

# **SUPERFUND SETTLEMENTS PROJECT**

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## EXECUTIVE SUMMARY

Superfund today is a mature program that has addressed most of its original workload. Construction of the remedy has been completed at most of the sites on the National Priorities List, and even more NPL sites have human exposure under control.

Today, private parties are cleaning up most of the sites on the NPL, and they are paying the full cost of those cleanups. The Trust Fund is used to pay for the “orphan sites” where no responsible parties can be found to perform the work.

Despite Superfund’s many accomplishments, there is still room for improvement. By strengthening its financial management controls, EPA can and should do more with its annual Superfund appropriation.

Specifically, EPA should conserve more of its annual appropriation for the core mission of the Superfund program – completing long-term cleanup at NPL “orphan sites.” Among the key steps EPA should take are these:

- spend less money on support services from EPA offices that are not involved in actual site cleanups;
- provide all stakeholders a meaningful opportunity to comment on proposed additions to the NPL;
- exercise centralized management control over remedy selection decisions that shape Superfund’s long-term financial obligations;
- spend less money on oversight of work performed by experienced private parties; and.
- spend less money on non-emergency removal actions.

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## **INTRODUCTION**

The Superfund Settlements Project (“the Project”) appreciates the opportunity to share with the Subcommittee some industry perspectives on the Superfund program as it operates today. The Project is a not-for-profit association of major companies from various sectors of American industry. It was organized in 1987 in order to help improve the effectiveness of the Superfund program by encouraging settlements, streamlining the settlement process, and reducing transaction costs for all concerned.

The members of the Project share an extraordinary degree of practical, hands-on experience with the Superfund program. They have been involved at literally hundreds of Superfund sites across the country over the last 25 years. Representatives of the Project have testified before Congress on many occasions regarding various aspects of the Superfund program. The Project has also played an active leadership role in the national policy debate over many Superfund issues, and has been a strong supporter of EPA’s Superfund Administrative Reforms since they were announced in 1995.

Collectively, the Project’s members have spent well over six billion dollars on site cleanups and site studies since 1980. That spending covered not only the companies’ own shares of liability, but also sizeable shares attributable to other parties that were defunct, insolvent, or otherwise unable to pay their fair shares. On top of that, these companies also paid out hundreds of millions of dollars more in federal Superfund taxes during the first 15 years of the program’s life. All told, these companies have paid far more than any fair or equitable measure of their actual responsibility for the contamination at these sites.

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## OVERVIEW

Superfund is a mature program that has largely accomplished its goals, albeit at a cost that was not always justified by the risks being addressed.<sup>1/</sup> The gaps in environmental regulatory programs that led to the creation of many Superfund sites have been filled by the Clean Water Act, the Resource Conservation and Recovery Act, and the Toxic Substances Control Act. Given the substantial deterrent effect of those statutes, Congress has a right to expect that fewer sites are being created that will require remediation in the future, and this is consistent with our experience.

Today, private parties are cleaning up most of the sites on the National Priorities List (“NPL”), and paying the full cost of those cleanups. The Superfund Trust Fund is paying for cleanups at the “orphan sites” where no responsible party exists.<sup>2/</sup>

Superfund has also largely addressed its original workload. Significantly, construction of the remedy has already been completed at most of the sites on the NPL. Today, Superfund is working on the remaining NPL sites, which include some of the largest, most complex, and most challenging sites.

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<sup>1/</sup> EPA considers “cost-effectiveness” only to a limited extent. 40 C.F.R. § 300.430(f)(1)(ii)(D) (2006). EPA does not consider the more fundamental questions as to the relative costs and benefits of alternative remedial actions. See *generally State of Ohio v. United States EPA*, 997 F.2d 1520, 1532 (D.C. Cir. 1993) (“there is nothing in section 121 [of CERCLA] to suggest that selecting permanent remedies is more important than selecting cost-effective remedies”).

<sup>2/</sup> This includes “orphan sites” where the responsible party is insolvent, or has been exempted from liability by Congress. The Trust Fund is also paying for general informational and outreach programs such as technical assistance to community groups, research and development, remedial and brownfields policy development, and public participation.

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In this statement, we first describe the evolving partnership between EPA and industry that has enabled the Superfund program to achieve notable successes, particularly since EPA's announcement of major administrative reforms in October of 1995. Then we turn to some of the pressing challenges currently facing Superfund.

The central theme that connects all of these challenges is the need for EPA to manage its annual appropriation more effectively than it does today.<sup>3</sup> Currently, EPA:

- transfers a significant fraction of its appropriation each year to EPA support offices that are not involved in actual cleanup work;
- assumes new long-term financial obligations each year with little transparency and limited review by senior management; and
- spends money each year on projects that are not high priorities and activities that are not essential.

In sum, EPA is not yet managing its Superfund "income" or "expenses" as well as it can. In the spirit of constructive criticism, we offer today a series of recommendations aimed at helping EPA address these challenges. In particular, EPA should:

- conserve more of its annual Superfund appropriation for long-term cleanup work at NPL sites that have non-performing PRPs;
- provide greater transparency for its new NPL listings;
- exert greater management control over the key cleanup decisions that increase Superfund's long-term financial obligations; and
- reduce unnecessary spending on oversight and non-emergency removal actions.

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<sup>3/</sup> The Superfund budget is about 50% bigger than the budget for the Food Safety and Inspection Service, which protects the nation's meat, poultry, and egg products.

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## I. SUPERFUND TODAY REFLECTS A HIGHLY SUCCESSFUL PARTNERSHIP BETWEEN EPA AND INDUSTRY.

Although the Superfund program has generated extraordinary levels of controversy and criticism, EPA has, over time, developed institutional capability and expertise, solved problems, improved relationships, and ultimately established a program that performs a critical function in society. To be more specific:

- tens of thousands of contaminated sites have been evaluated;
- short-term removal actions have been taken at several thousand of those sites;
- longer-term remedial actions have been completed at most of the non-federal sites on the NPL;
- construction is underway at most of the remaining NPL sites; and
- human exposure is under control at most NPL sites.

Superfund -- once a topic of intense public concern, dominated by controversy and emotion -- has fundamentally achieved its objectives and accordingly has receded in the public focus. Today a general public recognition exists that at most sites, the actions that should be taken are being taken.

In the process and in recent years, EPA has also worked to improve relationships with Potentially Responsible Parties ("PRPs") and has minimized its previously confrontational approach to private parties. For the most part, there now exists an atmosphere of cooperation and mutual respect. EPA should be commended for its accomplishments in this field.

It should also be recognized that industry has made major contributions to the success of this program. At site after site across the country, companies rose to the

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challenge. They organized PRP groups, established committees within those groups, investigated the conditions of contamination, and developed action proposals. Once EPA selected the remedies, those companies carried out remedial actions, and today they are managing long-term operation and maintenance at most sites. They provided the leadership, the technical resources, and the funding to perform required work at an ever-increasing percentage of contaminated sites. That percentage is now greater than 70% of NPL sites.

Welcoming the more cooperative spirit that EPA has demonstrated since adoption of the administrative reforms in 1995, those companies have themselves taken pride in the results of this program. They have earned the right to be regarded as constructive partners in the achievement of success under Superfund. They will continue to be constructive partners in addressing other sites through other cleanup programs.

Despite Superfund's notable successes, however, the program still has considerable room for improvement. In particular, EPA can and should be more efficient with the money it receives each year from Congress. Accordingly, in the spirit of constructive criticism, we describe below several ways in which EPA can direct more of its annual Superfund appropriation to the core mission of completing long-term cleanup at NPL "orphan sites." Importantly, all of the measures that we recommend here are steps that EPA can take without the need for legislative action or rulemaking.

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## II. EPA SHOULD CONSERVE MORE OF ITS SUPERFUND APPROPRIATION FOR CLEANING UP NPL "ORPHAN SITES."

Currently, some \$200 MM/yr of EPA's annual Superfund appropriation is directed not to the Office of Solid Waste and Emergency Response ("OSWER"), but to other EPA offices that provide varying degrees of indirect support to the Superfund program.

These other offices include:

- Office of Research and Development ("ORD");
- Office of Administration and Resource Management ("OARM");
- Office of the Chief Financial Officer ("OCFO");
- Office of Inspector General ("OIG");
- Office of Policy and Environmental Information; and
- Office of General Counsel ("OGC").

The net effect of these transfers is that nearly one-fifth of the total Superfund appropriation is diverted to other EPA offices that are not actually involved in cleaning up any Superfund sites. Congress should find this unacceptable, for several reasons.

First, \$200 million is a lot of money, particularly in comparison to the total amount that EPA actually spends on cleanup work. For example, the amount transferred to other offices in FY 2003 was about the same as the total amount that EPA spent that year on Remedial Design and Remedial Action at NPL sites -- the core mission of the Superfund program. In essence, Superfund has been spending about as much on indirect support in non-Superfund offices as it has been spending on actual cleanup of NPL sites.

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Second, the dollar amounts of these annual transfers to other offices were established years ago. These amounts apparently have not been revisited in light of the current level of program support that is actually needed from these other offices. Thus, it is not clear that these allocations reflect Superfund's current needs, or that they reflect sound management decisions about the wisest use of public funds.

Third, we know of no sound policy reason why the Superfund program should pay for the support of OARM, OCFO, and OIG, among others. These support offices provide shared services to EPA's many programs, which is why these offices are directly funded by Congress as part of EPA's annual appropriation. The current practice of having the Superfund program pay for these shared services is a glaring departure from the normal practice, both at EPA and throughout the federal government.

Finally, apart from the magnitude of these transfers to other offices, the transfers are open-ended, in the sense that any funds not actually used by the offices receiving the transfer apparently remain available for their use in subsequent fiscal years. Any funds not actually used in a given year should be returned to OSWER at the end of that year, so that they may be used on cleanups.

For all of these reasons, we recommend that EPA scrutinize its use of the annual Superfund appropriation and conserve more of that money for the core mission of the Superfund program.

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## III. EPA SHOULD MAKE ITS NPL LISTINGS FOCUSED AND TRANSPARENT.

Each new site listed on the NPL imposes long-term financial obligations on the Superfund budget for many years to come. We believe that new sites should be listed on the NPL only after (1) a specific finding that they require federal intervention because no other options will work (“the tool of last resort”), and (2) a transparent process that allows the public to comment fully on the listing. We address these two points in turn.

### A. NPL LISTING SHOULD REMAIN THE “TOOL OF LAST RESORT.”

In thinking about the purpose and scope of the NPL, it is helpful to bear in mind the lessons learned during the past 25 years in three main areas:

- the universe of contaminated sites;
- the alternatives available for addressing those sites; and
- the strengths and weaknesses of the Superfund NPL program.

We briefly address each of these points below, before explaining why the NPL is, and should remain, the “tool of last resort.”

First, experience has dramatically changed our knowledge about the number and character of contaminated sites throughout the country, as well as the risks associated with them. Rather than facing a few hundred sites, each of which was initially believed to pose severe threats to public health, it now is clear that we have a great many sites, most of which pose relatively small, if any, risks. For example, one EPA count of potential Brownfield sites indicated over 600,000 sites perceived to be affected by contamination, the great majority of which either are being addressed through State programs or pose no severe or immediate risk to human health or to the environment.

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These factors mean that instead of “making a federal case” out of each site, the framework for response should emphasize state, local, and private efforts, rather than “making a federal case” out of each site.

Second, there are now more ways to address contaminated sites than when Superfund was enacted in 1980. Virtually all states have developed their own “mini-Superfund” programs and voluntary cleanup programs that have achieved success. In addition, at the federal level, EPA’s RCRA corrective action program governs thousands of operating facilities, and another program covers underground storage tanks.

Third, Superfund has attached a lasting stigma to some sites and the communities that surround them. In many cases, Superfund has also imposed excessive operational, legal, and financial restrictions on these sites that will interfere with their future reuse or redevelopment. Moreover, the cost at which Superfund has achieved results – some \$35 billion in EPA appropriations alone since 1980, and at least that much more in private sector spending -- is widely viewed as far higher than necessary or justified in light of the risks being addressed.

In hindsight, it seems clear that many sites addressed under Superfund did not present major risks to human health or the environment.<sup>4/</sup> Instead, sites were listed on the NPL based on fairly crude assessments of their potential risks. Once a site is listed on the NPL, however, the focus shifts from risk reduction to “cleanup,” where progress

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<sup>4/</sup> See, e.g., U.S. General Accounting Office, *Environmental Protection – Meeting Public Expectations With Limited Resources* 17-18 (1991) (GAO/RCED-91-97) (health risks from contaminated sites ranked relatively low by EPA scientists, but relatively high by the public).

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is much slower and completion is maddeningly elusive. Ironically, this focus on “cleanup” often delays or limits the risk reduction that should be Superfund’s focus.

In light of this experience, it is clear that the NPL should be the tool of last resort - a tool that because of its unique nature should only be used in those situations that require such a high-cost, inefficient mechanism. EPA adopted this term – “the tool of last resort” – some years ago as its unofficial policy, but then failed to communicate this policy clearly in its actual NPL listings. As we show below, the resulting lack of transparency makes it difficult for local communities or other interested parties to understand why some sites are listed and others are not.

The circumstances warranting use of the Superfund NPL as “the tool of last resort” include sites that:

- are severely contaminated; and
- pose immediate or severe risks; and
- have no near-term prospect of cleanup by viable PRPs.

Apart from the sites that meet the above criteria for NPL listing, nearly all other sites should be managed under other programs, including the RCRA corrective action program and the full range of state cleanup programs. If those other programs are viewed as deficient in some respects, then those programs should be improved, rather than shifting sites to Superfund and thereby removing the incentive to remedy the perceived shortcomings of those other federal and state programs.<sup>5/</sup>

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<sup>5/</sup> This same approach should also govern NPL delistings or deletions. It makes little sense to keep a site in the NPL universe once it no longer meets the listing criteria.

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Importantly, it is fully expected that PRPs – private companies, as well as governmental departments and agencies -- will continue to perform and fund cleanups at sites they have contaminated. The point here is simply that Superfund is not the appropriate mechanism to address most of these sites.<sup>6</sup>

We now turn to the process that EPA uses to list sites on the NPL, with a focus on the need for transparency regarding the reasons why sites are being listed at all.

## **B. EPA SHOULD GIVE ALL STAKEHOLDERS A MEANINGFUL OPPORTUNITY TO COMMENT ON LISTINGS THAT ARE TRANSPARENT.**

When it comes to transparency in government, more is better. Yet considering the importance of NPL listings, EPA's approach is relatively opaque -- EPA never explains why it lists sites on the NPL.

EPA adds sites to the NPL each year. Yet EPA does so without offering any explanation of what it seeks to accomplish by listing the new sites, what other option(s) it considered for addressing those sites, or why it believes the other option(s) were inadequate.<sup>7</sup> Because EPA refuses to reveal its thinking, local communities and other interested parties have no opportunity to submit meaningful comments on proposed NPL listings.

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<sup>6</sup>/ Similarly, EPA should discontinue its "Superfund Alternative Approach," which brings sites into a parallel program where they compete with NPL sites for resources.

<sup>7</sup>/ EPA's Federal Register notices give the names and locations of the sites EPA proposes to list on the NPL, but they never explain what EPA hopes to accomplish by listing the sites. See, e.g., 72 Fed. Reg. 53,509 (September 19, 2007) (proposing to list 12 new sites on the NPL without giving any reasons for doing so).

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To address this deficiency, EPA should include in each proposed NPL listing a statement that describes the other approaches that EPA considered for addressing the site (e.g., state voluntary cleanup program). EPA should also explain why it believes NPL listing is the best approach for each site.

Based on that statement, the public could then submit comments that address the full range of possible approaches to a site. Such comments might point out the availability of other approaches to getting the site cleaned up. EPA would then consider those comments before making a final decision on whether or not to list the site. The net result would be a huge increase in transparency, without any added cost or delay.

In sum, strong centralized management of the NPL listing process will help insure that the NPL remains “the tool of last resort,” so the Superfund will be conserved for orphan sites. Second, greater transparency in the listing process will help ensure that EPA has considered all viable options for addressing a site.

#### **IV. SENIOR MANAGERS AT EPA HEADQUARTERS SHOULD BE ACTIVELY INVOLVED IN KEY DECISIONS ABOUT SITE CLEANUPS.**

After NPL listings, the next most important decisions in the Superfund program are the selection of final cleanup plans for NPL sites. Each year, EPA issues new Records of Decision (“RODs”) that select remedies for NPL sites around the country.

As a practical matter, each new ROD imposes financial obligations on the Superfund budget for years to come. If a site has no viable PRPs, or if the PRPs fail to step forward, then EPA eventually ends up paying for the cleanup. In this way, each new ROD effectively controls some of Superfund’s future spending. Given the high cost of some cleanups, these “commitments” can amount to tens of millions of dollars.

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Because the RODs are so important in shaping Superfund's long-term financial needs, the senior program officials at EPA Headquarters should review them closely before the final decisions are made. But that is not the norm today. Instead, EPA's Regional Offices usually have the final say on these cleanup decisions.

Specifically, under an EPA delegation of authority dating back to 1994, most new RODs are signed by Division Directors in the 10 Regional Offices. Review by senior program management at EPA Headquarters is typically quite limited. For all practical purposes, EPA Headquarters does not actively manage the rate at which the Superfund program takes on new financial obligations each year.

We recommend that EPA take several actions to address this problem:

- revise its delegation of authority so that senior managers at EPA Headquarters review new RODs before they are signed;
- expand its National Remedy Review Board so the Board can review more sites and help insure that future remedy decisions are consistent with decisions at similar sites, technically sound, and, as required by section 121(a) of CERCLA, cost-effective; and
- revisit and expand its use of the Fund-balancing ARAR waiver, the "inconsistent applications of state standard" ARAR waiver, and the Technical Impracticability ARAR waiver to facilitate the selection and prompt implementation of cost-effective remedies.

## **V. EPA SHOULD SPEND LESS ON OVERSIGHT OF WORK PERFORMED BY EXPERIENCED PRIVATE PARTIES.**

A decade ago, then-EPA Administrator Carol Browner recognized that EPA devotes excessive contractor dollars and excessive full-time equivalent personnel to duplicative technical work and to monitoring the studies and cleanup work performed by private parties ("oversight"). In a 1995 Administrative Reform, and again in guidance a

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year later, Administrator Browner pledged a 25% reduction in oversight at sites with capable and cooperative PRPs.

Despite that 1995 proclamation, however, EPA has yet to implement the necessary across-the-board reduction in oversight spending, or even institute a tracking system for its own oversight spending. In fact, EPA only recently embraced the general policy of tailoring oversight levels to reflect the experience of the private party and its contractor, the complexity of the site, the nature and strength of any public concern, etc.<sup>8/</sup> In our experience, EPA typically performs the same amount of oversight of PRPs that have successfully performed numerous cleanups at other sites as it did many years ago when those PRPs were just beginning to work on Superfund sites. Clearly EPA could free up additional resources for remedial construction at NPL sites by fulfilling its 10-year old pledge to reduce substantially its oversight of work performed by experienced private parties.

## **VI. EPA SHOULD REFOCUS THE REMOVAL PROGRAM ON ITS ORIGINAL PURPOSE OF ADDRESSING EMERGENCY SITUATIONS.**

The Superfund removal action program was designed primarily to address emergency situations that required an immediate response. Yet today, relatively few removal actions involve emergencies.

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<sup>8/</sup> See Using RCRA's "Results-Based Approaches and Tailored Oversight Guidance" When Performing Superfund PRP Oversight (December 22, 2006). Having belatedly embraced the policy of "tailored oversight," EPA now needs to develop training and communications tools to ensure that this new policy takes hold in the 10 Regional offices. This will be made more difficult by the bureaucratic reality noted earlier: the EPA Regions are accustomed to a highly decentralized system where Headquarters has delegated most of the key decisionmaking authority.

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In fact, most removal actions now consist of so-called “time-critical” actions, where EPA believes that work should be commenced within six months, and “non-time-critical” actions, where there is even less urgency involved. Of the 2,440 removal actions that EPA selected during the period from FY 1992 through FY 1999, a total of 1,892 (77.5%) were either “time-critical” or “non-time-critical” actions.<sup>9/</sup> Thus, less than one-fourth of all removal actions involved emergency situations.

Given the availability of other federal and state cleanup programs, it appears that spending some \$250 MM/yr to perform primarily non-emergency actions is not a wise use of the Superfund budget. Superfund removal actions should focus on those sites, orphan or otherwise, that need immediate action to address actual emergencies.

The point here is not to launch a debate over the precise contours of the term “emergency.” Rather, the idea is to limit the removal program to sites that present an emergency under some reasonable definition of that term. Most Superfund removal actions today, by EPA’s own definitions, do not involve emergencies in any sense of the term. Accordingly, the removal program should be refocused on its original purpose.

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<sup>9/</sup> K. Probst, et al., *Superfund’s Future – What Will It Cost?* at 25, Table 2-4 (2001).