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## "Common Sense Solutions", National Association of Counties

Max S. Baucus

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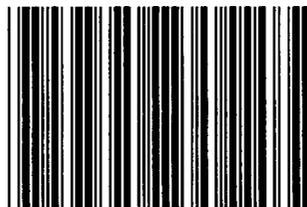
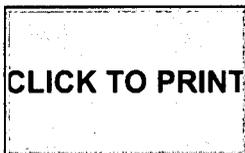
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\_\_\_\_\_ **"Common Sense Solutions"**

\_\_\_\_\_ **10/07/1993**



BAUCUS

# NEWS

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## "Common Sense Solutions"

Remarks of

Senator Max Baucus

to the  
National Association of Counties

October 7, 1993

Good morning. It is a great pleasure to see you all. I always find that some of my most productive discussions are with local officials. You and your colleagues are on the front line trying to carry out the laws that we write. So let me thank you again for the opportunity to share my views with you at this very important time.

I say this is an important time because over the next year we will reauthorize some of our most important laws -- the Clean Water Act, the Safe Drinking Water Act and Superfund. As we begin the journey to improve these laws, I hope to learn more about some of your problems and hear your suggestions. This morning, I would like to share my thoughts on Superfund -- what's working, what's broken, and how do we can fix the law -- and my views on the future direction of other environmental laws.

### The "Polluter Pays" Principle Works

During the 1980's, Superfund and other environmental laws came under attack. "Attack," in fact, is a mild term. What happened was closer to all out war. Environmental protection was labeled anti-growth and blamed for weakened American competitiveness. It was called unfair and even unconstitutional. It spawned a boom in litigation. And all fingers pointed at the polluter pays principle, central to our laws -- that is, pollution carries a price, and polluters should bear their share of it.

Of course, many critics were out to eliminate environmental protection, not to improve it. But some made serious and telling points. Environmental liability, at times, has been unfair and deterred cleanup instead of pollution. But the underlying principle of

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Superfund and other environmental laws -- that polluters must pay to clean up their mess -- is sound.

Too often it's easy to complain about the unfair parts of a law, and to forget what would happen without it. So before we decide to let polluters off the hook, we should step back and see what has happened in countries where polluters are not forced to pay.

- ▶ Mexico's environmental laws are much like ours. But because Mexican enforcement is lax, polluters are not held liable and businesses often feel free to pollute.

Eight of ten maquiladora plants violate Mexican law. Twenty-four million gallons of sewage, and fifty-five million gallons of industrial waste flow out of Juarez into the Rio Grande every day. It may cost \$30 billion just to clean it up. And the health bill is incalculable.

In El Paso, infectious hepatitis alone runs at five times our national rate; and each additional case costs the businesses and taxpayers who pay for the treatment \$9,000. That is why we have been fighting so hard for strong environmental side agreements to the NAFTA.

- ▶ In China, one of three visitors falls ill with a respiratory condition because air pollution is so bad in the cities. The water in the port of Dalian (Dolly-on) is bright blue -- because a factory there dumps water contaminated with cobalt into the harbor, without fear of legal penalties.
- ▶ In Poland, 20% of the tilled land should not be farmed because of dangerous levels of heavy metal and aromatic hydrocarbons. Another 32% of the land suffers from low fertility due to soil contamination.

These are developing countries, you might argue. But here we have only to go back 20 years to see the Cuyahoga River on fire, or smog levels in Los Angeles seven times the health standard. Fortunately, we've come a long way since the days of flaming rivers and soot filled air. And for one reason: our environmental laws make polluters pay.

Whatever the shortcoming of our laws, the underlying "polluter pays" principle has changed our country for the better. It has deterred pollution. It has made people think before they act, and encouraged environmental audits and investments in technology that prevent pollution. It has made businesses behave more responsibly.

### Problems with the Present System

This is not to say we can't do better. Even Senator Muskie, author of the first Clean Water Act, and Governor Florio, author of Superfund, are the first to say we need to make improvements. Superfund in particular needs reform. It should come as no surprise to anyone that Superfund was not the result of a thorough scientific analysis.

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It was born out of crisis to quickly and economically cleanup "Love Canal," "Times Beach," and other toxic dumps.

It hasn't done the job. It is best known for expensive and slow clean-ups -- for corruption -- and for being a cash cow for lawyers. But even Superfund has given companies good reason to stop polluting. It has shifted the focus from controlling pollution at the end of the pipe, the top of the stack, and the bottom of the landfill to preventing it in the first place.

But, all in all, Superfund has not worked. Many blame its failure on its "strict, joint, and several liability" system that courts use to apportion cleanup costs. This legal concept, grounded in centuries-old common law, makes each polluter liable for the entire cost of cleaning up the site.

The reasoning behind this system is sound -- it is hard to determine whether a company contributed 90 percent or 30 percent of the contamination, especially years later. Critics rightly note that this system focuses almost entirely on finding culprits and not reducing pollution, though.

#### What Changes do we Need?

So what do we do? Some suggest that we should eliminate Superfund's liability altogether. Others say we should switch to a "proportional liability" system where the government, or an administrative law judge would determine each polluter's share. In theory, proportional liability makes sense -- a company which contributed 30 percent of the pollution at a given site should pay 30 percent of the cleanup cost.

In practice though, it would be more complicated, more costly, more time-consuming and probably more litigious than now. Polluters would likely look for ways to reduce their share. In the end taxpayers would pay about \$500 million more, according to the EPA.

Despite these problems, there may be way to allocate cleanup costs more fairly without switching to proportional liability. We could give polluters an amnesty period to work out their cost allocations. If they can, great; if not, the government would have the strict, joint and several liability club in the closet.

Another suggestion, one that holds more promise, is to reduce the liability of those who contributed very small amounts to the site. As you all know, the present liability system unfairly entangles smaller parties in litigation. Some 450 cities and thousands of small businesses have been sued by big businesses. Defending these suits costs a lot of money -- money that could otherwise go to schools, police or fire stations -- instead goes to lawyers to both prosecute and defend. If small polluters could either settle on a fair share early, or be taken out of the system altogether, it would make Superfund fairer and reduce litigation.

Clearly we need to fix the parts of the laws that don't work. That means, reforms should focus not on Superfund's liability system, but on its cleanup standards. And two features of Superfund's cleanup standards need fixing -- the preference for permanent solutions, and the use of applicable, relevant and appropriate standards.

These two parts of Superfund lead to cleanups that cost too much, take too long and are less effective than they should be. Let me explain. Sometimes we cleanup industrial sites to levels that are more appropriate for residential neighborhoods. Meanwhile, polluted neighborhoods go untouched.

Sometimes we use cleanup technologies that don't work. Or we insist on silly strategies like pumping out groundwater and treating it before the contamination is plugged. That is like trying to mop up the water slopping out of a bathtub before turning off the faucet.

Making cleanup standards more flexible, and lacing them with a liberal dose of common sense, is the surest way to fix Superfund. Flexibility would enable local communities and the EPA to set priorities, to cleanup the worst problems first. It would give business the predictability they need and may encourage more cleanups and less lawsuits.

Considering land use plans when evaluating risks could also help speed cleanups, cut costs and get communities involved early on. If a polluted site is in a residential neighborhood, the strictest standards should apply. But if a polluted site is zoned for future industrial use, a different standard should be considered.

Being realistic will also help. Many problems took decades to create and they cannot be solved overnight. Clearly, toxic hot spots must be contained and cleaned up in short order. But we can't clean up every last drop of pollution at every site. Often, it simply is not technologically feasible. Even if it is, cleaning up a factory to the same standard as a residential neighborhood may not make sense.

Everyone will be better off if we find common-sense solutions. Not only will we clean up the worst sites faster, we will save money. I know liability is an easy target. But I'm convinced, the real problem is spiraling cleanup costs. Eliminating strict, joint and several liability, or replacing it with proportional liability, will not reduce costs. Instead, it would shift the costs from one person to another. But getting cleanup costs under control would reduce everyone's liability. That's common sense.

#### The Yorktown Refinery

Other laws have similar problems. There was a recent account in the Wall Street Journal of a joint study by EPA and Amoco of Amoco's refinery in Yorktown, Virginia. EPA regulations, written under the Clean Air Act, required the refinery to install a water pollution-prevention system at a cost of \$41 million. The study showed it could have

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achieved better results by spending \$11 million on an air-pollution system -- a common-sense solution the law did not allow.

At Yorktown, the pollutant was toxic benzene vapor. The joint study found that benzene emissions from dirty water -- the medium of pollution covered by the regulation -- was only five percent of what was predicted. Benzene releases at the loading docks where refinery workers pump fuel into barges were extremely high. But the Clean Air Act did not apply to them.

The result? Amoco spent \$41 million dollars on a small fraction of the problem -- when spending \$11 million on a bigger problem at the loading docks would have done more to reduce the amount of benzene entering the environment.

Environmental liability offers many such stories -- cases in which rigid laws and regulations frustrate good science and capable personnel, and force us to concentrate on minor problems -- while ignoring top priorities. We have to learn from them. We need to change the laws of the 1970s, look at the big picture and focus on reducing pollution rather than increasing litigation.

In some cases, that's precisely what we are doing. The new Safe Drinking Water Act that I plan to introduce is an example of where we are trying a multi-media approach to reducing health risks at less cost. Let me explain.

Radon is a contaminant found in drinking water but which also occurs with much greater frequency in indoor air. If we employ traditional, "command and control" approaches, we would require every drinking water system in the country to install the latest technology to reduce radon in water to the lowest possible levels. While we would certainly accomplish our goal of cleaning up the water, we would not be tackling the bigger risk of radon in air.

The program I propose would allow drinking water systems to meet a variable standard for radon, in exchange for their efforts to reduce radon exposure in homes. They could accomplish this through various plans -- to educate the public on the risks of radon in their homes, provide testing and develop mitigation plans. What counts is the total radon exposure reduced, not the amount of exposure through one medium alone. And at less cost.

This proposal will have critics -- plenty of them. Some say it doesn't go far enough in protecting public health. Others will argue that it goes too far to reduce risk that some discount as not a big problem. However, the proposal is made in the spirit of encouraging an important debate on a new method of environmental regulation -- which I believe will encourage greater public health protection at a lower cost. This is the direction in which we must move our country to create both a healthy environment and a strong economy.

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Of course, that's not the only change in the drinking water act that we'll make. We need to prioritize the listing of contaminants and put some rationality in the monitoring of those contaminants. And we need to provide substantial federal financial assistance to communities to help them supply truly safe drinking water.

### Conclusion

The bottom line is that our environmental laws should make problems better, not worse. Too often we lose sight of this goal. In the end, what matters will be the results we get. Not how many lawsuits EPA files, or how much it collects in fines. The true measure of our success is if we return environmentally blighted lands to productive use and continue to deter pollution.

Twenty-five years ago, our predecessors in environmental law committed themselves to leaving America cleaner and healthier than they found it. They succeeded. And our country is better off today because of them. It is our task now, as we enter a new era of environmental legislation, not to tear their work down but to improve upon it.

We have two decades of experience and scientific progress. We have a lot of knowledge. All we need to add is a bit of common sense.