly and profit from other people's misery. We believe that the Association can make a major contribution to overall reform of the system by focusing on key problem areas and adopting general principles that should guide needed reforms in them. We believe that the overriding goals that should govern substantial reform of CERCLA are, first, fairness, second, accelerated suitable cleanup of actual hazards, and third, overall cost effectiveness and cost benefit justification.

The proponents recommend substantial changes in two areas - allocation of responsibility and cleanup procedures. Through limitation of retroactive and strict liability, a requirement for early allocation of responsibility and provision for payment of
unallocated costs through broad-based funding the revisions enhance the fairness and efficiency of the system. Through risk-based selection of sites and cleanup standards, elimination of unnecessary intergovernmental requirements, incentives to States to hasten cleanup, and appropriate procedures for assessing and recovery of natural resource damages, the recommendation will advance the goal of speedy, efficient cleanup.

Where fairness and efficiency become the rule rather than the exception, then the heavy transaction costs that have characterized the current law will be substantially reduced.

**Allocation of Responsibility**

Government should generally avoid imposition of retroactive liability: that legislation which creates a new obligation, imposes a new duty, or attaches a new disability, for past activities. Retroactive criminal legislation is barred by our Constitution. Retroactive civil legislation is contrary to the common law and unknown in the civil law. It is unfair and presents an additional major risk to business decisions because present activities which are legal may have uncertain future legal consequences. This added risk tends to discourage new investments.

If prior to the enactment of CERCLA, certain persons acted to dispose of wastes to avoid anticipated responsibility for its cleanup, imposition of retroactive CERCLA liability on this limited class might be justified on the ground that legislation along the lines of CERCLA was pending in Congress.

As a general rule, strict liability, based on conduct contributing to the harms, should be retained for wastes disposed of after the effective date of the Act.

Where multiple potentially responsible parties are involved at a site, allocation, based on each person's relative contribution to the harm, should be required. Thus the polluter would still pay, but only for his own pollution -- not that of others. To facilitate allocations and settlements based on them, absent extraordinary circumstances, EPA or any other CERCLA plaintiff should be required to proffer a settlement based on a preliminary allocation of liability proposal before commencement of any future action. A limited exception for joint and several liability would still exist, but, absent criminal conspiracy, only where the plaintiff could prove facts sufficient to come within the exceptional circumstances contemplated by the pre-CERCLA common law as reflected in Restatement, Second, of Torts.

Restricting strict liability and shifting to a general rule for early allocation of costs that fairly reflects relative
contribution to the harm remedied would remove any justification for special exemptions or preferences that now exist or have been proposed based solely on status. In the past, on some occasions, federal, state and local entities that were potentially responsible parties were treated differently from other private defendants with the result that a disproportionate share of cleanup costs was imposed on the private sector. To avoid that result, settlements with governmental entities should undergo court scrutiny and approval, with prior notice to other potentially responsible parties and opportunity for them to comment. Intra-governmental or inter-governmental settlements should be on terms that are equivalent to those with private parties.

Excessive transaction costs are caused by several aspects of the current CERCLA process. The large number of parties prolongs and complicates the proceedings. The process does not function efficiently when all parties involved do not have clearly defined roles. This leads to a lack of focus and confused priorities. Finally, misplaced incentives such as the recovery of private legal fees cause delay and inefficiency.

The focal points for correcting these problems should be the following:

1. Establishment of procedures for early allocation of responsibility and resolution of disputes, including appointment of allocation panels, to accomplish the following:

   (1) Identify all responsible parties;
   (2) Designate appropriate categories of parties, when appropriate, including substantial and minor participants;
   (3) Dispose of claims against minor parties; and
   (4) Determine appropriate measures for assessment and remediation, including mechanisms for interim funding.

2. Encouragement of prompt and efficient compliance and dispute resolution by:

   (1) Placing the primary responsibility for developing, implementing and managing cleanup on substantial participants;
   (2) Mandating meaningful schedules with deadlines for completion of critical stages of the process;
(3) Reducing wasteful duplication of effort, expertise and expense;
(4) Eliminating incentives for delay or inefficiency, including recovery of private attorney fees not otherwise recoverable under citizen's suit provisions of the statute;
(5) Reducing the frequency and scope of judicial review; and
(6) Providing that allocation decisions will be made early in any litigation.

The current Superfund cleanup is financed in two ways: (1) through imposing liability on "potentially responsible parties" or "PRPs"; and (2) by the Hazardous Substances Superfund. The Trust Fund is financed by a combination of six sources: a petroleum tax, a chemical feedstock tax, an imported chemical tax, an environmental income tax (EIT), interest from money in the Trust Fund, and general revenues.

The current Superfund liability system is essentially a pay as you go fundraising mechanism. Any modification of the current liability system to enhance fairness and efficiency might impose on the Hazardous Substances Superfund a larger share of cleanup costs, which would require an increase in the size of the fund. Therefore, it is essential to identify appropriate and satisfactory supplementary funding approaches for Superfund cleanups. Increased reliance upon tax-centered supplements to liability based fundraising would reduce transaction costs, while producing the certainty of quantifiable payments over time. Some of the alternative funding methods which have been or are being currently discussed include:

(1) Pollution Taxes
Taxes imposed on waste generation or waste disposal, tipping fees (the charge for disposing of waste at a landfill), carbon taxes, and similar fees, are probably the closest to a market-based solution to Superfund financing.

(2) Basket of Taxes -- Existing and Additional Taxes
One of the most commonly discussed approaches for financing an expanded trust fund would rely on increases in all the existing taxes, supplemented by additional new, earmarked taxes -- such as ones targeted to small businesses, property/casualty insurance industry, and the general treasury on behalf of municipalities. Such formulas are designed to gain contributions from parties who might be viewed as the financial beneficiaries of reform to the liability system.
(3) General Treasury Revenues

Since its very inception, many have argued that the Superfund cleanup of old waste sites should be conducted as part of a nationwide public works program financed from general treasury revenues. This concept is directly analogous to the Clean Water Act construction grants program for sewage treatment facilities, an enormously successful and popular program.

(4) Increase existing Superfund taxes

An increase of one or more of the four existing Superfund taxes could be used to finance any shortfall created by modifying the current liability system.

(5) Broad-Based Tax, Such as a VAT

Concern over the size of the Federal budget deficit has generated interest in the possibility of enactment of a consumption tax, in the form of a value added tax, or a business transfer tax. This in turn has led to discussions of using part of the proceeds from such a tax for cleanup of hazardous waste sites.

In evaluating which funding mechanism to use for supplementing amounts received from PRPs, the timing of the cleanup process must be a central consideration. Hazardous waste should be viewed as an inter-generational problem created and solved over longer periods of time. Viewed as such, it can be effectively addressed on an equitable and cost effective basis by evaluating a variety of funding mechanisms, including ones that are tax-based.

CLEANUP PROCEDURES

EPA should establish rational guidelines to decide what constitutes a hazardous substance, when a site requires cleanup, and when remediation is complete. Uncertainties about these issues increase transaction costs, slow down cleanup, and discourage voluntary remedial action. They divert economic development from older, potentially contaminated areas, such as the inner city, to pristine areas that might otherwise be preserved.

The current method for deciding what constitutes contribution to contamination makes no allowance for the concentration or amount for which a party is responsible. In practice any amount of hazardous substance can lead to liability for cleaning up an entire site. Avoiding such absurd outcomes requires the development of reasonable cutoff points based on both amount and concentration.
The current hazard ranking procedure for deciding which sites require cleanup varies from region to region and even from site to site. As an alternative, EPA should develop screening tools so any quantity below a certain level would mean further site assessment is not warranted; anything above would require further investigation. The triggers should derive from available scientific data and generic risk assessments based on reasonable and realistic assumptions.

Establishing appropriate cleanup levels also requires reasonable risk assessment, and a selection methodology and procedure that accounts consistently and understandably for factors that vary from site-to-site. Guidelines should be developed that are detailed enough to afford certainty for parties who rely upon them, but should not be mandatory for parties who wish to craft site-specific remedies.

To avoid the unwarranted costs associated with eliminating overstated risks, more reasonable assumptions, and actual data should take precedence over any assumptions.

The current requirement that cleanups conform to applicable or relevant and appropriate requirements ("ARARs") causes confusion and wastes resources on excessive remediation. Some aspects of ARARs should be retained, but CERCLA should be amended to delegate remedy selection to the states, with clear guidelines that account for different geography, geology, climate, land use, and other factors. The delegations should require states to allow parties flexibility to adopt measures not covered by the guidelines if they are adequately protective.

Amendments to CERCLA should require that EPA adopt baseline technological methods that have proven effective at cleaning up sites to acceptable levels. These methods should presumptively meet statutory requirements when used appropriately, but the statute should allow the use of innovative technologies.

The EPA should establish a level technological playing field so that parties may use any cost-effective technology capable of achieving target risk reduction levels. The existing CERCLA program has a statutory preference for so-called permanent technologies. By placing such an emphasis on permanence, the Agency encourages delay in cleaning up sites, and creates unnecessary cleanup costs.

Any CERCLA reform proposal would be incomplete without addressing voluntary cleanups. Many hazardous waste sites do not score high enough to make it onto the NPL but still pose a threat to human health and to ecosystems. Such sites also may suffer a stigma that prevents their sale or productive use or development.
Moreover, the concern that a governmental agency might, at some point in the future, "second guess" the remedy implemented during a voluntary cleanup prevents many parties from doing cleanup. The lack of reasonable guidance on cleanup levels makes it difficult to proceed without involving a governmental authority. Parties also fear that on-site remedial activities will trigger certain RCRA regulatory provisions.

As part of the delegation of remedy selection, state-administered programs to approve voluntary cleanups should be established. Parties seeking approvals for cleanup plans should compensate the States for the reasonable cost of evaluating technical submittals.

The CERCLA administrative cleanup program is a federal projects program rather than a cooperative federalism regulatory program. Unlike the various pollution control statutes (e.g., Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act (RCRA)), the U.S. EPA has not delegated (and sometimes does not share) decision-making with its state counterparts. As a result, inevitably there has been friction between relevant federal and state agencies.

States need to have flexibility in setting standards and administering cleanup at all hazardous waste sites. For example, although RCRA was intended to apply primarily to active ongoing waste sites, once cleanup begins at an inactive (pre-RCRA) waste site, RCRA requirements may be triggered if the cleanup involved shipments of wastes off-site. Where this occurs, the standards applicable to cleanup may be much more stringent than those which would be applicable to Superfund NPL sites. This is because CERCLA Section 121 gives EPA the authority to waive certain Federal or State environmental standards and requirements (including those under RCRA) in selecting the "relevant and appropriate" cleanup standards (the so-called ARARs process). Also, the RCRA permit process is extraordinarily lengthy. At a minimum, states should have the same flexibility with respect to applicable and appropriate standards that EPA has under the present law.

States should be afforded the opportunity to exercise independent control over cleanup activities within their borders by obtaining delegated authority. Under such a system, states rather than EPA would select cleanup levels. Where states are granted the lead for a program or site, cleanup is more likely to be properly approached as a land use question bounded by public health considerations.

The requirement to assess and disclose potential environmental impacts of planned actions in a transparent process, open to the public is an intrinsic component of a democratic society and lies at the core of effective resolution.
of environmental disputes.

Public participation, as set forth in various environmental statutes, is that part of the decision-making process through which responsible officials become aware of public attitudes by providing all opportunity for interested and affected parties to communicate their views. According to these legal requirements, public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official.

Leading commentators and participants in the public involvement/consensus-building field believe that the only way to avoid stalemate, reduce the need for litigation, and restore the credibility of government is to generate agreement among all stakeholders on how to handle the problems that face us. Citizens and affected stakeholders should be provided meaningful involvement in the Environmental Protection Agency's decisions regarding the investigation and remediation of Superfund sites; effective public involvement is a central element of credible agency remediation decisions or negotiated settlements. Early, effective and continuous involvement of affected citizens and stakeholders, including non-government organizations and PRPs, will ultimately reduce the need for litigation, reduce transaction costs and restore credibility to the CERCLA process.

Natural Resource Damages in CERCLA owes its legislative origin to international and national concerns over massive oil tanker spills. In CERCLA, Congress, borrowing from the common law concepts of public law and parens patriae, created federal and state trustees for natural resources and gave them authority to seek damages for injuries to public and tribal natural resources caused by releases of hazardous substances.

Although the Natural Resource Damages provisions of CERCLA have existed for 13 years, there has been very little experience with the actual assessment of natural resource damages. Their potential economic impacts are still largely speculative, except for the result that since awards are potentially so great insurance against them is unavailable.

The first principle, that damages should be restricted to the reasonable costs of restoration, rehabilitation or replacement in kind of the natural resource, rules out the recovery under CERCLA of inherently subjective damages such as those based on "existence," "contingent" or "non-use" valuations. Determining inherently subjective damages runs the heavy risk that damages may edge into punishment and thus become "punitive in effect," triggering constitutionally mandated procedures for the imposition of punitive sanctions. Also inherently
speculative damages are likely to be uninsurable. Thus, there is an inherent danger of overdeterrence of what may in general be socially desirable economic activity.

Another factor that supports limiting natural resource damages under CERCLA to the reasonable costs of restoration, rehabilitation or replacement in kind is the additional burden determination of more speculative values would impose on the federal courts. Long trials under CERCLA over inherently speculative natural resource damages would add to the burden of the already crowded civil dockets of our federal courts.

The concept of "reasonable" costs is taken from the National Environmental Policy Act. It includes the concepts of "cost effectiveness" and "cost/benefits." Thus it recognizes that, in the name of saving or restoring natural resources, we should not incur a net social loss in the overall result. It is also intended to avoid excessive costs or excessive awards that could be punitive in effect. This limitation of reasonable costs is also recognized in the Proposed Directive on Liability for Wastes of the European Community, which provides that where "the costs substantially exceed the benefit arising for the environment from such restoration and other alternative measures ..., may be taken at a substantially lower cost" recovery is limited to those alternatives. Thus, consideration of international competitiveness reinforces common sense economics.

The second principle focuses on the fact that CERCLA is intended to be primarily a remedial statute. Cleanup issues are directly related to whether the hazard or threat of hazard being remedied under CERCLA has also damaged natural resources and if so how those resources can or should be restored, rehabilitated or replaced in kind. As a general rule all those related issues should be resolved in the same proceedings.

The third principle is designed to preclude the diversion of any funds recovered as natural resource damages, to other governmental purposes, including without limitation, reimbursement of administrative, overhead, enforcement, legal or other transactional costs.

Finally, we note that Congress intended that CERCLA's present natural resource damages provision, CERCLA 107(f)(1), not be applied retroactively. Nevertheless, some natural resource trustees have focused on the word "wholly" in the last sentence of that section to argue for the recovery of damages that were incurred years before the effective date of the Act. The Act should be clarified to avoid imposition of any such retroactive liability.
Respectfully submitted,

David S. Baker, Chair
Standing Committee on Environmental Law

Dudley Oldham, Chair
Section of Tort and Insurance Practice

Frank Erisman, Chair
Section of Natural Resources, Energy and Environmental Law

Richard M. Phillips, Chair
Business Law Section

February, 1994
1. Summary of Recommendation(s).

The resolution recommends amending the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund") to allocate responsibility for costs in a more equitable and efficient manner and to promote more effective and expeditious cleanup. The resolution supports the limitation of new retroactive and strict liability; requires allocation of liability based on each party's contribution to the harm; mandates early allocation through alternative dispute resolution or other procedures that encourage prompt and efficient compliance; and encourages the use of broader-based financing of responsibility not feasibly or equitably allocated. It recommends rational and consistent determinations for site and remedy selection, based on realistic risk estimates; cleanup guidelines which consider economical technical feasibility and such factors as geography, geology, climate and land use; and delegation of responsibility to States to select cleanup standards and to administer Superfund authorities without unnecessary intergovernmental requirements.

2. Approval by Submitting Entities.

This report with recommendations was approved by the Standing Committee on Environmental Law at a conference call meeting held on November 15; by the Business Law Section at a meeting held on November 22, by the Natural Resources, Energy & Environmental Law Section Council the week of November 8, and by poll of the Tort & Insurance Practice Council on November 15.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The House has adopted policy addressing two narrower issues under 'Superfund': fiduciary liability (#104C, February 1990) and innocent landowners (#100B, February 1991). The House has not considered the range of issues set forth in the present Report with Recommendations. The present resolution leaves intact the two earlier resolutions referenced here.
5. **What urgency exists which requires action at this meeting of the House?**

Congress presently expects to commence consideration of CERCLA reauthorization legislation beginning this winter, and has strongly solicited ABA input. To enable the Association to weigh in on reauthorization of this significant environmental statute in a meaningful manner, ABA President Bill Ide established the ABA-wide Working Group that developed this report for submission at the Midyear Meeting. Delay in consideration of the proposed policy will deny the ABA a timely opportunity to lend its expertise to the CERCLA reauthorization process. This would be even more unfortunate given President Clinton's unfavorable public remarks about the financial benefits that have accrued to lawyers under the present, inadequately performing statute.

6. **Status of Legislation. (If applicable.)**

Several bills have been introduced which address aspects of CERCLA; however, reauthorization legislation is not yet pending. The relevant congressional committees have determined to await the Administration's proposal, which is expected to be sent up to Congress after the recess of the first session of Congress. Numerous hearings on Superfund have been held, and will continue to be convened over the coming months.

7. **Cost to the Association. (Both direct and indirect costs.)**

Adoption of the resolution would not result in expenditures for the Association.

8. **Disclosure of Interest. (If applicable.) (conflict of interest question)**

Some members of the Working Group that developed the report with recommendations represent corporate clients who are or may be affected by CERCLA. However, no member of the Working Group or of the resolution's sponsors is known to have a material interest in the recommendations by virtue of a specific employment or engagement to obtain the results of the recommendations.

9. **Referrels.**

Referred to all state and local bar associations represented in the ABA House of Delegates, and to the following entities, in December, 1993:

**Sections and Divisions**

Administrative Law and Regulatory Practice
Antitrust Law
Business Law*  
Criminal Justice  
Dispute Resolution  
Family Law  
General Practice  
Government and Public Sector Lawyers*  
Individual Rights and Responsibilities*  
Intellectual Property Law  
International Law and Practice  
Judicial Administration  
Labor and Employment Law  
Law Student  
Legal Education and Admissions to the Bar  
Litigation*  
Natural Resources, Energy and Environmental Law*  
Public Contract Law*  
Public Utility, Communications and Transportation Law  
Real Property, Propate and Trust Law*  
Science and Technology*  
Taxation*  
Tort and Insurance Practice*  
Urban, State and Local Government Law*  
Young Lawyers  
Forum Committee on Health Law  

Committees  
Environmental Law*  
Coordinating Group on Energy Law  
Consortium on Legal Services and the Public  
Homelessness and Poverty  
Lawyers' Public Service Responsibility  
National Conference of Lawyers and Scientists  
Public Education  

Affiliated Organizations  
Association of American Law Schools  
Federal Bar Association  
Federal Energy Bar Association  
Hispanic National Bar Association  
National Asian Pacific American Bar Association  
National Association of Attorneys General  
National Association of Bar Executives, Inc.  
National Association of Women Judges  
National Association of Women Lawyers  
National Bar Association, Inc.  
National Conference of Women's Bar Associations  
National District Attorneys Association  
National Legal Aid and Defender Association
10. **Contact Person.** (Prior to the meeting.)

David S. Baker (404-572-6618)
Chair, Standing Committee on Environmental Law
Powell, Goldstein, Frazer & Murphy
15th Floor
191 Peachtree Street
Atlanta, GA 30303

11. **Contact Person.** (Who will present the report to the House.)

David S. Baker (404-572-6618)
Chair, Standing Committee on Environmental Law
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191 Peachtree Street
Atlanta, GA 30303

12. **Contact Person Regarding Amendments to This Recommendation.**

(Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

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*Reflects entities that participated in the ABA Working Group on CERCLA Reauthorization, whose mission it was to develop this report with recommendations.*