In late August, the calm was shattered as the pieces of bad news suddenly fit together to form a frightening whole. The Kansas Department of Health and Environment (KDHE), acting on behalf of the Environmental Protection Agency (EPA), reported that Wichita was sitting on an underground lake polluted by a variety of commercial and industrial chemicals. The area of contamination—dubbed the Gilbert and Mosley site after a street intersection near its center—was extensive, covering a plot about four miles long and one-and-one-half miles wide. Moreover, the polluted aquifer lay squarely beneath the city's central business district. The 8,000 parcels affected had an assessed value of about $86 million. Major banks, hotels, industrial headquarters, and homes all lay in the six-square-mile area. The worst pollution, consisting of high concentrations of trichloroethene, a chemical degreaser used to clean metal parts before painting, was found at Coleman's headquarters at the north end of the site.

Although KDHE had completed a preliminary study on Gilbert-Mosley the previous November, the August 1990 Listing Site Investigation was the first comprehensive contamination report that City Manager Chris Cherches had seen. According to his office's quick estimates, to clean the aquifer could cost as much as $20 million and take as long as 20 years. KDHE offered just two options in its report recommendations: either the companies responsible for the contamination could band together to clean up the area, or the state would rank the site for National Priority Listing, the first step toward activating Superfund.[1]

Contamination Fallout

The Wichita community did not view Gilbert-Mosley as a serious health risk. Although the contamination was moving south at the rate of about a foot a day, the polluted aquifer lay 15 feet below the surface and was not used for drinking water. "Kansas is not that concerned about water quality," explained William Cather, chair of the Sierra Club's small Kansas chapter. "We are concerned about water quantity."

But the potential economic impact of the contamination had the community up in arms. KDHE's report identified 508 area businesses as Potentially Responsible Parties (PRPs) under Superfund law. If Gilbert-Mosley became a Superfund site, all of these businesses would be potentially liable for cleanup costs regardless of whether they had contributed to the contamination. In the days following release of the Listing Site Investigation, KDHE received a barrage of phone calls from business owners anxious to understand the implications of their PRP status.

Even more threatening, however, was the response of the financial community. Just a few months earlier, in *US vs. Fleet Factors Corp.*, the US 11th Circuit Court in Atlanta had ruled that a lender may incur Superfund liability "by participating in financial management to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."[2]

Simply put, the ruling opened lenders to Superfund liability. Not only that, because of their relatively "deep pockets," financial institutions made ideal targets for Superfund cleanup cost recovery.

In the wake of the dramatic report, Wichita bankers took abrupt action, halting virtually all lending activity in Gilbert-Mosley, the heart of the city. "I don't think you could have hit a banker over the head with a two-by-four and gotten him to make a loan then," declared J.V. Lentell, chairman of the Kansas State Bank and Trust Co. "We already knew property values were plummeting in the downtown area. Downtown was drying up. It was the last thing we needed."

The banks' redlining had an immediate impact on both commercial and residential property owners. David C. Burk, for example, an architect turned developer, had formed an investment company to develop restaurant, retail, apartment, and office space in a few blocks of abandoned brick warehouses near Coleman's headquarters. Although he had drilled 20 test holes without finding contamination before launching his ill-timed venture, all three buildings he had contracts on, as well as those he had options to buy, fell within the contaminated zone. "As soon as Gilbert-Mosley came in, we lost our investors," he reported grimly. Residents were similarly affected, as they found it suddenly impossible to sell their homes. "There were hundreds of tragedies wrapped up here," declared Mayor Bob Knight. "I started getting calls from sons and daughters, trying to make provisions for a parent who was left alone and aged, who were unable to liquidate property."

As city government struggled in the days following the report's release to understand and respond to the crisis, it became clear that the twin threats of uncertain liability and the bank-imposed real estate freeze posed a substantial hazard to the city's tax base. Properties in the area had generated more than $12 million of the $203 million in local property taxes the previous year, but already, the county appraiser's office was receiving requests for reduced valuations. If all Gilbert-Mosley properties lost substantial value, or were frozen for months, or even years, not only would the redevelopment plan die, but the entire core area would be threatened. "When the groundwater problem came along," recalled city attorney Thomas R. Powell, "it looked like it was going to be the death knell."

The City Weighs Its Options

City Manager Cherches, who faced the immediate responsibility for drafting a plan, enlisted a cadre of staffers to study KDHE's two recommended options. In evaluating the possibilities, Cherches stressed that two priorities remained uppermost: to begin cleaning up the aquifer as soon as possible, and to preserve property values. The only way to do that: convince the banks to resume lending in the area.

1) Let Companies Responsible for Contamination Clean Up the Site

The first impulse on the part of some of Cherches's staff was to encourage Coleman and other polluters to take charge of the Gilbert-Mosley site. "In the very early stages, it was viewed as a business problem," recalled Mark Glaser, special assistant to the manager for management research. "The businesses contributed to the contamination. The businesses are basically responsible for cleaning up the contamination." Added city attorney Powell, "Our hope was that somehow Coleman would solve the problem."

But history argued strongly against this choice. Gilbert-Mosley was not the city's first experience with contaminated sites. Three years earlier, groundwater contamination had been discovered at a smaller site about two miles north of Gilbert-Mosley, known as 29th and Mead. There, also, the banks had stopped lending, and the county appraiser had lowered property values 40 percent. A group of about 100 potentially responsible parties at the site, including both the city and Coleman, had formed a PRP group to strike an agreement on how to pay for the initial EPA-required Remedial Investigation and Feasibility Study (RI/FS), which would identify sources and types of contamination along with remediation methods. But group negotiations had become divisive, then stalled, and the state had already placed the site on the National Priorities List (NPL). If the group fared no better in determining ultimate cleanup liability, it would face full implementation of Superfund and many years of real estate paralysis.

Given this experience, it seemed highly unlikely that the more than 500 PRPs at Gilbert-Mosley would be able to reach a timely agreement on liability. In addition, it was questionable whether Coleman would cooperate. Although the company had been a lead party at 29th and Mead, it had not pushed for a speedy resolution. Moreover, while Coleman acknowledged that it had found some pollution at its Gilbert-Mosley site, it was already discounting its responsibility for the overall contamination. Remarked city attorney Powell, "When they said they were going to pay for what they were responsible for, I didn't know if we would ever *agree* on what they were responsible for." If a PRP group at Gilbert-Mosley fared no better than the one at 29th and Mead, there would be no quick cleanup in sight, and no incentive for banks to resume lending until the threat of contamination had been removed.

2) Rank the Site for Possible Superfund Status

As unproductive as forming a PRP group might appear, Cherches and his staff soon concluded that KDHE's second option—to allow the site to be ranked for Superfund—was far less appealing.

If EPA became directly involved, Cherches learned, the cost of cleaning up Gilbert-Mosley would increase dramatically. The agency typically hired an oversight contractor, for example, to watch over the work of the regular contractor—a step that automatically added up to 40 percent to the cleanup bill. In addition, possible polluters faced the prospect of paying for the administrative oversight of EPA itself; the Superfund law called on EPA staffers to charge their time to the private firms. Moreover, EPA was allowed to overcharge as a means of replenishing its cleanup fund and punishing noncomplying businesses.

The threat of prolonged multi-party litigation was an even bigger deterrent to reliance on Superfund. Because any business in a contaminated area could be held responsible for cleanup costs, regardless of its contribution, lawyers played a major part in any Superfund resolution, as polluters sought to spread the blame, and faultless property owners struggled to avoid liability. In fact, Superfund law spread potential liability to such a