

ONE HUNDRED FOURTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON ENERGY AND COMMERCE  
2125 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6115

Majority (202) 225-2927  
Minority (202) 225-3641

**MEMORANDUM**

**July 11, 2016**

**To: Members of the Subcommittee on Environment and the Economy**

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

**Re: Hearing entitled “Oversight of CERCLA Implementation”**

On **Wednesday, July 13, 2016, at 10:00 a.m. in room 2123 of the Rayburn House Office Building**, the Subcommittee on Environment and the Economy will hold a hearing on the implementation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund.

**I. CONTAMINATED SITES AND SUPERFUND CLEANUPS**

**A. Background**

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.<sup>1</sup> In fiscal year 2013, the most recent year for which an estimate is available, an estimated 53 million people lived within three miles of a Superfund remedial site. Of those people, over 18 million were either under the age of 18 or over the age of 65.<sup>2</sup> These

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

<sup>2</sup> U.S. Environmental Protection Agency (EPA), *Population Surrounding 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)).

sites pose immediate and long-term risks to human health and the environment from exposure to contaminants including asbestos, dioxin, lead, mercury, and radiation.<sup>3</sup>

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.<sup>4</sup> Another study showed that property values suffer more when Superfund site cleanup is delayed for a decade or more.<sup>5</sup>

Congress passed CERCLA in 1980 to coordinate a federal response to clean up the most contaminated sites.<sup>6</sup> In 1986, Congress significantly amended the statute to apply to federal facilities<sup>7</sup> and to include the requirements of the Emergency Planning and Community Right to Know Act (EPCRA), among other things.<sup>8</sup>

Currently, there are 1328 sites on the National Priorities List (NPL), and an additional 55 sites have been proposed for listing. Of those, construction of cleanup remedies has been completed at 1178 sites. Since the list was started, 391 sites have been deleted due to completed cleanups and 62 sites have been partially deleted.<sup>9</sup>

## **B. How Superfund Works**

Superfund authorizes cleanups of contaminated sites and establishes a liability scheme to ensure that responsible parties pay for the cleanup of contaminated sites. Cleanup and enforcement authority under Superfund covers actual or threatened releases of hazardous substances (excluding petroleum) into the environment.<sup>10</sup>

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<sup>3</sup> U.S. EPA, *CERCLA: Contaminants* ([www.epa.gov/superfund/contaminants-superfund-sites](http://www.epa.gov/superfund/contaminants-superfund-sites)) (accessed July 8, 2016).

<sup>4</sup> Alan K. Reichert, *Impact of a Toxic Waste Superfund Site on Property Values*, *The Appraisal Journal* (Oct. 1997).

<sup>5</sup> William Schulze et al, *Stigma: The Psychology and Economics of Superfund* (July 2004).

<sup>6</sup> 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* (June 14, 2012) (R41039).

<sup>7</sup> House Committee on Energy and Commerce, Democratic Memo, *Hearing on Oversight of Federal Facility Cleanup under CERCLA*, 114<sup>th</sup> Cong. (Sept. 11, 2015) ([democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/Memo-EP-Federal-Facility-Superfund-Cleanup-2015-9-11.pdf](http://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/Memo-EP-Federal-Facility-Superfund-Cleanup-2015-9-11.pdf)).

<sup>8</sup> Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499.

<sup>9</sup> U.S. EPA, *National Priorities List* (Aug. 28, 2015) (online at [www.epa.gov/superfund/sites/npl/](http://www.epa.gov/superfund/sites/npl/)).

<sup>10</sup> Comprehensive Environmental Response, Liability, and Compensation Act §101, 42 U.S.C. 9601.

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.<sup>11</sup> The most contaminated sites are proposed for listing on the NPL, where they receive priority access to the limited federal cleanup funds and resources.<sup>12</sup> In some cases, sites with hazard ranking scores high enough to qualify for NPL listing are not listed due to concerns and desires of the states in which those sites are located.<sup>13</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>14</sup> In order for clean-up costs to be recoverable in court from responsible parties, the associated remedial actions must be carried out in a manner consistent with the National Contingency Plan.<sup>15</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>16</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>17</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 (because removal actions can lower the Hazard Ranking System score below the threshold for NPL listing).<sup>18</sup>

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<sup>11</sup> *Id.*

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

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

<sup>14</sup> GAO, *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>15</sup> Comprehensive Environmental Response, Liability, and Compensation Act §105; 42 U.S.C. 9605.

<sup>16</sup> *Id.* at §104(a)(2); 42 U.S.C. 9604(a)(2).

<sup>17</sup> GAO, *Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements*, at 14-15 (July 2009) (GAO-09-656).

<sup>18</sup> *Id.*

### **C. State & Public 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.<sup>19</sup> 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.”<sup>20</sup> More recent reforms required EPA to seek state concurrence from the government 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.<sup>21</sup> Under that policy, no site has been added to the NPL over state objection.

## **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 rather than taxpayers. 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, 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.<sup>22</sup> Instead, as the trust fund has been exhausted, it has been funded by appropriations from general revenues, with some contribution of other funds (i.e., cost-recoveries from responsible parties, enforcement actions, and interest on the trust fund balance).<sup>23</sup>

As a result of the expiration of the Superfund tax, the appropriations to the Superfund program have generally declined from fiscal year 1999 through 2016 by about 45 percent.<sup>24</sup> The

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<sup>19</sup> *Id.*

<sup>20</sup> 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 (June 14, 2012) (R41039).

<sup>21</sup> *Id.*

<sup>22</sup> H.R. 2783.

<sup>23</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 (June 14, 2012) (R41039).

<sup>24</sup> GAO, *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)); U.S. EPA, *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)).

start of some new remedial action projects have been delayed due to the decline in funding.<sup>25</sup> GAO analysis found that only 27 percent of new remedial action projects were funded in fiscal year 2013 compared to 100 percent in 1999.<sup>26</sup> Despite declining funds, Superfund sites continue to be added to the NPL.

## **B. Financial Assurance**

Without the Superfund tax, one means for ensuring the polluter pays for cleanup is through financial assurance requirements. These requirements ensure a financial guarantee, usually before waste is generated, to cover reclamation and cleanup costs in the event the responsible party is unable to pay for cleanup. CERCLA required EPA to identify categories of facilities that should be required to provide financial assurance and then to establish such requirements.<sup>27</sup> EPA missed by decades the statutory deadlines to identify categories of facilities, but in 2009 it identified hardrock mining as the first industry. The Agency subsequently identified three additional industries: chemical manufacturing; petroleum and coal products manufacturing; and electric power generation, transmission and distribution.<sup>28</sup>

Shortly after identifying hardrock mining as the first industry to be covered by financial assurance requirements, EPA began the regulatory process to establish those requirements. The process faced considerable political opposition,<sup>29</sup> including appropriations riders and hearings in this Committee.<sup>30</sup> Despite that, EPA plans to propose a financial assurance rule for categories of hard rock mining facilities this year and to finalize that rule in 2017.<sup>31</sup>

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<sup>25</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); U.S. 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>26</sup> GAO, *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>27</sup> U.S. EPA, *Superfund Financial Responsibility* (June 2016) ([www.epa.gov/superfund/superfund-financial-responsibility](http://www.epa.gov/superfund/superfund-financial-responsibility)).

<sup>28</sup> *Id.*

<sup>29</sup> *Dozens of riders, but will any become law?*, E&E News (July 23, 2015) ([www.eenews.net/eedaily/stories/1060022267/search?keyword=rider+financial+assurance](http://www.eenews.net/eedaily/stories/1060022267/search?keyword=rider+financial+assurance)).

<sup>30</sup> House Committee on Energy and Commerce, *Reducing Excessive Deadline Obligations of 2013*, Minority Views, 113<sup>th</sup> Cong. (2013) (H.Rept. 113-179).

<sup>31</sup> U.S. EPA, *CERCLA Section 108(b): Financial Responsibility*, at 6 (May 17, 2016) ([clu-in.org/conf/tio/108b/slides/CERCLA-108b-webinar.pdf](http://clu-in.org/conf/tio/108b/slides/CERCLA-108b-webinar.pdf)).

## **II. WITNESSES**

### **Panel 1**

**The Honorable Ann Wagner (R-MO)**

**The Honorable Wm. Lacy Clay (D-MO)**

### **Panel 2**

**The Honorable Mathy Stanislaus**

Assistant Administrator for the Office of Land and Emergency Management  
Environmental Protection Agency

### **Panel 3**

**Mr. Steve Nadeau**

Partner, Environmental Practice Group  
Honigman Miller Schwartz and Cohn LLP

**Ms. Marianne Horinko**

President  
The Horinko Group

**Ms. Amy Brittain**

Environmental Programs Manager, Site Remediation Section  
Land Protection Division, Oklahoma Department of Environmental Quality  
*On behalf of the Association of State and Territorial Solid Waste Management Officials*

**Mr. Robert Spiegel**

Executive Director  
Edison Wetlands Association