June 13, 1978

TO: Senator Muskie
FROM: Leon
SUBJECT: Hazardous Substances

The discussion of a hazardous substance fee bogged down over the nature of the fee, the collection mechanism, and the amount. In my view, an attempt to establish a fee or to provide regulatory authority to establish a fee could kill the superfund legislation.

Several arguments can be advanced that a fee is not necessary, including 1) a majority of hazardous substances are petro-chemical based; 2) all penalties for discharge of non-removable hazardous substances (in effect, a stipulated damage) are deposited in the fund that is offsetting the cost of clean-up and mitigation; and 3) any fund is arbitrary by definition.

In addition, existing law provides for clean-up and liability for damage to natural resources. The non-recoverable clean-up costs come from the contingency fund. Obviously, damage to natural resources is only paid when established and within the limits of liability of any spiller. I see no reason why the fund should not at least be available for those two aspects of liability covered by existing law. If it is necessary to compromise the issue to reduce the controversy and expedite the bill, I would suggest that third party damages not be included, either within the limits of liability or compensation from the fund. There is, under state law, the existing judicial process to recover such costs. If there is going to be no fee and no participation in the fund, there should be no pre-emption of the availability of state courts and no limitation on that which a third party can collect if the burden of proof under state law can be met. Conversely, the argument for including clean-up costs and damage to natural resources for hazardous substances is that they are a new form of liability imposed by governmental action.
Senator Muskie
June 13, 1978
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On Friday of last week, a district court in western Louisiana suspended all of EPA's hazardous substances regulations on the basis that EPA's hazardous substances regulations and penalties were arbitrary and capricious.

Unlike most EPA regulations, judicial review of the hazardous substance provision is not in the various U.S. courts of appeals, but in the district courts. This means that these national regulations are applicable to all waterways and all facilities and vessels can be litigated in all of the country's district courts with no potential for early consolidation of litigation.

Tom Jorling argues that this is an abuse of process. Whether or not that is the case, the effect of the Louisiana district court judgment is to suspend for at least two years any potential for cleaning up hazardous substances, establishing liability for spills, or recovering either penalties or costs of clean-up. Even if the Justice Department expedites this action, it will be six months before this issue is brought before the Court of Appeals, and 18 months before the Court of Appeals renders a decision. At the same time, other industries are bringing action in other friendly district courts, so that this issue will be litigated several times before it arrives in the Supreme Court four or five years hence. This suggests two results:

1. There are no hazardous substances with which to be concerned, therefore there is no risk associated with including them in this liability scheme; and special interests will have ample time before this litigation is resolved to try to change the Congress' mind by coming up with an effective alternative; or

2. It may be appropriate in the context of the current legislation to try at least to incorporate the existing regulations by reference for the purpose of clean-up and require expedited review by U.S. Court of Appeals for the District of Columbia of the penalty regulations.
MEMORANDUM

TO: Senator Muskie
FROM: Leon

September 23, 1978

Attached is a letter from Tom in which he expresses the urgent need for a modification of the Clean Water Act with respect to hazardous substance legislation. Tom is trying to gain agreement from all parties (the House Committee, the chemical industry, and the Senate Committee) to the changes he outlines in his letter.

I have urged Tom to determine if the Senate Committee staff would be prepared to recommend this change. He has pursued this thoroughly.

I have also told Tom that it is too late in the session to try to abrogate through anything except that on which all parties agree and to which there will be no objection. There is a vehicle -- a minor technically required authorization extension to a clean water research provision which the House has passed and is pending in the Senate. This could be amended by the Senate and returned to the House -- assuming (a) that the amendment is acceptable to you and others; and (b) that the House is willing to accept it.

The basic policy question raised by the amendment relates to the issue of "standard of care". Current hazardous spill policy is intended to create a high standard of care to reduce the number of spills. This is accomplished by creating a penalty scheme theoretically tailored to the potential risk posed by a chemical in the water environment. Unfortunately, after six years this scheme has not been implemented and for the reasons stated Tom does not believe it can be in any reasonable time for any significant number of chemicals.
So the alternative is to adopt an amendment which expedites designation of chemicals for which notice of spill will be required and clean up (including mitigation) will take place or continue litigation with all its uncertainties. Tom opts for the former and I am inclined to agree (if Karl concurs) that this particular "bird in the hand" is worth holding if all parties will agree and no more than a half day of your time will be taken.

If you agree with Tom I would propose to Karl that a hearing be held next week for the case to be presented and to determine whether or not there can be unanimity (including especially Senators McClure and Wallop)... A brief hearing would not commit you to anything and I would advise keeping your public options open until after the hearing -- however if you don't want to pursue Tom's proposal I will tell him now so they can get on with litigation.
MEMORANDUM

TO: Karl
FROM: Leon

SUBJECT: Hazardous Substances Modification

October 3, 1978

I perceive the following problems with Tom's proposal:

1. I don't believe that either the legislative language or the legislative history of Section 311 are as negative as he suggests. At the very least, before any decision is made with respect to his proposal, the staff ought to review thoroughly that legislative history to determine whether or not a case can be made in the courts to uphold the proposed regulations. Such a legislative history has not been done and I would think we would be guilty of sloppy staffwork if we charged ahead with a proposal with the ramifications of this one without having first completed that review.

2. I think that the proposal amounts to complete capitulation to the chemical industry in general and to the barge industry in particular. Other industries could legitimately cry "foul" with respect to their problems with Section 311 if the Congress "fixed" what is basically a barge and direct discharger problem and ignored other fears on Section 311. This is not to say that those other "fears" should be fixed. It is to say that they are probably as legitimate as the others.

3. The effect of Tom's amendment is to limit to the minimum liability ($250,000) spills from barges carrying chemical in bulk. These are potentially the greatest risk and are the areas in which the standard of care was thought most important. At the very least, the proposal should continue those sources under the existing authority to be litigated through the courts.
4. The Committee is going to have to generally review the whole question of chemicals in the environment with respect to discharge, spill and dump; with respect to drinking water, water pollution leaching into the ground water, persistency and with respect to the regulatory capability of both intentional and accidental discharges. This proposal removes one of the important players and perhaps the only current leverage for a broader and better fix, both in terms of the process by which regulations are developed and the terms and manner in which they are reviewed by the courts. Tom's proposal does not "fix" the judicial review problems at all.

5. I think that out of Tom's hearing should come a record which identifies the potential problems of 311, which need to be reviewed next year in the context of the larger and more important question. A public exposition of the use of the judiciary to frustrate the will of Congress is needed. We've got to begin to build that record.

6. I do not believe that Congress can intelligently legislate on this issue at this time and in this session, and anyone who has been on the floor for the past two days should share that feeling.

7. The Superfund legislation isn't going anywhere. As you indicated the other day, it provides a potential vehicle for dealing with this and other questions, at least with respect to chemicals next year.

Note: Barry Meyer's old idea about an Environmental Review Board becomes increasingly attractive with respect to EPA and its problems with the judiciary. If EPA proposed regulations to an Environmental Review Board, the Board could promulgate the regulations; review could be limited to the circuit courts; and that review could be limited to technical errors or exceedence of law. This would probably greatly expedite the process and would remove EPA from being the advocate, the promulgator and the enforcer of regulations.
DRAFT

TO: Karl                      April 19, 1978
FR: Leon

Following up on our conversation, I think it would be useful to have an amendment drafted to the superfund legislation which would direct the Environmental Protection Agency, after consultation with the National Oceanic and Atmospheric Agency, to establish the value of damage to, or the cost of restoration of, natural resources which specification of cost would be subject to reimbursement from the superfund without modification by the administrators of the fund. This might even be an appropriate amendment to Section 311 which includes damage to natural resources or cost of cleanup, thus avoiding a suggestion by the Commerce Committee that it's an area within their jurisdiction.

I also think it would be useful to require the fund to transfer to the Environmental Protection Agency and to NOAA the "reasonable costs" of assessing damage to natural resources. The cost of assessing should be strictly based on the costs actual costs incurred by EPA or NOAA. The damages identified should either be utilized specifically for restoration or should be transferred to the Treasury and miscellaneous receipts as an award to the public for resources foregone.
MEMORANDUM

TO: Senator Edmund S. Muskie

FROM: Karl Braithwaite

SUBJECT: Timetable for Hazardous Substances Legislation

It is important that Subcommittee action, and perhaps full Committee action, occur on the hazardous substances legislation this year. It is not essential that the bill be passed by the Senate this year. If by some stroke of luck that becomes possible, fine.

The reason for urging that Subcommittee activity occur this fall is simply that the spring schedule will get too crowded for us to plan on doing everything next spring. There are two obvious obstacles next spring: your Budget Committee schedule, and the rush of other legislation that will have to move through for the May 15 reporting deadline.

From the beginning of this session, I have felt that the most conducive climate for passing this legislation was going to occur this Congress. After having concluded seven months' work on the legislation, I believe even more that that is the case. We have met precisely the timetable I thought would be necessary to move this legislation along. The hearings have been completed, and the staff can work to get a mark-up document ready for late September, after the budget schedule allows.

Therefore, I would suggest that an informal private discussion occur between the four principal Senators involved: you, and Senators Culver, Stafford and Chafee. With open mark-up sessions, there is little opportunity to informally discuss a new piece of legislation and express comments that might not be as freely made in the mark-up session.

I would suggest that a comfortable format would be to do this over a dutch treat lunch in S143. Each Member would be allowed to bring one staff member along.

The purpose of the session would be to discuss the timing of Subcommittee, full Committee, and Senate floor action, and discuss a few of the key substantive issues to give a modest amount of direction to the staff in preparing documents over the August recess.
Attached is a one-page agenda for such a luncheon, along with a background paper which is going to be supplied to Senators Chafee and Stafford.

The Administrative Assistants of the other Senators all thought that this was an excellent way to proceed. If you feel the same, then I would suggest that we could go ahead with the luncheon tomorrow, Thursday, July 26. If you do not want to do this, then I would suggest that you chat individually with these Members to see how they feel about moving the bill through the joint Subcommittee mark-up process this fall.

May we go ahead with the luncheon? It is clear on all four Senators' schedules.
AGENDA

1. Should we continue to develop legislation on this subject?  OK

2. Should joint Subcommittee markups be scheduled for late September and October?  ( )

3. Are more hearings required to complete the record? Or will staff meetings be adequate?  ( )

4. Should the goal be to complete just markups or floor action by year’s end?  ( )

5. Should oil continue to be treated separately? What if the House passes an oil only bill, or the Senate Commerce Committee reports an oil bill?

6. Should we continue to pursue a comprehensive bill dealing with all releases, strong liability provisions, and new concepts, as in S. 1480?
AGENDA

1. Should we continue to develop legislation on this subject?
2. Should joint Subcommittee markups be scheduled for late September and October?
3. Are more hearings required to complete the record? Or will staff meetings be adequate?
4. Should the goal be to complete just markups or floor action by year's end?
5. Should oil continue to be treated separately? What if the House passes an oil only bill, or the Senate Commerce Committee reports an oil bill?
6. Should we continue to pursue a comprehensive bill dealing with all releases, strong liability provisions, and new concepts, as in S. 1480?
3. Are more hearings required to complete the record? If so, when?
4. Should the goal be to complete just markups or floor action by years?

Substantive Questions
Oil pollution - all bills
Affirmative or negative
Covers?

If there is a fee, on what basis will it be imposed?
Who will create the Trust Fund?
What if the Trust Fund is not sufficient?
What if the Trust Fund is solvent?
How will liability be apportioned?
Is there a single source of liability or multiple sources?
Is liability determined by physical proximity or contribution to the spill?
Is there a joint and several liability?
Does the Trust Fund cover all costs or just cleanup costs?
Can the Trust Fund be used to pay for damages to natural resources?

For what damages would a party be liable: cleanup; third party; economic;
causal and proof (e.g., economic losses, out-of-pocket medical expenses, etc.);
harmful to the environment; and so on?

Will the bill impose liability by creating a federal cause of action?
Will the bill impose liability by imposing joint and several liability?
Will the bill impose joint and several liability on those who contribute to a release?
Will the bill impose liability on purchasers, operators, lessees, agents, or otherwise?

Will the bill impose strict liability for those responsible for releases?
Will the bill impose strict liability by creating a federal cause of action?
Will the bill impose joint and several liability for those responsible for releases?
Will the bill impose joint and several liability for those who contribute to a release?
MEMORANDUM

TO: Senator John C. Culver

FROM: Karl Braithwaite

SUBJECT: Timing of Action on Hazardous Substances Legislation

At the luncheon today with you and Senators Muskie, Stafford and Chafee, I would suggest that the key consideration is the timing of action on this legislation. There may be a tendency to want to set the bill over until next year. I think that would be a mistake for a number of reasons.

If we want to have a bill signed into law by the end of this Congress, I think it will require some Subcommittee action this fall. If all action is held until the spring of next year, the bill will run into the flood of legislation that always comes through the Committee in order to meet the May 15 reporting deadline. That schedule would also encounter problems with the Budget Committee schedule.

Major legislation, and particularly environmental legislation, has always seemed to consume at least two sessions of Congress. It is certainly not necessary for Senate floor action to occur this session. But if all action is held until next year, there is the risk of spending considerable time on the legislation and still not having it be completed by the end of this Congress. Beginning Subcommittee mark-ups would not preclude having some concurrent hearings if the Members deem that to be necessary. I believe that remaining issues can be handled in staff discussions with interested parties, but some Senators may not agree with that.

Whatever your decision regarding this recommendation, I think it would be useful at the meeting to have you lead out in recommending the timetable through the rest of this Congress.
**Timing and Precedural Questions**

**CONTINUE WORK**

Should we continue to develop legislation on this subject?

**HEARINGS**

Are more hearings required to complete the record? If so, who will chair and when?

**MARKUP**

When should markups be scheduled?

**YEAR-END GOAL**

Should the goal be to complete just markups or floor action by year's end? Should House progress be a factor in this decision?

**Substantive Questions**

**COVERAGE**

Will the bill deal with only spills and abandoned dumps or releases generally? Should oil be included?

**LIABILITY**

Will the bill impose strict liability by creating a Federal cause of action or otherwise?

**DAMAGES**

For what damages would a party be liable: cleanup; third party; economic; personal; injury.

**CAUSATION AND PROOF**

Will the bill alter the rules of causation for some classes of injuries (e.g. economic losses or out-of-pocket medical expenses)?

Will the bill alter the methods of proof for damages to natural resources?

**LIABILITY LIMITS AND DEFENSES**

Will the bill establish liability limits for those responsible for releases?

Will the bill impose joint and several liability on those who contribute to a release?

**FINANCIAL RESPONSIBILITY**

Will the bill impose insurance, bonding or other financial responsibility requirements?

**CREATION OF A "SUPERFUND"**

Will the bill establish one or more "superfund" to cleanup releases and compensate their victims?

**GOVERNMENT CONTRIBUTIONS**

Will appropriated monies constitute part or all of the Fund?

Will state or local governments be required to contribute financially?

**FEE SOURCE**

If there is a fee, on what basis will it be imposed?
MEMORANDUM

TO: JCC
FROM: Bill Donovan, Peter Rosenberg
RE: Lunch Meeting on Hazardous Waste

You are scheduled to meet at noon in S. 143 in the Capitol with Senators Muskie, Chafee, and Stafford and four staff members for lunch to discuss action on the hazardous waste response fund legislation.

ISSUE

This is the major piece of environmental legislation in this Congress. What should the schedule be for markups in subcommittee and full committee?

RESOURCE PROTECTION STAFF VIEW

A number of substantive and technical issues remain unresolved. Formal Subcommittee decisions could be made this year on items that prove uncontroversial. The rest should be reviewed over the break and staff should prepare for markups early next year.

TIMING AND PROCEDURAL QUESTIONS

Should further hearings be held this year? Should subcommittee markups be held/completed this year? Should staff draft a bill for subcommittee meetings/markup this year?

SUBSTANTIVE QUESTIONS

1. Coverage
   --Should the bill deal with oil spills as well as hazardous substances?
   --Should medical costs be covered? Economic losses?
   --Should dollar value of coverage be limited?
2. Liability
   --Will the bill impose strict liability?
   --Will the bill limit liability?
   --Should there be a federal cause of action on all damages and cleanup costs?
3. Causation and Proof
   --Will the bill alter rules of causation for some classes of injuries? (medical, economic losses?)
4. Financial Responsibility
   --Will the bill impose insurance, bonding, or other financial responsibility requirements on industry?
5. Financing
   --Should there be a government contribution?
   --Feedstock fees or fees on manufacturers and generators of hazardous end-producers and wastes? Combination of fees? How to collect?