

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

September 9, 2015

To: Members of the Subcommittee on Environment and the Economy

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on Federal Facility Cleanups under Superfund

On Friday, September 11, 2015, at 9:30 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Environment and the Economy will hold an oversight hearing on Superfund cleanups at federal facilities. The Environmental Protection Agency (EPA), Department of Defense, Department of Energy (DOE) and US Government Accountability Office (GAO) will testify on one panel. Additional written testimony is expected from the Department of the Interior. The Subcommittee will reconvene on Wednesday, September 16th at 4:00 p.m. in room 2123 of the Rayburn House Office Building to hear from additional witnesses yet to be announced.

Testimony is expected to focus on requirements for federal facility cleanups under Superfund, ongoing efforts by various agencies to identify and remediate contaminated sites, and resources available for cleanup efforts. The treatment of federal facilities under Superfund, as well as the general cleanup process under Superfund is described below.

I. BACKGROUND ON CONTAMINATED SITES AND SUPERFUND CLEANUPS

A. The Risks of Contaminated Sites

Contaminated sites across the country pose significant risks to human health and the environment. According to EPA estimates, one in four Americans live within three miles of a hazardous waste site.¹ These sites pose immediate and long term risks to human health and the

¹ U.S. Government Accountability Office, *Superfund: EPA Should Take Steps to Improve Its Management of Alternatives to Placing Sites on the National Priorities List* (Apr. 2013) (GAO-13-252).

environment, from exposure to contaminants including asbestos, dioxin, lead, mercury, and radiation.²

Contaminated sites also impose economic harms. One study of the real estate market in Uniontown, Ohio found that the value of properties located near a local Superfund site fell between 5-15 percent as public awareness of contamination concerns grew.³ Another study showed that property values suffer more when Superfund site cleanup is delayed for a decade or more.⁴

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly referred to as Superfund, was passed in 1980 to coordinate a federal response to clean up the most contaminated sites.⁵ In 1986, the statute was amended to apply to federal facilities and to include the requirements of the Emergency Planning and Community Right to Know Act (EPCRA).⁶

B. How Superfund Works

Superfund authorizes cleanups of contaminated sites and establishes a liability scheme to ensure that responsible parties pay for their cleanup. Cleanup and enforcement authority under Superfund covers actual or threatened releases of hazardous substances (excluding petroleum) into the environment.⁷

The 1980 Act established the Hazardous Substance Superfund Trust Fund to pay for the cleanup of sites where the responsible parties cannot be found or cannot pay. Costs for cleanup are funded through taxes on polluting industries. The taxing authority expired on December 31, 1995 and has not been renewed despite repeated introduction of legislation to do so. Instead, as the trust fund has been exhausted, it has been funded by appropriations from the treasury (with

² U.S. Environmental Protection Agency, *CERCLA: Contaminants* (online at www.epa.gov/superfund/health/contaminants/index.htm).

³ Alan K. Reichert, *Impact of a Toxic Waste Superfund Site on Property Values*, *The Appraisal Journal* (Oct. 1997).

⁴ William Schulze et al, *Stigma: The Psychology and Economics of Superfund* (July 2004).

⁵ P.L. 96-510; *See also*, Congressional Research Service, *Comprehensive Environmental Response, Compensation, and Liability Act: A summary of Superfund Cleanup Authorities and Related provisions of the Act* (Jun. 14, 2012) (R41039).

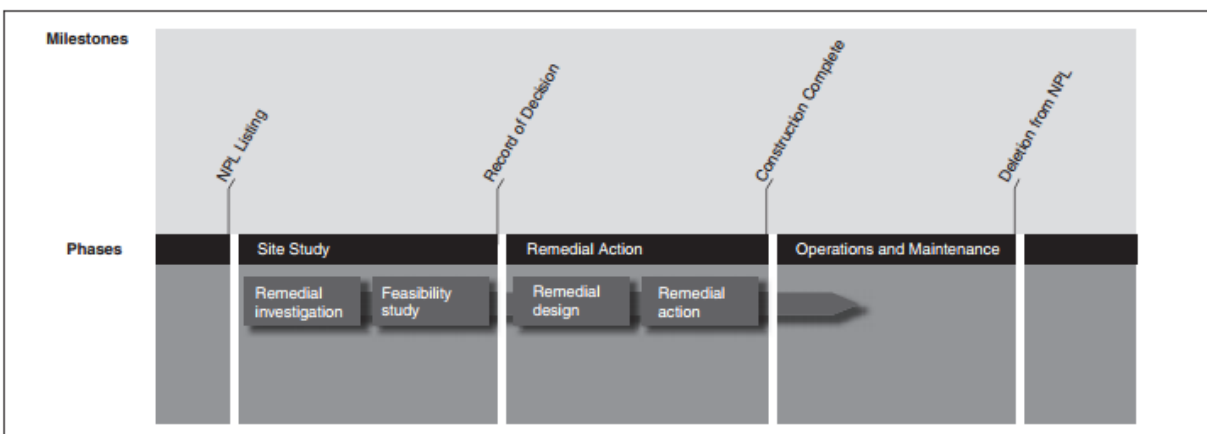
⁶ Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499.

⁷ Comprehensive Environmental Response, Liability, and Compensation Act §101, 42 U.S.C. 9601.

some contribution of other funds (i.e., cost-recoveries from responsible parties, enforcement actions, and interest on the trust fund balance).⁸

In order to prioritize cleanups at sites without viable responsible parties, such sites are evaluated and given a score under the Hazard Ranking System based on the severity of contamination and the potential threat to human health or the environment.⁹ The most contaminated sites are proposed for listing on a National Priorities List (NPL), where they receive priority access to the limited federal clean up funds and resources.¹⁰ In some cases, sites with hazard ranking scores high enough to qualify for NPL listing are not listed, because of concerns or desires of the state in which the site is located.¹¹

The clean-up process for NPL sites is illustrated below:



Source: GAO analysis based upon EPA data.

Non-NPL sites can be cleaned up under state authorities, by private parties who may then seek to recover their cleanup costs pursuant to CERCLA, or under a newer Superfund Alternatives (SA) approach.¹² In order for cleanup costs to be recoverable in court from

⁸ Congressional Research Service, *Comprehensive Environmental Response, Compensation, and Liability Act: A summary of Superfund Cleanup Authorities and Related provisions of the Act* (Jun. 14, 2012) (R41039).

⁹ U.S. Environmental Protection Agency, *Introduction to the Hazard Ranking System* (online at www.epa.gov/superfund/programs/npl_hrs/hrsint.htm).

¹⁰ Comprehensive Environmental Response, Liability, and Compensation Act §105; 42 U.S.C. 9605.

¹¹ U.S. Government Accountability Office, *Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements* (Jul. 2009) (GAO-09-656).

¹² U.S. Government Accountability Office, *Superfund: EPA Should Take Steps to Improve Its Management of Alternatives to Placing Sites on the National Priorities List* (Apr. 2013) (GAO-13-252). The SA approach has been used where responsible parties agree to pay for cleanup in advance in order to avoid potential stigma associated with an NPL listing.

responsible parties, they must be carried out in a manner consistent with the National Contingency Plan.¹³

In addition to remedial actions, CERCLA authorized short term “removal actions” to address imminent and substantial dangers from actual or threatened hazardous substance releases.¹⁴ Removal actions funded through the Superfund trust fund must be completed in 12 months or less and can cost no more than \$2 million (with some exceptions).¹⁵ Removal actions can be taken at non-NPL sites and can be undertaken by states if they have sufficient resources. These removal actions are one mechanism by which states can prevent the listing of a site on the NPL (because removal actions can lower the Hazard Ranking System score below the threshold for NPL listing).¹⁶

C. Federal Facilities

Since adoption of Superfund in 1980, federal agencies have been subject to liability requirements and requirements to notify EPA of any known, suspected, or likely releases of pollution.¹⁷ The applicability of cleanup requirements to federal facilities was clarified and strengthened in 1986. Under those amendments, federal facilities are explicitly subject to the same liability and cleanup requirements as private facilities and are subject to some additional requirements, beyond those applicable to private sites. Specifically, federal agencies are required to complete all necessary cleanup, or enter into covenants to perform future cleanup, before transferring property.¹⁸

Also in 1986, amendments to the Resource Conservation and Recovery Act (RCRA) required federal agencies to prepare and maintain an inventory of their contaminated sites. The majority of federal superfund sites are owned or operated by the Department of Defense but the Department of Energy, the Department of the Interior, NASA, and USDA also own superfund sites.

¹³ Comprehensive Environmental Response, Liability, and Compensation Act §105; 42 U.S.C. 9605.

¹⁴ *Id.* at §104(a)(2); 42 U.S.C. 9604(a)(2).

¹⁵ U.S. Government Accountability Office, *Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements* (Jul. 2009) (GAO-09-656).

¹⁶ *Id.*

¹⁷ U.S. Government Accountability Office, *Hazardous Waste: Agencies Should Take Steps to Improve Information on USDA’s and Interiors Potentially Contaminated Sites*, at 4 (Jan. 16, 2015) (GAO-15-35).

¹⁸ Comprehensive Environmental Response, Compensation, and Liability Act §120(h); Congressional Research Service, Congressional Research Service, *Comprehensive Environmental Response, Compensation, and Liability Act: A summary of Superfund Cleanup Authorities and Related provisions of the Act*, at 30 (Jun. 14, 2012) (R41039).

Some federal facilities are listed on the NPL before cleanup based on their hazard scores, but not all. The cleanup of federal facilities is not funded with Superfund Trust Fund monies, whether they are listed on the NPL or not, but with other federal monies appropriated to the agencies responsible for administering the facilities. However, EPA and the states remain responsible for overseeing and enforcing the implementation of CERCLA at federal facilities to ensure that applicable cleanup requirements are met.¹⁹

D. State Participation

The states and the public participate in federal cleanup decisions at NPL sites, and have had greater opportunities for participation since adoption of the 1986 amendments.²⁰ Section 121 of CERCLA, added in 1986, requires EPA to promulgate regulations affording states “substantial and meaningful involvement in the initiation, development, and selection of remedial actions.”²¹ These requirements do not apply to federal facility cleanups of non-NPL sites, which are not funded through the trust fund – in those cases the rights of states to challenge remedial decisions are limited to decisions that are not supported by substantial evidence.²²

Opportunities for state participation were increased again through a series of policy reforms adopted by the EPA during the Clinton Administration, known as the Superfund administrative reforms.²³ One policy adopted as part of those reforms required EPA to seek state concurrence from the governor of the state in which a site is located before listing the site on the NPL, with some exceptions, as when the state is the responsible party.²⁴ Under that policy, no site has been added to the NPL over state objection.

E. Accomplishments of the Superfund Program

Currently, there are 1320 sites on the NPL, 157 of which are federal facilities. An additional 51 sites have been proposed for listing, including four federal facilities. Of those, construction of cleanup remedies has been completed at 1173 sites including 76 federal facilities. Since the list was started, 389 sites including 17 federal facilities have been deleted because

¹⁹ Congressional Research Service, *Comprehensive Environmental Response, Compensation, and Liability Act: A summary of Superfund Cleanup Authorities and Related provisions of the Act*, at 5 (Jun. 14, 2012) (R41039).

²⁰ *Id.*

²¹ Comprehensive Environmental Response, Compensation, and Liability Act §121, 42 U.S.C. §9621; Congressional Research Service, Congressional Research Service, *Comprehensive Environmental Response, Compensation, and Liability Act: A summary of Superfund Cleanup Authorities and Related provisions of the Act*, at 11 (Jun. 14, 2012) (R41039).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

cleanups were completed and 62 sites, including 19 federal facilities have been partially deleted.²⁵

II. WITNESSES

The following witnesses have been invited to testify:

John Conger

Performing the Duties of the Assistant Secretary of Defense for Energy, Installations, and Environment
U.S. Department of Defense

Alfredo Gomez

Director, Natural Resources and Environment
U.S. Government Accountability Office

Mathy Stanislaus

Assistant Administrator for the Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency

Mark Whitney

Principal Deputy Assistant Secretary for Environmental Management
U.S. Department of Energy

²⁵ U.S. Environmental Protection Agency, *National Priorities List* (Aug. 28, 2015) (online at www.epa.gov/superfund/sites/npl/).