

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

**January 16, 2018**

**To: Subcommittee on Environment Democratic Members and Staff**

**Fr: Committee on Energy and Commerce Democratic Staff**

**Re: Hearing on “Modernizing the Superfund Cleanup Program”**

On **Thursday, January 18, 2018, at 10:15 a.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee will hold a hearing titled “Modernizing the Superfund Cleanup Program.” The two-panel hearing will include testimony from the Environmental Protection Agency (EPA) and stakeholders.

**I. BACKGROUND ON CONTAMINATED SITES AND SUPERFUND CLEANUPS**

**A. The Risks of Contaminated Sites**

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly referred to as Superfund, to coordinate a federal response to clean up the most contaminated sites and ensure that polluters pay for cleanups. 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).

Contaminated sites across the country pose significant risks to human health and the environment from exposure to contaminants including asbestos, dioxin, lead, mercury, and radiation.<sup>1</sup> In FY2013, the most recent year for which an estimate is available, some 53 million people, or 17 percent of the U.S. population, lived within three miles of a Superfund site. Of

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<sup>1</sup> Environmental Protection Agency, Contaminants at Superfund Sites ([www.epa.gov/superfund/contaminants-superfund-sites](http://www.epa.gov/superfund/contaminants-superfund-sites)) (accessed Jan. 16, 2018).

those people, over 18 million were either under the age of 18 or over the age of 65.<sup>2</sup> These sites pose immediate and long-term risks to human health and the environment.

Contaminated sites also have negative economic consequences. In Uniontown, Ohio property values near a local Superfund site fell between five and 15 percent as public awareness of contamination concerns grew.<sup>3</sup> In addition, property values suffer more when Superfund site cleanup is delayed for a decade or longer.<sup>4</sup>

## **B. How Superfund Works**

Superfund authorizes cleanups of contaminated sites and establishes a liability scheme to ensure that cleanups can move forward expeditiously and then be reimbursed by responsible parties. CERCLA's cleanup and enforcement authority covers actual or threatened releases of hazardous substances (excluding petroleum) into the environment.<sup>5</sup>

In order to prioritize cleanups at contaminated sites such sites are evaluated and given a score under the Hazard Ranking System (HRS) based upon the severity of contamination and the potential threat to human health or the environment.<sup>6</sup> The most contaminated sites are proposed for listing on a National Priorities List (NPL), where they receive priority access to the limited federal cleanup funds and resources.<sup>7</sup> 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.<sup>8</sup>

Currently, there are 1341 sites on the NPL, and an additional 49 sites have been proposed for listing.<sup>9</sup> Of those, construction of cleanup remedies has been completed at 1184 sites. Since

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<sup>2</sup> Environmental Protection Agency, *Population Surrounding 1,388 Superfund Remedial Sites* (Sept. 2015) ([www.epa.gov/sites/production/files/2015-09/documents/webpopulationrsuperfundsites9.28.15.pdf](http://www.epa.gov/sites/production/files/2015-09/documents/webpopulationrsuperfundsites9.28.15.pdf)).

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

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

<sup>5</sup> Comprehensive Environmental Response, Compensation, and Liability Act §101, 42 U.S.C. § 9601.

<sup>6</sup> *Id.*

<sup>7</sup> Comprehensive Environmental Response, Compensation, and Liability Act §105; 42 U.S.C. § 9605.

<sup>8</sup> Government Accountability Office, *Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements*, at 13 (Jul. 2009) (GAO-09-656).

<sup>9</sup> Four additional sites are expected to be added to the NPL in the near future, but that listing has not yet been published in the Federal Register.

the list was started, 395 sites have been deleted because cleanups were completed. Sixty-five sites have been partially deleted.<sup>10</sup>

Non-NPL sites can be cleaned up under state authorities, by private parties who then seek to recover their cleanup costs pursuant to CERCLA, or under a newer Superfund Alternatives (SA) approach.<sup>11</sup> In order for clean-up costs to be recoverable in court from responsible parties, they must be carried out in a manner consistent with the National Contingency Plan.<sup>12</sup>

In addition to remedial actions, CERCLA authorized short term “removal actions” to address imminent and substantial dangers from actual or threatened hazardous substance releases.<sup>13</sup> 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).<sup>14</sup> 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, as removal actions can lower the HRS score of the NPL to below the listing threshold.<sup>15</sup>

## **II. FUNDING FOR SUPERFUND CLEANUPS**

### **A. Hazardous Substance Superfund Trust Fund**

CERCLA is based on the “polluter pays” principle, intended to ensure that responsible parties pay for the cleanup of contaminated sites through superfund taxes rather than having taxpayers shoulder the expense. The 1980 Act established the Hazardous Substance Superfund Trust Fund to pay for the cleanup of orphan sites, approximately 30 percent of sites on the NPL,<sup>16</sup> where the responsible parties cannot be found or cannot pay, funded through taxes on polluting industries.

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<sup>10</sup> Environmental Protection Agency, *National Priorities List* (Jan. 8, 2018) ([www.epa.gov/superfund/sites/npl/](http://www.epa.gov/superfund/sites/npl/)).

<sup>11</sup> Government Accountability Office, *Superfund: EPA Should Take Steps to Improve Its Management of Alternatives to Placing Sites on the National Priorities List*, at 52 (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.

<sup>12</sup> Comprehensive Environmental Response, Compensation, and Liability Act §105; 42 U.S.C. § 9605.

<sup>13</sup> *Id.* at §104(a)(2); 42 U.S.C. § 9604(a)(2).

<sup>14</sup> Government Accountability Office, *Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements*, at 14-15 (Jul. 2009) (GAO-09-656).

<sup>15</sup> *Id.*

<sup>16</sup> Environmental Protection Agency, Superfund Special Accounts ([www.epa.gov/enforcement/superfund-special-accounts](http://www.epa.gov/enforcement/superfund-special-accounts)) (accessed Jan. 16, 2018).

The taxing authority expired on December 31, 1995, and Congress has not renewed it despite repeated introduction of legislation to do so.<sup>17</sup> Instead, as the trust fund has been exhausted, it has been funded mainly by appropriations from the Treasury.<sup>18</sup> However, appropriations to the Superfund program have generally declined from fiscal year 1999 through 2016 by about 45 percent.<sup>19</sup> The 2018 EPA budget would decrease the Superfund program budget by an additional 30 percent.<sup>20</sup>

The decline in funding has delayed the start of new remedial action projects.<sup>21</sup> An analysis by the Government Accountability Office (GAO) found that only 27 percent of new remedial action projects were funded in fiscal year 2013 compared to 100 percent in 1999.<sup>22</sup> Under President George W. Bush an average of 18 sites annually were delisted, and when President Barack Obama was in office an average of ten were delisted per year.<sup>23</sup> Despite declining funds and a slowdown of completed remedial actions, Superfund sites continue to be added to the NPL.

Funding for Superfund cleanups comes from congressional appropriations, cost-recoveries from responsible parties, enforcement actions, voluntary settlement agreements, and interest on the trust fund balance. In 2016, EPA obtained approximately one billion in commitments from Potentially Responsible Parties (PRPs) for Superfund site cleanups and billed

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<sup>17</sup> H.R. 2783, 114<sup>th</sup> Cong. (2015).

<sup>18</sup> Congressional Research Service, *Comprehensive Environmental Response, Compensation, and Liability Act: A summary of Superfund Cleanup Authorities and Related provisions of the Act*, at 22 (Jun. 14, 2012) (R41039).

<sup>19</sup> Government Accountability Office, *Trends in Federal Funding and Cleanup of EPA's Nonfederal National Priorities List Sites*, at 11 (Oct. 2015) (GAO-15-812) ([www.gao.gov/assets/680/672734.pdf](http://www.gao.gov/assets/680/672734.pdf)); Environmental Protection Agency, *Fiscal Year 2017 Budget in Brief*, at 9 (Feb. 9, 2016) ([www.epa.gov/sites/production/files/2016-02/documents/fy17-budget-in-brief.pdf](http://www.epa.gov/sites/production/files/2016-02/documents/fy17-budget-in-brief.pdf)).

<sup>20</sup> Environmental Protection Agency, *FY 2018 EPA budget in Brief* (May 2017) ([www.epa.gov/sites/production/files/2017-05/documents/fy-2018-budget-in-brief.pdf](http://www.epa.gov/sites/production/files/2017-05/documents/fy-2018-budget-in-brief.pdf)).

<sup>21</sup> Senate Committee on Environment & Public Works, Testimony of Lisa Jackson, Administrator, Environmental Protection Agency, *Hearing on the Environmental Protection Agency Fiscal Year 2013 Budget*, 112<sup>th</sup> Cong. (Mar. 22, 2012); Government Accountability Office, *Trends in Federal Funding and Cleanup of EPA's Nonfederal National Priorities List Sites*, at 11 (Oct. 2015) (GAO-15-812) ([www.gao.gov/assets/680/672734.pdf](http://www.gao.gov/assets/680/672734.pdf)).

<sup>22</sup> Government Accountability Office, *Trends in Federal Funding and Cleanup of EPA's Nonfederal National Priorities List Sites*, at 18 (Oct. 2015) (GAO-15-812) ([www.gao.gov/assets/680/672734.pdf](http://www.gao.gov/assets/680/672734.pdf)).

<sup>23</sup> *Superfund Work Touted by Trump EPA Was Completed Years Ago*, The Washington Post (Jan. 5, 2018) ([www.washingtonpost.com/politics/superfund-work-touted-by-trump-epa-was-completed-years-ago/2018/01/05/88849984-f230-11e7-95e3-eff284e71c8d\\_story.html?utm\\_term=.9cab6fae6104](http://www.washingtonpost.com/politics/superfund-work-touted-by-trump-epa-was-completed-years-ago/2018/01/05/88849984-f230-11e7-95e3-eff284e71c8d_story.html?utm_term=.9cab6fae6104)).

PRP approximately \$91.8 million in oversight costs associated with Superfund site cleanups.<sup>24</sup> In the past 35 years, PRPs have paid \$35 billion for Superfund cleanups.<sup>25</sup> These monies were secured primarily through the judicial actions of the Justice Department's Environment and Natural Resources Division (ENRD).<sup>26</sup>

EPA provides ENRD with approximately 27 percent of its budget to cover the cost of 115 full time employees as reimbursement for ENRD's Superfund expenditures.<sup>27</sup> The EPA's 2018 proposed budget zeroed out reimbursements for ENRD despite the financial returns to Superfund gained through this investment.<sup>28</sup> That cut was not reflected in the budget proposal for the Department of Justice. EPA also proposed cutting its own enforcement activities by more than 40 million.<sup>29</sup>

## **B. Financial Assurance**

Without the Superfund tax, one means for ensuring the polluter pays for cleanups is through financial assurance requirements. These requirements ensure a financial guarantee, before waste is generated, to ensure that a responsible party will be able to cover cleanup costs. CERCLA required EPA to identify categories of facilities that should be required to provide financial assurance and then to establish such requirements.<sup>30</sup> EPA missed the statutory deadlines to identify categories of facilities, by decades, but in 2009, identified hardrock mining as the first industry. The agency subsequently identified three additional industries: the chemical manufacturing; petroleum, and coal products manufacturing; and the electric power generation, transmission, and distribution industries.<sup>31</sup> These industries were chosen because of the

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<sup>24</sup> Environmental Protection Agency, Superfund Remedial Annual Accomplishments, Fiscal Year 2016 Superfund Remedial Program Accomplishments Report ([www.epa.gov/superfund/superfund-remedial-annual-accomplishments](http://www.epa.gov/superfund/superfund-remedial-annual-accomplishments)) (accessed Jan. 16, 2017).

<sup>25</sup> *Experts Vexed by Pruitt Bid to Cut DOJ's Superfund Pay*, Energy and Environment News – Greenwire (Sept. 28, 2017) ([www.eenews.net/stories/1060062041](http://www.eenews.net/stories/1060062041)).

<sup>26</sup> Environmental Protection Agency Web Archive, *EPA recovers over \$10 million for past costs at the Gilt Edge Mine Superfund site in South Dakota* (Apr. 15, 2016) ([archive.epa.gov/epa/newsreleases/epa-recovers-over-10-million-past-costs-gilt-edge-mine-superfund-site-south-dakota.html](http://archive.epa.gov/epa/newsreleases/epa-recovers-over-10-million-past-costs-gilt-edge-mine-superfund-site-south-dakota.html)).

<sup>27</sup> *E.P.A. Threatens to Stop Funding Justice Dept. Environmental Work*, The New York Times (Sept. 27, 2017) ([www.nytimes.com/2017/09/27/us/politics/scott-pruitt-epa-justice-department-funding.html](http://www.nytimes.com/2017/09/27/us/politics/scott-pruitt-epa-justice-department-funding.html)).

<sup>28</sup> Environmental Protection Agency, *Fiscal Year 2017 Justification of Appropriation Estimates for the Committee on Appropriations* ([www.epa.gov/sites/production/files/2017-05/documents/fy-2018-congressional-justification.pdf](http://www.epa.gov/sites/production/files/2017-05/documents/fy-2018-congressional-justification.pdf)).

<sup>29</sup> *Id.*

<sup>30</sup> Environmental Protection Agency, *Superfund Financial Responsibility* (Jun. 2016) ([www.epa.gov/superfund/superfund-financial-responsibility](http://www.epa.gov/superfund/superfund-financial-responsibility)).

<sup>31</sup> *Id.*

significant cleanup costs they have imposed on taxpayers.<sup>32</sup>

In the proposed rule the EPA analysis determined that financial assurance requirements for hardrock mining would save between \$511 and \$527 million over 34 years, and for 80 percent of the companies included in the analysis, the financial impact would be below 1 percent of their operating cash flow.<sup>33</sup> The rule also had the potential to avoid creation of new contaminated sites by incentivizing prevention and safeguard activities.

Despite this, in December 2017, EPA announced that it will not issue the regulation and will allow these industries to continue operating without establishing their ability to pay to clean up the contamination they cause.<sup>34</sup>

### III. SUPERFUND IMPLEMENTATION UNDER ADMINISTRATOR PRUITT

In May of 2017, Administrator Pruitt announced the creation of a taskforce, chaired by senior advisor Albert Kelly, to recommend reforms to EPA's Superfund implementation.<sup>35</sup> Although the taskforce has supposedly generated no records and was presented with no materials, it issued 42 recommendations for reforms to the program, all of which were apparently immediately implemented.<sup>36</sup> The recommendations are organized around five goals:

- Expediting cleanup and remediation;
- Re-invigorating responsible party cleanup and reuse;
- Encouraging private investment;
- Promoting redevelopment and community revitalization; and

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<sup>32</sup> Government Accountability Office, *Abandoned Mines - Information on the Number of Hardrock Mines, Cost of Cleanup, and Value of Financial Assurances* (Jul. 14, 2011) (GAO-11-834T) ([www.gao.gov/assets/130/126667.pdf](http://www.gao.gov/assets/130/126667.pdf)).

<sup>33</sup> Environmental Protection Agency, *Financial Responsibility Requirements under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry*, 82 Fed. Reg. 3388 (Jan. 11, 2017) (proposed rule).

<sup>34</sup> Environmental Protection Agency, *EPA Determines Risks from Hardrock Mining Industry Minimal and No Need for Additional Federal Requirements* (Dec. 1, 2017) ([www.epa.gov/newsreleases/epa-determines-risks-hardrock-mining-industry-minimal-and-no-need-additional-federal](http://www.epa.gov/newsreleases/epa-determines-risks-hardrock-mining-industry-minimal-and-no-need-additional-federal)).

<sup>35</sup> Environmental Protection Agency, *EPA Announces Superfund Task Force Recommendations* (Jul. 25, 2017) ([www.epa.gov/newsreleases/epa-announces-superfund-task-force-recommendations](http://www.epa.gov/newsreleases/epa-announces-superfund-task-force-recommendations)).

<sup>36</sup> *EPA Says Superfund Task Force Left behind Little Paper Trail*, Associated Press (Dec. 21, 2017) ([www.apnews.com/64759348d0da4c7b8ebff04570d26f71/EPA-says-Superfund-Task-Force-left-behind-little-paper-trail](http://www.apnews.com/64759348d0da4c7b8ebff04570d26f71/EPA-says-Superfund-Task-Force-left-behind-little-paper-trail)); Environmental Protection Agency, *Superfund Task Force Recommendations* (Jul. 25, 2017) ([www.epa.gov/sites/production/files/2017-07/documents/superfund\\_task\\_force\\_report.pdf](http://www.epa.gov/sites/production/files/2017-07/documents/superfund_task_force_report.pdf)).

- Engaging partners and stakeholders.<sup>37</sup>

Although it is the mission of EPA, it is worth noting that protection of public health and the environment is not included in these goals. It is also worth noting that while one of the stated goals is to engage stakeholders, stakeholders were not consulted in the formulation of these recommendations. No public meetings were held, and public comment was not taken.

One of the recommendations was to create a “top ten list” for the Administrator’s weekly attention. On December 8<sup>th</sup>, EPA published a list of 21 sites that would be targeted for “immediate, intense action,” ostensibly in response to this recommendation.<sup>38</sup> Again, despite the stated goal of engaging stakeholders, the list was published without any public engagement. It is not clear what factors were used to choose sites for the “top ten list”, or what the consequences of being included in the list will be. It is clear that no additional funding will be made available for these sites for the foreseeable future.<sup>39</sup>

#### **IV. WITNESSES**

The following witnesses have been invited to testify:

##### **Panel I**

##### **Barry Breen**

Principal Deputy Assistant Administrator, Office of Land and Emergency Management  
Environmental Protection Agency

##### **Panel II**

##### **Steve Cobb**

Chief, Land Division  
Alabama Department of Environmental Management  
*On behalf of the Association of State and Territorial Solid Waste Management Officials*

##### **Debbie Mans**

Executive Director and Baykeeper  
NY/NJ Baykeeper

##### **James McKenna**

Portland Harbor Policy Analyst  
State of Oregon, Governor Kate Brown’s Natural Resources Office

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<sup>37</sup> *Id.*

<sup>38</sup> Environmental Protection Agency, Superfund Sites Targeted for Immediate, Intense Action ([www.epa.gov/superfund/superfund-sites-targeted-immediate-intense-action](http://www.epa.gov/superfund/superfund-sites-targeted-immediate-intense-action)) (accessed Jan. 16, 2018).

<sup>39</sup> *Id.*

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