

# All Boggled Down in Litigation

## Superfund's Polluters Prefer To Pay Counsel, Experts Say

By Susan Dianne Rice  
Daily Journal Staff Writer

Environmental consciousness was not uppermost in the American corporate psyche 36 years ago, when Aerojet-General Corp. began disposing of toxic chemicals at its Sacramento rocket testing facility in a way that ultimately contaminated the ground water.

The massively polluted facility is one of more than 1,200 sites on the U.S. Environmental Protection Agency's National Priorities List, better known as the Superfund list. California counts 97 such sites.

Somebody will have to pay as much as \$500 million to clean up the site, right now, that somebody looks like Aerojet.

Aerojet wants its insurers to pick up the tab, but despite spending millions of dollars in litigation, the company so far has lost every major battle to shift the cost of cleanup.

Nationwide, other companies are waging similar court battles to avoid having to pay for pollution cleanup mandated under the federal Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA.

The Aerojet litigation typifies what is wrong with Superfund, according to its critics. They contend that an inordinate proportion of Superfund money is going to lawyers, rather than to pay the direct cost of cleaning up contaminated sites.

"The whole program is being questioned,"

said John Ronan, an attorney whose firm, Sedgwick, Detert, Moran & Arnold, represents companies on the hook for cleanup costs. "There are many, many segments of industry that feel absolutely overwhelmed by the costs and the demands on their technical resources."

Al Meyerhoff, an attorney with the Natural Resources Defense Council, agrees that Superfund has been "a jobs program for all types of lawyers," but he doesn't believe that justifies changing the overall statutory scheme that seeks to impose liability on polluters.

"The present effort to alter [Superfund's] liability scheme is seriously misguided," Meyerhoff said. "It's an attempt by certain industries to escape liability."

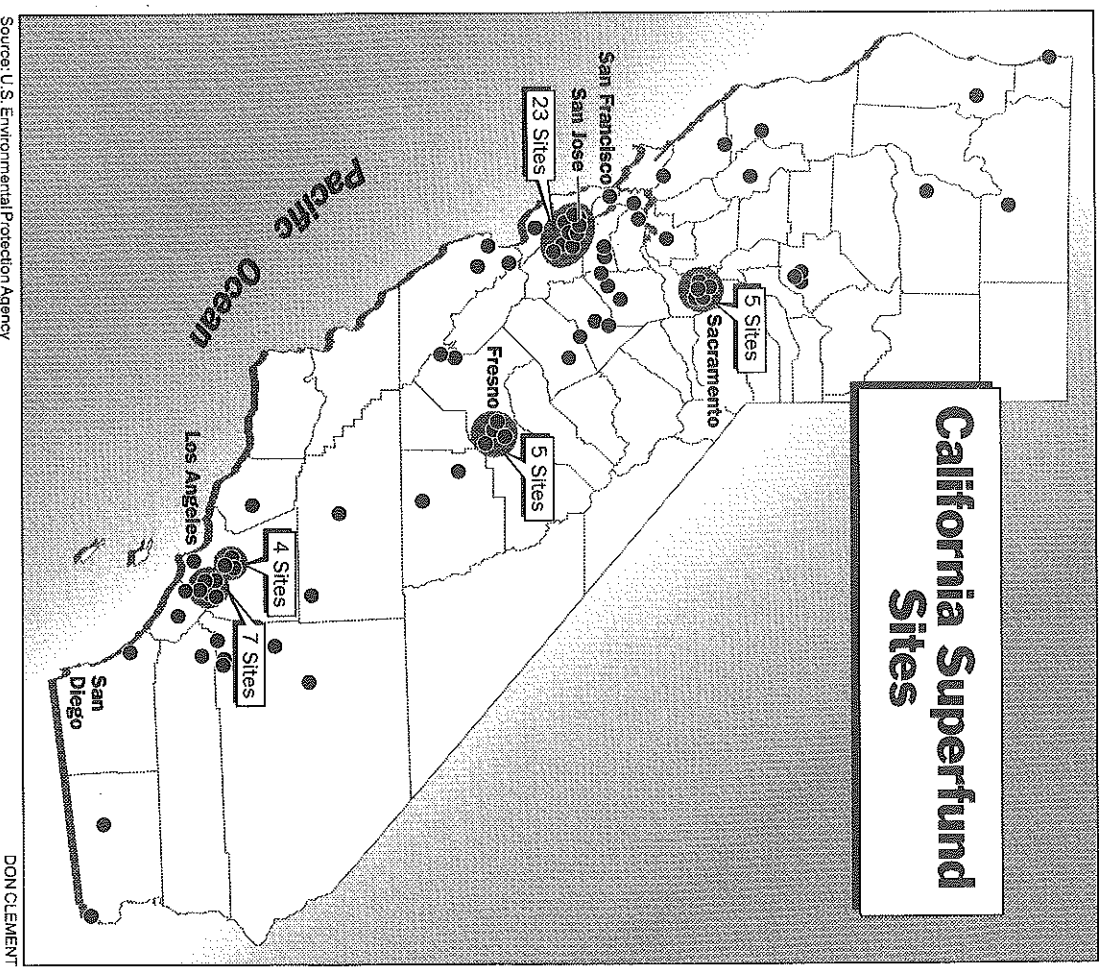
The philosophy underlying Superfund is that those who contributed to the pollution — not the general public — should pay to clean it up.

Generally speaking, Superfund has spawned three types of litigation: suits by the EPA against "potentially responsible parties" or PRPs; suits by PRPs against other PRPs over their proportionate share of liability; and suits by PRPs against their insurers.

The bottom-line issue in all these suits is: Who will pay for pollution cleanup that by Ronan's estimate averages \$50 million per site?

In cases where the polluter cannot be identified or has gone out of business, cleanup is paid by Superfund — a semi-revolving fund

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created by various taxes on business.

In other cases, the EPA may order one or more PRPs to pay for cleanup. Or the agency can clean up the site itself and seek reimbursement from PRPs after the smoke of litigation has cleared.

Superfund is the EPA's largest program, accounting for one-fifth of the agency's budget, according to Lloyd Dixon, an economist with the Rand Corp. Institute for Civil Justice.

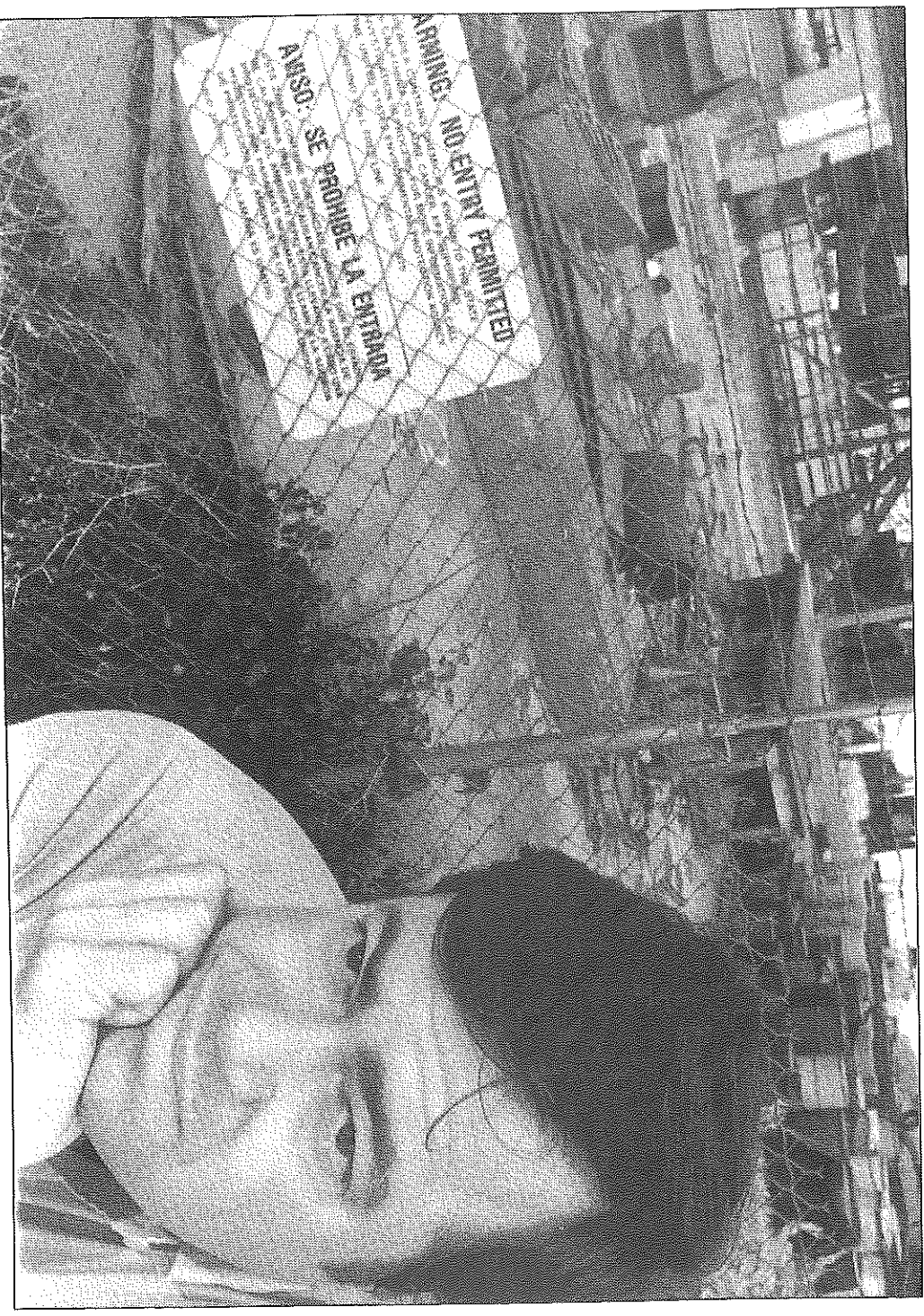
The institute recently released a study that analyzed expenditures by four insurance companies and five Fortune 500 corporations involved in Superfund litigation.

It showed that 88 percent of the money spent by insurers went for "transactional costs," primarily legal fees, as opposed to cleanup. Transactional costs accounted for 21 percent of the money spent by the five corporations identified as PRPs.

Superfund critics focus on the 88 percent figure as evidence that the law is diverting funds away from cleanup.

But according to Doug Wolf, an attorney with the Natural Resources Defense Council: "The data seem to show that transactional costs aren't a significant problem unless you happen to be an insurance company."

Not surprisingly, insurance companies are



**TED SMITH** — "[High-tech businesses] promote themselves as a clean industry, but they manage to leak, dump and spill TOXIC SOI-vents."

leading the charge to reform Superfund. "The liability system is fundamentally wasteful and delays cleanup," said Doug Lo-  
wenstein, spokesman for the American Inter-  
national Group, a New York-based insurance company.  
The American International Group and two other insurance companies propose creation  
of a National Environmental Trust Fund that would pay to clean up pollution — at least with respect to "old sites" — absolving companies  
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