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Facilitative Government: An Experiment in Federal Restraint

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I. INTRODUCTION

In an area just north of the City of Boulder, Colorado, the community draws its water supply from a shallow groundwater aquifer. The aquifer is contaminated with industrial solvents and the contamination is spreading. The Boulder County Health Department (BCHD) and the Colorado Department of Public Health and Environment (CDHPE) have asked the United States Environmental Protection Agency (EPA) to become involved because the County and the State do not have the resources or legal authority to manage the cleanup or hold the responsible parties accountable. EPA considered the request as a call for Superfund authority to be brought to bear.[1]

The scenario presented by this story is familiar to those who work in environmental law. The outcome is similarly familiar. History shows that going through the EPA's Superfund process is likely to take 10 to 15 years and $12 million.[2] Additionally:

1. There will be an expensive groundwater investiga-tion and monitoring plan that will take several years. The cost of

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1. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510 (codified as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, at 42 U.S.C. §§ 9601-9675 (1994 & Supp. I 1995)). CERCLA is also known as "Superfund."

Preparation of a National Priorities list is required in the National Contingency Plan (NCP) under CERCLA § 105(a)(8)(A). The NPL refers to the list, compiled by the EPA pursuant to CERCLA § 105, of uncontrolled hazardous substance releases in the U.S. that are priorities for long-term remedial and response projects. 40 C.F.R. pt. 300 (1993), app. B.

2. H.R. REP. No. 103-35, at 3-7 (1993).

this effort, without negotiations and other transaction costs accounted for will likely be $500,000 or more.[3]

2. A series of alternative solutions will be developed. The cost of this effort will be between $50,000 and $300,000.[4]

3. EPA will make a formal decision choosing either groundwater treatment ($1,000,000 to $5,000,000), institutional controls (provision of an alternative water supply, and restricted access to the aquifer), or some combination of an alternate water supply and cleanup.[5]

4. EPA will demand reimbursement from all the parties who may potentially be responsible.[6]

5. Incredible expenditures of time and expensive technical and legal resources will be made by all parties throughout the process because of the complex and generally adversarial nature of the Superfund process.[7]

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3. These figures are based on the experience of several project managers in EPA Region VIII with groundwater contamination investigations. For an area as large as the N. Boulder site, about one square mile, with an unknown number of potential sources, this cost is very likely low.

4. EPA data for 1983-85 indicate that study costs for Colorado sites range from $10,000-17,497. Conversations with Barry Friedman, Budget Coordinator, Superfund Remedial Program, in Denver, Colo. (July 8, 1996). Data on the median and mean expenditures is unavailable and not likely to be meaningful due to the variability between projects.

5. This summary of costs and likely outcomes is based on 11 years of personal experience as a Superfund Remedial Project Manager. The costs are not the result of careful cost estimating procedures. Rather, these figures are "ballpark figures," intended to provide a reasonable understanding of what this sort of work may cost. Cost estimates for work of this nature can vary greatly. However, these are adequate for an initial understanding of the potential consequences.

6. CERCLA § 107(a) is directive. It states that liability shall attach and that there are extremely limited defenses. Thus the option of the U.S. choosing not to pursue a liable party is not addressed in the statute and is left to the Agency's prosecutorial discretion. However, the Superfund is a trust fund, and the U.S. is the trustee, thus there are obligations to recover for funds spent out of the fund. *See*, CERCLA § 107(a)-(b); *see also*, Brian J. Pinkowski, *Simplifying CERCLA Defenses to Liability*, 28 THE URBAN LAWYER 197 (1996).

7. Congress has reported that the eventual costs for site cleanup across the U.S. could be as high as $752 billion. H.R. REP. No. 103-35, at 6-10 (1993). The breakdown of the $752 billion:

$151 Billion for Superfund sites,
$234 Billion for Resource Conservation and Recovery site,
$30 Billion for State and private programs,
$67 Billion for underground storage tanks,

Rather than following this traditionally prolonged and expensive approach, the EPA opted for a different solution to the groundwater problems in Boulder, Colorado. The EPA exercised restraint in its authority by taking the unusual step of asking the major stakeholders to step forward and solve the problem prior to initiation of the Superfund process. The EPA was able to implement this approach by providing incentives and a working environment that enable the parties to resolve the problem.[8]

$30 Billion for Department of Defense sites,
$240 Billion for Department of Energy sites.

An additional sum not accounted for above will be the transaction costs. Transaction costs for private property (and some federal property) may run between 25% to 88% of the response costs listed above. *See generally* JAN PAUL ACTON & LLOYD S. DIXON, THE INSTIT. FOR CIVIL JUSTICE, RAND CORP., SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE FIRMS (1992).

8. In recognition of the novelty of this approach, the people involved received Vice-President Gore's Heroes of Reinvention, Hammer Award for Reinventing Government. The award granted by the Vice-President's office was as follows:

Reinvention of Service

> Creative use of Superfund authority has facilitated community based environmental decision-making in North Boulder, Colorado to develop a solution to a groundwater contamination problem with minimal EPA involvement and without Superfund listing. EPA created an environment for local government, industry and residents to solve a local contamination problem without reliance on the federal Superfund program. In response, the community will have completely resolved this situation (including construction) for $700,000, within 12 months of being contacted by EPA. This approach may have saved this community as much as 10 years of Superfund involvement and potentially as much as $12 Million. Further, the approach taken at this site sets a new standard for Superfund enforcement based on mediation skills and consensus building to allow communities to solve their own problems, in their own manner, with EPA support.
>
> *Cutting Red Tape*
>
> When EPA became involved at the site in North Boulder several of the parties were entrenched in litigation about the groundwater contamination. The Superfund team saw an opportunity to use EPA staff and authorities to create an environment where the community, including the litigants, could reach a solution to the groundwater problem on their own.
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> EPA approached the groundwater contamination issue from the perspective of finding a way to facilitate a community-based solution. Additional EPA goals were to minimize the use of EPA resources and to maximize the incentives for the community to work together to solve this problem outside of the Superfund program.
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> Toward that end, EPA informed the parties about the potential risks involved in taking the status quo approach to the groundwater problem and provided the opportunity for the community to develop a solution prior to EPA taking any steps toward a Superfund listing. After creating

Helping the community solve its own problems, as opposed to usurping local authority, is a very different role for the federal government. The role is basically a form of facilitation. The federal government's role as a facilitator offers great potential but has not been explored elsewhere. This essay will look at how the EPA handled this case and what factors may make a situation amenable to federal facilitation efforts.

II. BACKGROUND[9]

In 1988, a man in the Crestview neighborhood in North Boulder visited his chiropractor complaining of pain and swelling in his joints. The

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this environment for the community to construct an innovative solution, EPA took on the role of mediator for the various disputes that arose between parties. The success of this approach has saved millions of dollars from private and federal sources and has saved the community from being involved in the Superfund process for the next decade.

Making Government Cost Less and Work Better

A technically sound solution to the groundwater problem in North Boulder was developed and paid for by residents, industry, state, city, and county governments within six months of being contacted by EPA. Construction will be completed within 12 months of the community being contacted by EPA. Citizen's representatives were integrally involved throughout development of the solution.

Had EPA taken the standard approach to resolving the groundwater contamination (studies, listing, more studies, and contentious remedy development) or chosen to delay action, property values would have been substantially affected for many years and economic redevelopment of this "brownfields" area would have been deterred.

Additionally, the approach used at this site by EPA illustrates the potential use of Superfund authority and EPA staff to facilitate private party solutions to environmental problems without Superfund listing or the use of administrative orders.

Reinvention of government cannot take place without the support of the public. In this case, the responsiveness of the non-federal parties to EPA's efforts to change the typical way of doing business was the lynchpin in making this effort possible and successful. Accordingly, all of the individuals named are heroes of Reinvention and should be recognized for their efforts.

Submitted by
William Yellowtail,
Regional Administrator,
U.S.E.P.A. Region VIII.

9. The following history was developed with the help of conversations with Karen Zulauf (attorney for the citizens in the lawsuit), Winn Franklin (resident), Jack Conway (President of Centerline), Alan Gilbert (attorney for Centerline), and Susan Martino (Boulder County Health Department Staff). Unless otherwise noted, all conversations took place between December 1994 and April 15, 1995. Where possible, specific references to the individuals responsible for the information will be made.

chiropractor suspected that the pain might be associated with a problem in the patient's liver.[10] At the chiropractor's suggestion, the man had his drinking water tested by a local environmental laboratory. The sampling results indicated high levels of 1,1,2-Trichloroethane (TCA), and 1,2-Dichloroethane (DCE).[11] The patient contacted the Boulder County Health Department (BCHD), which then sampled the water supply wells used by the residents. BCHD confirmed elevated levels of TCA and DCE in the water supply.[12]

The Hazardous Material and Waste Management Division of the Colorado Department of Public Health and Environment (CDPHE) was immediately notified by BCHD. From March 1988 to March 1994, the CDPHE and BCHD worked together to identify the source of this contamination and to notify the affected residents in the neighborhood.[13]

This joint investigation resulted in the identification of a leach field as a potential source of the groundwater contamination. Cencorp Inc., occupied the building using the leach field. Cencorp denied any responsibility for the contamination and pointed to the previous tenant, Centerline Specialties, a printed circuit board manufacturer.[14]

Cencorp was created when the one of the original owners of Centerline Specialties left to form a separate corporation.[15] The management of Cencorp was believed to have been directly involved in the operations at Centerline which were alleged to have caused the groundwater contamination.[16] A review of CDPHE's files revealed that Centerline had

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10. Using analytical skills known only to those indoctrinated in the mysteries of the chiropractic healing arts.

11. 1,1,2-Trichloroethane (TCA) is used primarily as a cleaning solvent. TCA is known to cause burning of skin in humans. Animal data indicates that it may affect the liver, kidney, and digestive tract. Some of the industries which are known to release TCA are: timber products, plastic, and laundries (dry cleaners).

1,2-Dichloroethane (DCE) is used primarily to make vinyl chloride and other solvents that remove grease, glue, and dirt. DCE is also used to remove the lead from leaded gasoline. DCE may reasonably be anticipated to be a carcinogen. Both humans and animals have died from lung and heart failure after breathing, eating, or drinking large amounts of DCE.

12. Letter from David C. Shelton, Director, Hazardous Materials & Waste Management Division, Colo. Dep't of Health, U.S. EPA., to Bob Duprey, Director, Hazardous Waste Management Division of EPA (March 21, 1994) (on file with author).

13. *Id.*

14. *Id.*

15. Centerline Specialties is a printed circuit board manufacturer. In 1979, Centerline Specialties moved to Longmont, Colo., and changed its name to Centerline Circuits. It will be referred to as Centerline throughout the remainder of this essay.

16. Conversations with Jack Conway, Pres. of Centerline Circuits, Inc., & Alan Gilbert, attorney at Sherman & Howard, L.L.P., in Denver, Colo. (Oct. 15-20, 1994).

used DCE, TCA and other chlorinated solvents at its operation in North Boulder.[17]

Centerline voluntarily implemented a sampling program to characterize groundwater quality at the facility upon being contacted by CDHPE. Centerline also voluntarily supplied bottled drinking water to all residents with contaminated wells.[18]

Concurrent with the groundwater investigation, BCHD asked the City of Boulder to investigate the feasibility of providing water service to residences within the impacted neighborhood.[19] The City of Boulder Department of Public Works met with both the BCHD and Centerline to evaluate this alternative.[20] At that time, Centerline had proposed to pay 50 percent of the cost to design and install a water main through the area.[21] Centerline also offered to pay the entire amount of the cost to connect individual properties whose wells exceeded the DCE standards to this water supply service.[22] These offers were later withdrawn after the community, 105 individuals, filed suit against Cencorp and Centerline.[23]

Further, on December 23, 1993, Centerline Circuits notified CDPHE that they would no longer collect water samples from the affected neighborhood.[24] These decisions were based on their desire to conserve resources to defend the lawsuit filed against them by the Crestview neighbors.[25]

CDHPE did not have authority under existing State laws to require Centerline to do further investigative work at the facility and did not have the resources to undertake the work itself.[26] In such instances it is common for states to request assistance from EPA.

EPA has great authority to act and order private parties to act under the Comprehensive, Environmental Response, Compensation and Liability Act (CERCLA or Superfund) where there has been a release of a hazardous substance into the environment.[27] Congress passed the Super-

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17. *Supra* note 12.

18. *Id.*

19. Telephone conversations with Susan Martino, Public Health Inspector, Boulder City Health Dept. (Nov. 15, 1994).

20. Conversations with Stan Zemler, City of Boulder, in Boulder, Colo. (Dec. 8, 1994).

21. *Supra,* note 16.

22. *Id.*

23. Letter from Alan J. Gilbert, Sherman & Howard, to Walter Avramenko, Corrective Action Unit Leader, Monitoring & Enforcement Section, Hazardous Waste Control Program, Colorado Department of Health (December 23, 1993) (on file with author).

24. *Id.*

25. *Supra,* note 16.

26. *Supra* note 12.

27. CERCLA, *supra* note 1.

fund law to address inactive or abandoned hazardous waste facilities.[28] Congress intended to encourage parties to focus on cleanup.[29] Toward that end, liability under the statute is considered to be strict, joint and several, and retroactive, thus minimizing the initial series of arguments about who actually caused hazardous wastes to be released.[30]

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28. H.R. REP. No. 103-35, at 3 (1993).

29. *Id.*

30. Once the parties have assured themselves that liability is strict under the case law, they frequently realize that their efforts may be better spent resolving the contamination issue rather than fighting with EPA. *See generally* United States v. Hardage, 982 F.2d 1436 (10th Cir. 1992); United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992); United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992); 3550 Stevens Creek Associates v. Barclays Bank, 915 F.2d 1355, 1357 (9th Cir. 1990) (CERCLA "generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed"); United States v. Kayser-Roth, 910 F.2d 24 (1st Cir. 1990); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989) ("CERCLA contemplates strict liability for landowners"); Idaho v. Hanna Mining Co., 882 F.2d 392 (9th Cir. 1989); United States. v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Shell Oil Co., 841 F. Supp. 962 (C.D. Cal. 1993); United States v. Fleet Factors Corp., 821 F. Supp. 707 (S.D. Ga. 1993); United States v. Consolidation Coal Co., No. 89-2124, slip op. (W.D. Pa. July 5, 1991) (available on LEXIS at 1991 U.S. Dist. LEXIS 15229 and Westlaw 1991 WL 333694); United States v. Kramer, 757 F. Supp. 397 (D.N.J. 1991); United States v. Alcan Aluminum, 755 F. Supp. 531 (N.D.N.Y. 1991), *modified by* 990 F.2d 711 (2d Cir. 1993); Weigmann & Rose International Corp. v. NL Industries, 735 F. Supp. 957 (N.D. Cal. 1990); United States v. Marisol, 725 F. Supp. 833 (M.D. Pa. 1989); B.F. Goodrich v. Murtha, 697 F. Supp. 98 (D. Conn. 1988); Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988) (no showing of negligence required); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563 (E.D. Pa. 1988); O'Neil v. Picillo, 682 F. Supp. 706 (D.R.I. 1988); United States v. Hooker Chemicals & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1988); United States v. Moore, 698 F. Supp. 622 (E.D. Va. 1988); United States v. Serafini, 706 F. Supp. 346 (M.D. Pa. 1988); Anheuser-Busch Co., Inc. v. Charles Todd Corp., No. 85-236C, slip op. (E.D. Mo. Nov. 4, 1987) (available on LEXIS at 1987 U.S. Dist. LEXIS 15320); Chemical Waste Management, Inc. v. Armstrong World Indus., Inc., 669 F. Supp. 1285 (E.D. Pa. 1987); FMC Corp. v. Northern Pump, Co., 668 F. Supp. 1285 (D. Minn. 1987); United States v. Bliss, 667 F. Supp. 1298 (D. Mo. 1987); United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987); *In re* Hemingway Transport Inc., 73 B.R. 494 (May 8, 1987); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269 (D. Del. 1987), *aff'd on other grounds*, 851 F.2d 643 (2d Cir. 1988); Sunnen Products Co. v. Chemtech Indus., Inc., 658 F. Supp. 276 (E.D. Mo. 1987); United States v. Miami Drum Services, Inc., 25 Env't Rep. Cas. 1469 (S.D. Fla. 1986); United States v. Tyson, 25 Env't Rep. Cas. 1897 (E.D. Pa. 1986); United States v. Medley, 25 Env't Rep. Cas. 1315 (D.S.C. 1986); Violet v. Picillo, 648 F. Supp. 1283 (D.R.I. 1986); Missouri v. Independent Petrochemical Corp., No. 83-2670, slip op. (E.D. Mo. Dec. 16, 1986) (PRP's lack of knowledge that fill contained dioxin not relevant in view of strict liability); United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985); United States v. Ward, 618 F. Supp. 884 (D.N.C. 1985); United States v. Conservation Chemical Co., 589 F. Supp. 59 (W.D. Mo. 1984); United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1986); United States v. Price, 577 F. Supp. 1103 (D.N.J. 1983); United States v.

Accordingly, on March 21, 1994, CDHPE and BCDH both requested assistance from EPA.[31] Specifically, they asked EPA to perform the following list of activities:

1. Sample the drinking water supplies for all residents within the plume boundaries (approximately 200 properties). "Sampling should be performed four times per year and should be designed to track the eventual spread and migration of the groundwater contamination."[32]

2. Complete a door-to-door survey of the homes in the area to identify all registered and any potentially unidentified drinking water wells.[33]

3. Sample the local creek that runs through the contamination plume and a marsh area near the elementary school. Evaluate the potential exposure of children to contaminated water from these areas.[34]

4. Characterize subsurface geology and hydrogeology to determine the fate and transport of the contaminant plume and the possibility of additional down gradient contamination.[35]

5. Sample indoor air to determine the risk that residents may be inhaling VOCs while showering and cooking.[36]

The CDHPE's request was extensive and would have involved a substantial time and resource commitment by the EPA. The EPA agreed to look into the matter but did not agree to satisfy CDHPE's extensive

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Northeastern Pharmaceutical and Chemical Co., Inc., 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part and rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983); City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982); United States v. Argent Corp., 21 Env't Rep. Cas. 1354 (D.N.M. 1984); *see also* United States v. Fleet Factors Corp. 901 F.2d 1550 (11th Cir. 1990) ("CERCLA holds the owner or operator of a facility . . . strictly liable"). *But see* United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982), *aff'd on other grounds*, 713 F.2d 49 (3rd Cir. 1983).

31. *See supra* note 27.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*

request.[37] The EPA analyzed the data provided by the State and sent out a sampling team. The EPA also began communications with the BCHD staff to develop the background for this case.[38]

North Boulder has a history of light industrial and commercial uses such as auto and body shops, fabrication plants, silk screen shops, etc. North Boulder also includes the Fire Training Center, which is utilized by numerous municipal fire departments; a Colorado Department of Transportation maintenance facility, which has been in existence for almost 40 years; and a county vehicle maintenance facility.[39]

The residences and commercial properties in North Boulder rely on septic systems to manage their wastewater.[40] Based on conversations with staff at the Boulder County Health Department, EPA determined that it was likely that septic systems throughout the area were contributing to groundwater contamination.[41] EPA's efforts to map the groundwater contamination furthered this suspicion.[42]

The difficulties posed by the number of potential contamination sources were increased by the social characteristics of the residential community. This area of Boulder is comprised of large parcels of land with many of the residents keeping horses and other farm animals on their properties. The area covers approximately one square mile and includes as many as 400 residents. The residents of this area have historically resisted annexation efforts by the City of Boulder partly because they are dissatisfied with the development plans of the city. Also, they don't want to pay additional taxes; they don't want to pay the fees associated with annexation; and lastly, they don't like the city.[43] Folks out west are sometimes like that.

The City of Boulder had been working with the County and citizens in North Boulder area since 1992 on a North Boulder Subcommunity Plan that included annexation for the affected area. Annexation of the area would allow the residents to have access to an uncontaminated drinking water supply. In fact, the City Planning Department had gone before the City Council to investigate the possibility of bringing this area into the City

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37. Letter from Robert L. Duprey, Director, Hazardous Waste Management Division, U.S.E.P.A., Region VIII, to Howard Roitman, Acting Director Hazardous Materials and Waste Management Division, Colorado Department of Health (now known as Colorado Department of Public Health and Environment) (June 10, 1994) (on file with author).

38. *Id.*

39. *See supra* note 19.

40. *Id.*

41. *Id.*

42. Preliminary Assessment, Centerline Circuits. Boulder, Boulder Cty, Colo. Dec. 30, 1993. TDD #T08-9308-504.

43. Telephone conversations with Karen Zulauf, attorney for residents (Jan. 13, 1995).

early due to the groundwater contamination. The City Council decided that they would not supply water to this area until this enclave of people agreed to be annexed into the City. The rationale of the City Council was that City Services should be for those who pay City taxes.[44]

Despite the local politics of the annexation issue, City Staff and several of the residents believed that annexation was only a matter of a few years away.[45] The area was nearly surrounded by City property and was substantially supported by City Services such as bus routes and parks. From the City's perspective, this neighborhood was already benefiting from being part of the City, but without paying for services.[46]

III. COMMUNITY NEEDS IN ENVIRONMENTAL CLEANUP

Before proceeding to describing the EPA's actions in this community it is important to spend some time attempting to understand the conflicts that occur when environmental cleanup issues arise in a community. Many of these conflicts were identified during a series of panel discussions that took place at the Medical University of South Carolina. The author had the opportunity to participate in these panel discussions and saw in them the basis for guidelines for federal interactions with communities.[47] The guidelines developed by EPA's participation in these panel discussions were the underlying basis for EPA strategy on the North Boulder site.

a. "In Search of Purity"

In June 1993, the Environmental Hazards Assessment Program of the Medical University of South Carolina (MUSC) assembled 15 individuals with demonstrated experience with the problems posed by hazardous wastes, public health, and the roles of government and communities in solving these problems.[48] The purpose of this panel was to provide an open forum to expose the underlying interests at the heart of conflicts that arise

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44. *See supra* note 20.

45. Conversations with Stan Zemler and Leslie Lacy, Boulder Cty. Attorney's Office, in Boulder, Colo. (January, 5 1995).

46. *See supra* note 20.

47. EPA Region VIII Management concurred. Conversation with Bob DuPrey in Denver, Colo. (Nov. 21, 1994).

48. Videotape: In Search Of Purity (The Medical University of South Carolina, Environmental Hazards Assessment Program, Crossroads of Humanity Series; PBS Round Table discussion produced by Fred Friendly Productions 1993) (on file with author).

at hazardous waste sites.[49] The method chosen by MUSC to guide the panel through the exploration of these issues was a role playing exercise in a hypothetical community.

The moderator, Charles Nesson from Harvard Law School, placed the panelist in the fictional town of Purity at a town picnic celebrating the opening of the "East End Library." A fictional character approaches one of the panelists and reminisces about how the East End used to be the town dump. The panelist assumes the role of a local housewife and mother, pointing out that her kids had come back from the woods by the old dump with "melted" tennis shoes.

The response of the city officials on the panel was to try to keep the community "from overreacting" until they could find out what was "really" going on. There was also a brief discussion of whether or not the city should keep any of its findings secret from the public and how to minimize press reaction. Two of the panelists reacted adversely to the notion of government "managing" public fears and concerns. They concluded, "the only way

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49. The MUSC panel was composed of the following individuals:
Dean L. Buntrock is Chairman of the Board and Chief Executive Officer WMX Technologies, Inc. (formerly Waste Management, Inc.), Oak Brook, Ill.
Brian Costner is Director of the Energy Research Foundation.
Caron Chess is Director of the Center for Environmental Communication at Rutgers University, New Brunswick, N.J. She also serves on the National Research Council's Board on Radioactive Waste.
Arnold Diaz is an investigative reporter for WCBS-TV, New York, N.Y.
Tom Fink, J.D., Mayor of Anchorage, Alaska.
Ruth M. Heifetz, M.D. & M.P.H., Senior Lecturer in the Department of Community & Family Medicine, University of California, San Diego School of Medicine.
Marilyn Leistner served as Mayor of Times Beach, Missouri.
James A. McClure, J.D., served 24 years in the United States Congress, Idaho.
Alan Moghissi, Ph.D.
Brian J. Pinkowski, M.S.C.E., J.D., Superfund Remedial Project manager for the U.S. EPA, Denver, Colo.
Michael J. Pompili serves as Assistant Health Commissioner (Environmental Health) for the Columbus Health Department in Ohio.
Ellen K. Silbergeld, Ph.D., professor, Dep't of Epidemiology & Preventive Medicine, University of Maryland.
Rena I. Steizor, J.D., partner, Speigel & McDiarmid (law firm), Washington, D.C.
Lee M. Thomas, former EPA Administrator from 1985-1989, Senior Vice President, Environmental & Governmental Affairs, Georgia-Pacific Corporation, Atlanta, Ga.
Sanford L. Weiner, visiting scientist, Energy Laboratory & Center for Technology, Policy & Industrial Development at Mass. Instit. of Technology, Boston, Mass.

government will listen to us is when we involve the press." Thus, the tensions escalated as media representatives discussed the "angles" they would use to portray the story.

When asked if EPA should come out to investigate the source of the community concern and press attention, a former U.S. Senator became frustrated and declared that it is unreasonable to send people out to investigate every rumor, particularly a story such as this "which is ridiculous on its face."

When a former EPA administrator was asked how EPA would react, he answered that there would be no reaction from the federal government unless the state agency was inappropriately ignoring the situation. An EPA project manager on the panel disagreed, and pointed out that the local EPA office must be more sensitive to community issues than EPA headquarters back in Washington D.C. and that the local EPA office would probably look into it.[50]

An academician/consultant claimed that everyone was failing to handle this situation properly because no one had consulted him. In his view, use of a technical expert that relies on scientific, peer reviewed studies to conclude whether there may be a problem would be the only rational course of action.

There were a few more arguments about whether an environmental problem was actually present in this community. However, ultimately, this panel discussion devolved into a series of conflicts over the ability of the local government to handle this situation and whether the federal government should become involved. The entire panel discussion can easily be summarized as the realistic portrayal of the lack of coordination and competing views of how to proceed on a hazardous waste issue. But that is merely the beginning of a hazardous waste project.

b. "Purity Revisited"

MUSC was a little surprised by the outcome of the first panel discussion. They hadn't expected conflict to arise so early in the process of addressing an environmental issue. Because MUSC was interested in the more widely known conflicts surrounding remedy selection they held another panel, "Purity Revisited," and moved the hypothetical forward in time.[51] In the updated scenario several studies had been conducted, a fence

50. The author.

51. Videotape: Purity Revisited (The Medical University of South Carolina, Environmental Hazards Assessment Program, Crossroads of Humanity Series, PBS Round Table discussion produced by Fred Friendly Productions 1993) (on file with author).

had been placed around the area and the federal government, through EPA, had become involved.

Nesson asked the Mayor of Purity whether the site should be on the National Priority List (NPL). The mayor responded that the site should not be placed on the NPL because doing so will remove the site from local influence and the town will "lose its voice." An EPA attorney on the panel confirmed that the Mayor's statement was true to the extent that the authority for site decisions rested with the EPA under federal law once the site is placed on the NPL.

Business leaders on the panel claimed that placing the site on the NPL provided responsibility for business to handle and pay for the situation but no real input into the resolution. Both business and city officials wanted to keep the federal government out because they feared the project would be removed from local control.

In response, a state agency representative on the panel attempted to point out that there was plenty of room for input in the Superfund process through the required public comment periods, but was interrupted by one of the business leaders who stated that this was not the kind of input they want. They wanted up front input, not reactive input after the government had made up its mind.

The state agency representative pointed out that the town and the business likely do not have sufficient funds to do the work themselves and have to live with the involvement of the feds and the state if they want the cleanup to be performed.

The EPA attorney then made the relationship between EPA and the locals more clear: "Like it or not, we're your government. Someone has to make decisions for this site and we have the authority and funding." The mayor responded angrily, stating that this was exactly the approach that removed any notions of partnership. "[We] can do all the work, but EPA makes the final decision." The state agency representative pointed out that the site had been there for 20 years and no progress had been made until EPA became involved.

The moderator then moved the setting forward in time to the point of remedy selection. He provided facts that indicated that the best technical decision for the site would be onsite incineration of the contaminated soils. The hypothetical "science" provided was that there would be no residual products coming out of the smokestack. Incineration would work here better than anywhere else on the planet. With these "facts," Nesson asked about the 30 to 60-day comment period that EPA provides to gather input from the community.

The community representatives declared that, "It doesn't sound like EPA really wants to know what the public wants." Amusingly, EPA confirmed and denied this at the same time by saying that unless someone comes forward with dramatically different and unexpected information,

there would be no change of the decision to use incineration. But he assured the panel that EPA was committed to spending a great deal of time after the formal decision trying to educate the community about how incineration works and the safety factors involved.

The mayor claimed that this input, like the rest, would be superficial and "after the fact." The community representatives agreed and declared that it would be time to chain themselves to EPA's door if the community wishes were not taken seriously.

The EPA attorney explained that EPA is required to find the most permanent remedy and incineration is the most permanent remedy available for this project. However, as he backpedaled, he conceded that EPA would have to come up with another remedy if the community would not allow incineration to proceed.[52] After he rationalized the decision to do what the community originally wanted, the residents and elected officials accused EPA of being uncommitted to its own ideals.

c. Analysis of Purity

The apparent collapse of these two panel discussions revealed several important messages from the public:

1. Communities need help in the form of technical assistance, financial assistance, and leadership to precipitate activity at sites;

2. Local governments need help in the form of legal authority to involve the appropriate parties, technical expertise, financial assistance, and credibility with the community, and gentle leadership to initiate actions at waste sites without supplanting local autonomy;

3. The federal government is obliged to make sure that a minimum level of health is maintained nationally and that citizens have an opportunity for involvement in the solution to these issues.[53]

Given these interests, the federal government traditionally steps in to resolve the issue itself. The federal government can provide the authority, leadership, technical expertise, and financial wherewithal to resolve

52. The author has personally had the pleasure of backpedaling in the face of community upset on several occasions. It comes with the job.

53. It is ironic that the citizens see the government process as excluding citizens, while the feds view their role as protecting citizens' rights.

environmental issues. Hence the joke: "I'm from the government and I'm here to help." However, when EPA assumes this type of leadership role in a community, the problems revealed in the panel discussions are repeated and the resolution of the environmental problem is bogged down in conflict resulting from the actual or perceived federal usurpation of local authority.

IV. THE CHALLENGE TO THE PARTIES IN NORTH BOULDER

EPA's Denver office took the lessons from the MUSC panels to heart. The Denver office has to deal with several large and politically difficult sites where the community surrounding these sites has reacted precisely as did the citizens in the fictitious town of Purity. Further, the author and other EPA Region VIII project managers have had the misfortune of participating in a series of congressional hearings where the same scenario portrayed in the MUSC panel discussion played itself out over and over.[54] Accordingly, when the groundwater contamination problem in Boulder was brought to EPA's attention, EPA decided it was the perfect forum for an experiment in federal restraint.[55] Rather than get trapped into the expensive and predictable pathway followed at so many other sites, EPA decided to focus on two main themes that arose from the Purity panels. Namely, EPA intended to use its authority to ensure that the parties potentially responsible for the contamination would participate in a community based decision making process. EPA also intended to help this community take ownership of this project and the resulting decisions about this project.[56] In other words, EPA intended to facilitate the natural abilities of the community to resolve this issue themselves.

Toward that end, EPA invited the major stakeholders to a meeting on December 6, 1994, to discuss EPA's involvement in the groundwater investigation and the potential options available for this project. The stakeholders are identified below.

The intent of the meeting was to provide the warning from EPA with which many of the parties were already familiar: "You are a

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54. *See generally* H.R. REP. No. 103-35 (1993).

55. The EPA staff initially assigned to this project were: Brian J. Pinkowski, Joseph Santarella, Victor Ketellapper, and Karen Kellen. Several others eventually became part of the team by the time the Vice President's Reinventing Government Award was presented.

56. The terms "community" and "stakeholders" include all parties who live, work, or govern in the area near the site, and have some interest in the outcome of any public service provided by the government related to the site. The term "financial stakeholders" refers to those parties who may be potentially responsible for the contamination under federal law and is used to distinguish potentially responsible parties (PRPs) from residents (or citizens). "Residents" or "Citizens" refers to those members of the community that live or own businesses in or near the site.

potentially responsible party and will be facing substantial environmental liability issues at a Superfund site." The meeting was also intended to put the parties on notice that they had an opportunity to take a different type of approach at this site.

The major stakeholders invited to this meeting were:

1. The City of Boulder was invited because of its association with the Boulder County Fire Training Center and because of its access to treated drinking water.[57] The City was also important because of its role in the future development of the North Boulder Area.

   The Fire Training Center was used by the City of Boulder, Boulder County, and several other surrounding jurisdictions for training fire fighters. The Center would spread mixed oil and solvents over mockups of buildings, burn the mixture, and put the fires out. The facility would then be washed down with water which was later trapped in an unlined soil impoundment, 15 to 25 feet above the water table, upgradient of the residential area relying on the aquifer as a drinking water supply.[58] Both the City and County were on the Board of Directors for the Fire Training Center, in addition to both collecting burn material and using the facility.[59]

2. Boulder County was also included as a stakeholder because of its activities at the Fire Training Center and for its operation of a vehicle maintenance facility. The maintenance facility had been in use for several decades and historically had used solvents for cleaning vehicle parts.[60] The County Health Department had identified its facility as a suspected contamination source upgradient of the affected community.[61]

3. The Colorado Department of Transportation vehicle maintenance facility was also identified by BCHD as a suspected source upgradient of the affected community. The CDOT facility had been in operation for more than 40

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57. Letter from Sue Ellen Harrison, Assistant City Attorney, City of Boulder, Colo., to Maureen O'Reilly, Enforcement Specialist, U.S. EPA. (October 26, 1994) (on file with author).

58. *Id.*

59. *Id.*

60. Letter from Dan Hershman, Manager, Road Maintenance Division Boulder County, to Brian Pinkowski, Project Manager, U.S. EPA (October 26, 1994) (on file with author).

61. *See supra* note 19.

years by CDOT and, before then, the Colorado National Guard.[62]

4. Centerline was invited to participate as a stakeholder because of the initial investigatory work linking them with the plume.[63]

5. Cencorp was invited to participate because of their management involvement with Centerline prior to the formation of Cencorp as a separate corporate entity.[64]

6. The remaining major stakeholders to be invited were the citizens themselves. From EPA's perspective, it was important to include the residents in the development of any remedy for this area because the citizens would ultimately have to live with the solution. Since many of the citizens had already organized for the lawsuit, their attorney was invited to attend the meeting as their representative.

At the December 6 meeting EPA talked with the group about why each of them had been invited. The group was also told that EPA was concerned about the contamination in the drinking water supply because the nature and extent of contamination was unknown.[65] Thus, a significant groundwater investigation could be necessary, resulting in a substantial investment of time and money on the part of all of the parties, except the residents.

EPA also helped the stakeholder group understand the decision they faced by explaining the primary approaches available to the federal government if the stakeholders decided against developing and implementing a solution outside of EPA's direction.

The most common approach for EPA at projects such as this is to score the site with a hazard ranking system model (HRS) in preparation for the National Priorities List. The Hazard Ranking System is a simple mathematical model that uses information about a site to produce a numerical result, or score.[66] If the score is 28.5 or greater, the site qualifies for the National Priorities List. The National Priorities List (NPL) is a list of

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62. Letter from Kenneth M. Gambril, Manager, Office of Environmental Services, Colorado Department of Transportation, to Brian Pinkowski, Project Manager, U.S. EPA (October 28, 1994) (on file with author).

63. *See supra* note 27.

64. *See supra* note 49. *See also* Letter from Ronald R. Snyder, Dovatron International, to Brian Pinkowski, Project Manager, U.S. EPA (July 28, 1994) (on file with author).

65. Author's notes (on file with author).

66. 40 C.F.R. pt. 300, app. A (1993).

hazardous waste sites compiled by EPA, which are priorities for agency attention.[67] Once a site is on the NPL, commercial and residential development in the area is hindered because people fear the extensive liability scheme under CERCLA.[68]

Once a site is on the NPL and EPA undertakes response actions, the cost of a private party's involvement (i.e. transaction costs) goes up dramatically.[69] Private parties are also exposed to staggering liability.[70]

One of the costs would be for an investigation of the nature and extent of the contamination. The author's experience with groundwater investigations suggests that an investigation in North Boulder would cost more than $500,000 due to the uncertainty of the source, the number of potential sources identified by the BCHD, the complexity of the hydrogeology, and the sheer size of the area.

After an investigation is completed, a set of alternatives is proposed to resolve the problem and a selection of remedy is made in a final Agency decision document or Record of Decision (ROD).[71] It takes 10 to 12 years to get to a ROD on a site.[72] It takes several more years to actually manage the cleanup.[73]

The cost of a remedy involving treatment of the groundwater would be expensive. A rule of thumb for groundwater cleanup is $1,000,000 per gallon of material escaped into the aquifer.[74] It was very uncertain how much material had escaped into this aquifer in North Boulder due to the historical land use in the area.

After going over the implications of a traditional Superfund groundwater investigation, EPA suggested that the parties may have had solutions available to them that were not available to the federal government. They were invited to explore alternatives and come back to EPA with a solution. EPA also gave them three specific criteria to meet as they came up with a proposal for EPA's approval.[75]

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67. *Id.*

68. *See, e.g., How Lender Liability Under Superfund Affects Small Business: Hearings on H.R. 2085 Before the House Comm. on Small Business,* 101st Cong., 1st Sess. (1989) (testimony of Glenn L. Unterberger, Associate Enforcement Counsel for Waste, Office of Enforcement & Compliance Monitoring, EPA).

69. *See supra* notes 2, 5, and 6.

70. *Id.*

71. *See* 40 C.F.R. § 300.430 (1990) (describes EPA's obligation to prepare a ROD documenting the final remedy selection).

72. H.R. REP. No. 103-35, at 136 (1993).

73. *Id.*

74. Author's estimate.

75. Author's comments to Stakeholders' group at December 6, 1994 meeting in Denver, Colo.

- Develop a community-based solution by March 15, 1995,
- Begin implementation within seven months,
- Keep the use of EPA resources to a minimum.[76]

V. HOW THE PARTIES PROCEEDED[77]

During the December 6 meeting, several of the stakeholders argued that they were not responsible for the groundwater contamination and saw no reason for their involvement. To ensure their participation, EPA reminded the parties that there was no technical information available to rebut the Health Department suspicions that spilling had occurred at all of the stakeholders' properties in the area. When met with further argument by the parties, EPA offered to undertake an investigation at each of the properties to see if any releases had actually occurred. The parties understood that such an action would result in time and money being spent by EPA. EPA would then be obligated to seek cost recovery from the parties. Further investigation was also likely to reveal contamination associated with all of the financial stakeholders' properties. All of this would take time, perhaps years, and not move the group any closer to a solution for the contaminated drinking water.

EPA redirected the discussion by reiterating its belief that the stakeholders had alternatives to the approaches described above if the parties worked together. EPA also stated its eagerness to consider such alternatives. The message to the parties was clear: "Either you figure out how to solve this problem, or EPA will be obliged to take the job."

This choice goes to the heart of the messages raised in the MUSC panel discussions. The community members in the MUSC panel including local government, business and residents often felt excluded from EPA's decision making process. In North Boulder, EPA forced the community to make a conscious choice as to the role the community would like for the federal government on a local issue.

The stakeholders recognized that they had significant interests in resolving this matter with as little help as possible from EPA. EPA left the stakeholders to talk among themselves, but told them that they would be expected to make a decision within a week as to their willingness to resolve the groundwater problem. Although the parties did not organize to the point where a single representative responded to the agency, each of the parties individually agreed with EPA to work with the others to resolve this issue.

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76. *Id.*

77. This section is told entirely from the author's perspective as the EPA Project Manager.

Despite their stated willingness to work together, the initial discussions between the parties progressed quite slowly. The City of Boulder professed no liability whatsoever associated with the groundwater contamination and was resistant to participating in the dialog. The County and the Colorado Department of Transportation were also reluctant.

Centerline demurred as well, pointing out that they were in the middle of a lawsuit regarding the groundwater contamination and were concerned about their appearance to resolve those issues before trial. Cencorp and Centerline were both defendants in the lawsuit by the residents. However, Cencorp had settled out as a result of a mediation effort that had taken place. Naturally, Cencorp was not eager to participate in any further activities related to the groundwater contamination. They believed that they had paid whatever monies were necessary to extricate themselves from this situation and were resistant to the prospect of extensive liability under Superfund as well as any further involvement. Cencorp insisted that the settlement money be used by the residents toward the development of the groundwater solution. From Cencorp's perspective, they had paid their settlement money to be used toward the resolution of the ground water issue.

The citizens appeared unwilling to commit any of the funds that they had received in settlement from Cencorp toward a resolution of the groundwater contamination issue. Instead, they wanted EPA to come in and clean the aquifer. The residents, however, were concerned about the potential impact on property values and the length of time anticipated with EPA Superfund involvement.

Over the next several months, EPA worked with the parties as closely as possible while keeping its actions within the three objectives. EPA's first objective was restraint. EPA did not want to dictate the outcome of the solution. EPA also did not wish to bias the discussions. It was EPA's belief that the group would come up with the best solution under the circumstances, and that they would develop a better, more site-specific solution than EPA could at the federal level.

The stakeholders' initial view of EPA's approach varied. The citizens were frustrated that EPA was not dictating the solution to the private parties. They wanted government to "fix it." The City complained to the other parties that EPA was extorting performance out of all the parties. In contrast, Centerline was happy that EPA had offered the parties a chance to resolve the situation without being dragged into a decade-long, adversarial relationship with the agency.

From EPA's perspective, the community was being set up to resolve the groundwater problem without the conflicts encountered in MUSC's panel discussions. While the community worked on the groundwater issue, EPA focused on creating the environment for this community to have all of the necessary parties and resources to create a local solution to the problem.

In part, this was accomplished by maintaining regular contact with all of the parties, serving as an unbiased message courier while the parties struggled to work out a solution.

EPA also emphasized that Alternative Dispute Resolution (ADR), specifically mediation was available to this group as they struggled through their disputes. The parties reacted to EPA's mediation suggestions in a strange manner. Cencorp, Centerline and the citizens had already tried mediation and did not believe further benefit could be gained. Additionally, all of the parties reacted as if dispute resolution was unnecessary because they were all "still talking" to each other on a relatively friendly basis.

It was apparent that they saw ADR as a formal process that required preparation similar to going to trial. None of the parties wanted a formal process to sidetrack the discussions. Part of their reluctance was related to the timing of the trial and their apparent unwillingness to negotiate with each other. Another part of the problem was that the resources and energy of the parties were focussed on the litigation and not on EPA.

Despite the fact that the parties were unwilling to be "sidetracked" with ADR, the group took advantage of EPA as a de facto mediator. Although EPA was unable to provide assurances for confidentiality, the discussions with the individual parties often involved a sharing of confidences with EPA. For its part, EPA did not break those confidences.[78]

Perhaps because EPA was not formally assigned the role of mediator, the individual parties often revealed information that likely would have not been shared with a formal mediator. Many conversations between individual parties and EPA would digress to the point where the parties were "tattling" on one another for things said between them. Rather than attempting to "refocus" the individual parties, EPA would remain neutral while encouraging the individual parties to continue to release their frustrations. However, all of the individual parties were disciplined professionals and conversations eventually came back on track with little or no prompting from EPA.

The parties often called EPA to request that the agency use its enforcement authority to bring a recalcitrant party "into line." The context for these requests varied greatly. Some parties would delicately suggest "while EPA can, of course, make up its own mind, EPA should consider the use of enforcement tools to force the parties to cooperate." Some parties would blatantly tell EPA that "the others" should be ordered to take certain actions. EPA always refused to take sides in the individual disputes but often acted as a go-between for the issues that developed.

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78. The confidences which were shared with EPA were only those which clients had authorized.

The parties would describe to EPA the results of negotiations with each other. Frequently, the independent summaries of negotiating sessions would not match. When EPA concluded that the parties did not understand each other's messages, EPA would act as a go-between, or "translator" to help clear up the confusion.

On three separate occasions EPA called meetings involving some subset of the larger group specifically for the purpose of insuring that communications remained clear. The three occasions where the parties all insisted that the messages communicated during negotiations were clear, and the reconciliation of interest was potentially simple from EPA's view yet out of reach of the parties, EPA called the parties together to take a more assertive mediation role. On two of the three occasions, the disputes were entirely related to the lawsuit matters, completely outside EPA's purview, yet important to the parties' ability to reach agreement on the groundwater contamination. Invariably, the parties were either misleading EPA or themselves about the content of the information that they had exchanged. This became obvious when several "offers" that supposedly were made earlier ended up being made for the first time at the meetings where EPA was in attendance and questioned the parties directly.[79]

It also appeared that the attorneys had not clearly explained the situation and risks to their clients. At one of the meetings where clients were in attendance, there were a few looks of surprise on the clients' faces when EPA explained the risks of environmental liability under Superfund if an agreement were not reached. This was puzzling in light of the fact that weekly discussions about Superfund liability had been going on among the attorneys for several months.

On April 15, 1995, five months after initially being called together as a group by EPA, the stakeholders group came to an apparent agreement and proposed a resolution to the ground water problem. They agreed that water would be provided from the City of Boulder to all domestic water users in the affected area. The City would develop an annexation plan for the area and provide the engineering design and construction for the water hook-up. The cost of the design and construction would be borne by the stakeholders and amounted to about $700,000, an amount far below the usual remedy costs at Superfund sites.

EPA congratulated the parties after this presentation was made and all the parties left the meeting except for the citizen's representatives. The

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79. For example:
EPA Question: "How did you respond to X's offer of blah, blah?"
Answer: "We have not heard that until now."
X then jumps in to make the offer that they had told EPA about weeks earlier.

citizens wanted to discuss the possibility of EPA weighing in on the details of the annexation plan.

However, in the middle of this discussion, there was a knock at the door and the other stakeholders asked to meet with EPA to discuss a problem that had just been revealed among the parties. The financial stakeholders had agreed to a solution but had failed to agree on the financial stake of each party. The parties had not, in fact, worked out an agreement.

Knowing that the parties were close to an agreement but distracted by their lawsuit in the first weeks of May, EPA agreed to extend the deadline until two days after the scheduled trial date. EPA hoped that the parties would reach settlement on the lawsuit and then quickly reach resolution on the groundwater issue.

The residents and Centerline ultimately failed to reach settlement and proceeded with the trial. The residents prevailed at court and went on to reach an agreement on damages with Centerline.[80]

However, with the lawsuit out of the way, the parties were able to return their attention to EPA and the resolution of the groundwater problem. All of the parties were able to agree on the idea that city water would be provided to the residents. The residents, however, were not happy with the annexation plans being proposed by the City. It quickly became apparent that the residents were unable to pull together as a group to decide on the details of implementation.

Nine months after the financial agreement had been reached, the City annexed the streets in the area and began putting in water lines. However, it has refused to allow residents to hook up to the City water supply without individually annexing into the city.

Sixteen months after initially being contacted by EPA, the residents do not have an alternative water supply and are still asking EPA to force the City to provide water without annexation.

Despite their informal request for Agency assistance, the residents have turned their attentions away from issues surrounding the health risks presented by the water and the actual injuries that they claimed at trial due to drinking the water. Instead, they have concentrated their energies on maximizing protection of their individual land use concerns and minimizing the restrictions that come with being annexed into the city. The citizens have an alternative water supply available to them and are working out the details for its delivery to their homes. They have placed the apparent priority of their efforts on land use issues.

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80. Centerline subrogated its claim against its insurance company to the residents. As of this writing, the claim against the insurance company has not progressed significantly.

The end result is that this community has resolved a drinking water problem within 15 months of being contacted by EPA and for a cost of approximately $700,000. Further, the driving forces behind the resolution to this groundwater problem are almost entirely local. The process of resolving this problem was far from painless; there will likely be some continuing attention to the evolving terms of the annexation agreement. Nonetheless, this project reflects local priorities and concerns and presents a successful model to be used in other communities to minimize the disempowerment concerns raised in the MUSC panel discussions.

VI. DISCUSSION

The first step in determining the characteristics of this project that contributed to its success is to strip away many of the site-specific details until just the critical underlying elements remain. It makes sense to start with a description of the parties and their functional roles in resolving this groundwater problem.

The Roles of the Parties

Residents

In North Boulder the citizens were organized for the purpose of the lawsuit and had agreed to communicate with EPA through their attorney. The issue of groundwater contamination had sufficient interest in the community that the residents were able to draw together around it.

The cohesiveness of the residents acted as a catalyst for government action. This is different than many communities where the citizens receive information from the government but are not stirred to coalesce as a community behind the issue. Unless the community is focussed on an issue, the government usually spends a great deal of time trying to inform the community into a state of manageable excitement. This seldom succeeds. However, an apathetic response from a community is usually interpreted as support for the government's proposed approach. In fact, the apathetic response by a community is more precisely a tentative delegation of authority to proceed. This authority can and often is withdrawn from the government the moment a more interesting issue for the community arises. Communities coalesce around an issue while it is important to them, then dissolve their focus when the issue no longer demands their attention.

The critical characteristics for the residents involved in this agreement were that they had largely come to focus on the issue and had empowered spokespersons.[81]

Corporate Community

The corporate community on this project was comprised of parties with an interest in seeing the groundwater problem resolved. Centerline and Cencorp were concerned about potential Superfund liability and it was in their best financial interests to arrive at a quick solution. Centerline had the additional concern regarding the outcome of the lawsuit. The Colorado Department of Transportation had the same financial interests as the corporate stakeholders.

Thus, the critical characteristics of the corporate community involved in this agreement were their clear financial interests. Obviously, the personality and values of the corporate leadership can play a role, but a financial interest is consistently compelling. The interests and needs of municipalities, however, is a more complex matter.

Municipal Governments

Boulder County had the combined interest of protecting the health of the people in their jurisdiction and the financial interest of minimizing potential Superfund liability. Their behavior throughout the entire process was focused primarily on solving the health risk problems and not the financial liability issues. Given the potential magnitude of their financial liability under Superfund, the County's ability to remain focussed on health issues was admirable.

The City of Boulder was the party most responsible for making this agreement come together. Granted, the City's potential Superfund liability was the prime motivator to bring them to the table. However, once they had committed themselves to participating in the stakeholder's group, their leadership kept the group focussed on the goal of getting an uncontaminated water supply to the residents.

Thus, the critical characteristics of the municipalities involved in this agreement were their sense of commitment to the welfare of the residents. This is what all municipalities are "supposed" to be focused on, but experience reveals that the commitment of municipalities to a politically difficult and high risk process is not always decided by citizen welfare

81. The only way to test for these characteristics is indirectly through a subtle sociological observation process. Unfortunately, this process is beyond the scope of this essay.

issues. This is especially true when several corporate constituents are exposed to significant liability. Many municipalities will either "lie in the weeds" – staying uninvolved and complaining that another party is more appropriate to address the problem – or make an audible display of concern, but take no action and commit no resources to the issue. Thus, a municipality's commitment to resolving the problem is a significant characteristic of a successful environment for problem solving.

The Federal Role

The chief characteristic of the federal agency involved in this agreement was a dogged commitment to seeing this community resolve the problem on its own. In fact, this is the single most important characteristic of a successful government facilitation effort. If an agency is unclear about its willingness to allow a community to resolve its own problems, the community is doomed to become mired in bureaucracy.

The agency's dedication to this goal helped increase the creativity of EPA staff in finding ways to assist the parties in overcoming obstacles.

The type of other projects that this approach may apply to is limited only by the imagination of the federal government. Any place that the federal government has the traditional role of being final decision-maker could benefit from this hands-off approach. The spotted owl controversy in the Northwest could have benefited from this approach. Certainly, the parties "on the ground" in the spotted owl issue had sufficient knowledge to develop a solution which addressed all of the interests. However, they probably did not have sufficient resources and authority. Hence, the need for federal involvement. The spotted owl controversy was a controversy because it was more complex than merely the preservation of a species. It involved preservation of a timber culture in the United States that has been present for many generations of families. It also involved corporate financial interests. Only by bringing the proper groups together to deal with the specific interests of all the parties can progress be made.[82]

A perfect example of facilitative government gone awry can be found in Interior Secretary Babbit's Rangeland Reform Initiative in 1993 and 1994. Secretary Babbit fostered the development of local working groups to address issues of public lands use. These groups were comprised of environmentalists, ranchers, recreational public land users, and others in and around specific public lands. Several of these groups developed rangeland proposals that were workable for the surrounding communities

82. The spotted owl controversy could have been a candidate for facilitative government because it has the proper elements in place. However, I am not criticizing the approach that was taken or its outcome.

and interests, only to have the Department of Interior reject the solutions in the end. The Interior Department had not been committed to empowering the local communities to solve their own problems.

There are some practical problems with the facilitative government approach. First, it is difficult to measure success. Is success to be measured by the construction of some item or dollars saved? What benchmark do you use to measure dollars saved? Perhaps success should be measured by the ambiguous measures associated with communities taking more ownership and responsibility for local environmental issues.

Another issue of no small importance to the federal government is the question of resources. How can an agency budget for facilitative government projects? Are full time mediators a valid measure of budgeting? Perhaps, but it becomes more difficult to understand how many mediators might be necessary on a project when you don't know the project exists and the end result of a successful project may be nothing more than a more active and responsible community. These issues are certainly resolvable, but most budget people like hard measures of resources and budgets. Congress is no different.

VII. CONCLUSION

The primary characteristics of a problem that would be amenable to a facilitative approach is that the federal government actually wants to let a community reach its own solutions, and is willing to resist the numerous opportunities to direct the outcome of the community's decision-making process. This can be frustrating for the agency and the community. This also runs contrary to our cultural tendencies of elevating issues to the next higher authority at the first sign of conflict.

When EPA is called into a community, they typically assume the role of final decision-makers. In the North Boulder case, EPA literally forced the community to resolve this problem on their own. It remains to be seen whether the solution reached by this community will provide comfort for all the parties, but it is their solution and not a solution imposed by the federal government. Certainly the annexation agreement to be worked out between the residents and the City will be difficult due to the independent nature of this community and the history of annexation in the area. Despite these difficulties the community will be entirely in control of the outcome. EPA's role was merely to ensure that the proper parties were brought together with sufficient interest in resolving the groundwater issue.

Some of the residents questioned whether EPA had fulfilled its responsibility. In its worst light, EPA failed to clean the groundwater and failed to provide safe drinking water to the residents. EPA effectively did nothing.

On the other hand, if EPA had taken steps to treat the groundwater, millions of dollars would have been spent over many years, with no guarantee that the residents would receive drinking water without annexation. Further, if EPA had ordered the City to provide water to this area, years of litigation would most certainly have ensued.

As it turned out, EPA forced all the parties in the community, including the citizens, to accept some responsibility for resolving this situation. All the parties had a hand in developing the package that would provide safe drinking water to the residents in North Boulder.

EPA was able to facilitate a community based environmental decision by using its authority to make sure the appropriate parties in the community would participate. It's uncertain that the North Boulder problem would have come together if EPA had not been able to hold parties accountable. Thus, the current threat of Congress to diminish the liability scheme may have the unintended effect of destroying incentives for corporate citizens to work as problem solving partners in their communities. If Congress removes the liability scheme under CERCLA, then corporate America will have one less reason to feel part of and responsible to the communities that surround it.

Perhaps the personality mix on the North Boulder project team allowed for this informal agency approach where it may not otherwise be tenable. However, the success of the approach in North Boulder suggests that the federal government and EPA in particular should explore the potential for a role as facilitator in communities rather than merely the dominating outside expert.

Overall, this project has been a success to date. The residents have safe drinking water available to them and the overall expenditure of resources by all parties has been relatively small. The primary question presented in this essay is whether the federal government can successfully facilitate the natural talents and decision-making capabilities of communities. In North Boulder, the answer was "yes." The answer on many other projects is also likely to be "yes."

In North Boulder, EPA discovered that communities could handle environmental issues with federal facilitation available as assistance. Hopefully the government's role as facilitator will be experimented with by other agencies in the future.