

**TESTIMONY OF SUSAN PARKER BODINE  
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BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
SUBCOMMITTEE ON OVERSIGHT  
“PROTECTING TAXPAYERS AND ENSURING ACCOUNTABILITY: FASTER  
SUPERFUND CLEANUPS FOR HEALTHIER COMMUNITIES”  
JUNE 10, 2014**

Chairman Booker, Ranking Member Inhofe, members of the subcommittee, thank you for the invitation to testify today on “Protecting Taxpayers and Ensuring Accountability: Faster Superfund Cleanups for Healthier Communities.” I am currently a partner in the law firm of Barnes & Thornburg. I have previously worked as an assistant administrator for the Office of Solid Waste and Emergency Response at the U.S. Environmental Protection Agency, with responsibility for the Superfund program. I would like to make four points in my testimony today:

- First, EPA can protect taxpayers by remaining within its statutory authority, focusing Superfund on national priorities, following its own guidance to ensure protective and cost-effective cleanups.
- Second, EPA’s focus on getting sites ready for anticipated use is ensuring accountability and creating healthier communities.
- Third, cleanup is funded by both appropriations and private parties and appropriations are unrelated to the balance of the Superfund Trust Fund.
- Fourth, the pace of Superfund construction completions has declined, but that decline appears to be unrelated to federal funding and due instead to the complexity of the sites that remain on the National Priorities List.

## **I. EPA has Policies Designed to Ensure Cost-Effective Cleanups.**

### **A. Staying Within the Limits on Statutory Authority.**

EPA can protect taxpayers by staying within its statutory authority.

The Comprehensive Environmental Remediation, Compensation, and Liability Act (CERCLA) authorizes EPA action to address releases of hazardous substances to the environment. CERCLA does not give EPA unlimited authority to address any releases. For example, under section 104(a)(3), absent a public health emergency, EPA cannot use CERCLA authority to address a naturally occurring substance in its unaltered form (precluding most responses to releases of radon), or products which are part of the structure of, and result in exposure within, residential buildings or business or community structures (precluding most responses to releases from indoor lead paint).

CERCLA also does not authorize EPA to provide a remedy that goes beyond what is needed to address a significant risk. For example, if relocation is part of a remedy, EPA cannot provide a person with a better home. If soil removal damages septic systems, EPA cannot build a centralized sewage treatment facility. If groundwater contamination requires hookups to public water systems, EPA cannot also hook up homes with uncontaminated wells. All of these examples are considered “enhancements” or “betterments,” which are not authorized by the statute. *See, e.g.*, EPA 540-K-01-008, OSWER Directive 9230.0-100 (Feb. 2002).

### **B. Focusing on National Priorities.**

EPA can protect taxpayers by focusing on national priorities.

The National Priorities List (NPL) under the Superfund program is not intended to be the mechanism for addressing all situations where there may be human exposure to a release of a hazardous substance. The NPL is intended to be a list of “national priorities among the known releases or threatened releases throughout the United States.” CERCLA, § 105(a)(8)(B). Not every release to the environment and not every exposure to hazardous substances is a “national priority” that merits intervention by the federal government. In fact, under the National Contingency Plan (NCP), releases that pose no significant threat to public health or the environment are not national priorities and are eliminated from further consideration. 40 C.F.R. 300.420(c)(i).

For example, some hazardous substances exposures can be cost effectively addressed through off the shelf technology. These types of exposures do not need the technical expertise of the federal Superfund program.

An example of a less costly and complex site is a site where the sole pathway of exposure is vapor intrusion. Under the current Hazard Ranking System, sites can be added to the NPL based on groundwater, surface water, soil, and air exposure pathways. These pathways do not include exposure to indoor air through vapor intrusion. If a vapor intrusion site is complex, it generally would be eligible for NPL listing based on another pathway. In not complex, a vapor intrusion site can be addressed using the same simple technology that homeowners use to address radon.<sup>1</sup>

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<sup>1</sup> Vapor intrusion sites also can be addressed by EPA through its removal program, under which EPA can take action for up to 2 years and \$2 million (caps that can be waived) without listing a site on the NPL.

In 2011, EPA had proposed to amend the Hazard Ranking System to add a vapor intrusion pathway. Recent trade press articles indicate that this proposal has been set aside. This does not mean EPA cannot list a vapor intrusion site on the NPL if it is truly a national priority.<sup>2</sup> But, by setting aside this rulemaking, EPA has avoided suggesting to states that every dry cleaner site is now a national priority, with the implicit promise of federal resources.

### **C. National Remedy Policies.**

EPA can protect taxpayers by following its own policies.

There are other types of Superfund sites that are highly complex. For these types of sites, EPA Headquarters has developed policies requiring consultation with Headquarters to ensure appropriate action and national consistency.

For example, EPA has developed policies requiring consultation for dioxin sites, contaminated sediment sites, some groundwater and lead sites, and highly costly sites. See <http://www.epa.gov/superfund/policy/remedy/sfremedy/hqconsult>. I discuss a few of these policies below.

#### *1. Contaminated Sediment Policies.*

Contaminated sediment sites are often both highly complex and highly costly. To ensure that remedies focus on risk reduction, rather than simple removal of sediment mass, and to ensure that sources are addressed first to avoid recontamination of sites, EPA developed “Principles for

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<sup>2</sup> Under 40 CFR 300.425(c)(3), a site may be listed if it poses a significant threat to public health. EPA used this authority to list the Garfield Groundwater Contamination Site, in Garfield N.J., on the NPL.

Managing Contaminated Sediment Risks at Hazardous Waste Sites,” Office of Solid Waste and Emergency Response (OSWER) Directive 9285.6-08, February 2002. This guidance established

11 risk management principles for sediment sites:

- Control Sources Early.
- Involve the Community Early and Often.
- Coordinate with States, Local Governments, Tribes, and Natural Resource Trustees
- Develop and Refine a Conceptual Site Model that Considers Sediment Stability
- Use an Iterative Approach in a Risk-Based Framework
- Carefully Evaluate the Assumptions and Uncertainties Associated with Site Characterization Data and Site Models.
- Select Site-specific, Project-specific, and Sediment-specific Risk Management Approaches that will Achieve Risk-based Goals.
- Ensure that Sediment Cleanup Levels are Clearly Tied to Risk Management Goals.
- Maximize the Effectiveness of Institutional Controls and Recognize their Limitations
- Design Remedies to Minimize Short-term Risks while Achieving Long-term Protection
- Monitor During and After Sediment Remediation to Assess and Document Remedy Effectiveness.

This guidance also established a Contaminated Sediment Technical Advisory Group (CSTAG) composed of Headquarters and Regional experts to help regional site project managers comply with Headquarters guidance on contaminated sediment cleanups. The purpose of the CSTAG is to provide technical input before a remedy is developed. Accordingly, OSWER

Directive No. 9285.6-20, September 2009, Changes to the Roles and Responsibilities of the Contaminated Sediments Technical Advisory Group (CSTAG), clarified that sediment sites require a separate, earlier, technical review even if the site will also undergo a review by the Remedy Review Board.<sup>3</sup>

<http://www.epa.gov/superfund/policy/remedy/sfremedy/hqconsult.htm#CSTAG>

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<sup>3</sup> Although the 2009 guidance has not been changed or withdrawn, there is some indication that EPA is no longer following this guidance, which requires early technical input to regions on remedies for contaminated sediment sites. April 11, 2014, National Remedy Review Board and Contaminated Sediments Technical Advisory Group Recommendations for the Diamond Alkali Superfund Site, Lower Eight Miles of the Lower Passaic River (Focused Feasibility Study Area) (“EPA decided not to have a separate technical review by the CSTAG per OSWER Directive No. 9285.6-20, September 2009, Changes to the Roles and Responsibilities of the Contaminated

## 2. *Superfund Remedy Review Board*

EPA established the Remedy Review Board as one of the 1995 Superfund Administrative Reforms to help control response costs and promote consistent and cost-effective remedy decisions. The Board provides a cross-regional, management-level, review of high cost proposed response actions prior to their being issued for public comment. The Board reviews all proposed cleanup actions that exceed its cost-based review criteria, currently \$25 million.<sup>4</sup> The Board review is intended to help control remedy costs and to promote both consistent and cost-effective decisions.<sup>5</sup> <http://www.epa.gov/superfund/programs/nrrb/index.htm> The purpose of the Remedy Review Board is to review a proposed remedy after it has been developed.

## 3. *Remedy Optimization*

In September 2012, the Superfund program released a “National Strategy to Expand Superfund Optimization Practices from Site Assessment to Site Completion.”<sup>6</sup> The goals of the Strategy are to expand and formalize optimization practices as an operating business model for the Superfund remedial program. The Strategy envisions the application of optimization concepts throughout all phases of the remedial pipeline as a normal part of remedial program activities.

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Sediments Technical Advisory Group (CSTAG), but instead elected to have a combined NRRB/CSTAG meeting for this site. *This joint meeting format is the approach EPA plans to take in the future at CSTAG sites.*)

<sup>4</sup> There are higher thresholds for certain DOE sites.

<sup>5</sup> Consistent with the CERCLA and the NCP, in addition to being protective, all remedies are to be cost-effective.

<sup>6</sup> <http://www.epa.gov/superfund/cleanup/postconstruction/optimize.htm>

Optimization is a remedy evaluation to determine if a site is meeting its remedial action objectives and facilitates remedy revision if objectives are not being met. At some sites this may involve changing from active to passive remediation, if active treatment is not working. The benefits of these optimization efforts may include more cost-effective expenditure of Superfund dollars; lower energy use; reduced carbon footprint; improved remedy protectiveness; improved project and site decision making; and acceleration of project and site completion.

#### *4. Groundwater Remedy Completion Strategy.*

In May 2014, EPA released a groundwater remedy completion strategy. OSWER Directive 9200.2-144. This guidance requires Regions to consider groundwater goals when designing a remedy and, through the optimization process discussed above, to reconsider those goals if they are not being met.

[http://www.epa.gov/superfund/health/conmedia/gwdocs/pdfs/EPA\\_Groundwater\\_Remedy\\_Completion.pdf](http://www.epa.gov/superfund/health/conmedia/gwdocs/pdfs/EPA_Groundwater_Remedy_Completion.pdf)

It appears that this guidance may be motivated by a 2012 report by the National Academies of Sciences entitled: Alternatives for Managing the Nation's Complex Contaminated Groundwater Sites (2012) (NAS Groundwater Report). [http://www.nap.edu/catalog.php?record\\_id=14668](http://www.nap.edu/catalog.php?record_id=14668)

This NAS report estimates that at least 126,000 sites across the U.S. still have contaminated groundwater, and their closure is expected to cost at least \$110 billion to \$127 billion. About 10 percent of these sites are considered "complex," meaning restoration is unlikely to be achieved in the next 50 to 100 years due to technological limitations. At sites where contaminant

concentrations have plateaued at levels above cleanup goals despite active efforts, the report recommends evaluating whether the sites should transition to long-term management, where risks would be monitored and harmful exposures prevented, but at reduced costs. The report includes the following recommendation: *“At many complex sites where the effectiveness of site remediation has reached a point of diminishing returns prior to reaching cleanup goals, the transition to passive management (like monitored natural attenuation or MNA) should be considered using a formal evaluation called a Transition Assessment.”*

The NAS conclusions mean that many pump and treat remedies are using energy and emitting greenhouse gases but are not actually cleaning up groundwater. EPA’s new guidance encourages EPA Regions to evaluate these situations and, if needed, to change the remedy or the remedial objectives.

In its review of complex contaminated groundwater sites, the NAS did its own analysis of 80 delisted groundwater Superfund sites identified by EPA as having met cleanup goals because this information was not readily available. NAS Report, at 65 and Appendix C. This highlights the fact that missing from EPA’s groundwater remedy completion guidance is any reporting of the results of remedy evaluations. The guidance recommends site-specific evaluations of progress in achieving groundwater remedial action goals but does not indicate whether such information will be collected at the national level. EPA should collect and report this information in its Annual Status Reports.



EPA's Annual Status Report used to report on the status of remedies, including the number of pump and treat projects that had been shut down. Treatment Technologies for Site Cleanup: Annual Status Report (Twelfth Edition) (Sept. 2007) (EPA-542-R-07-012), at 4-13 (ASR). <http://www.clu-in.org/asr/> The Thirteenth Edition of this report (renamed the Superfund Remedy Report, reports on the type of groundwater remedies selected, but no longer reports the status of those remedies. EPA should reinstate reporting on remedy status and include information on achievement or modification of remedial action goals. For example, the 12th ASR reported 73 pump and treat remedies had been shut down, 30 because they met project goals. Id., at 4-13 and Appendix G. The report also noted that 100 pump and treat remedies had been changed to other groundwater remedies. Reporting this information will help the public understand the limits of current technologies, promoting both transparency and EPA's ability to implement its Groundwater Remedy Completion Strategy.

## **II. Protecting Communities by Ensuring Sites are Ready for Reuse.**

EPA ensures accountability and protects communities by evaluating sites based on whether human health will be protected when the site is returned to productive use.

In the past, the Superfund program was evaluated primarily on the basis of how many sites it completed. Initially, sites were determined to be complete when they were deleted from the NPL. However, many sites had long term remedies, such as groundwater remedies, and site deletions lagged far behind the work performed by the Agency. In 1993, EPA created the category called "construction completion," and began tracking and reporting the number of Superfund sites where the physical construction of the cleanup remedy is finished.

Construction completion is simply a measure of physical progress, not of the protectiveness of a remedy. Following enactment of the Government Performance and Results Act, EPA also adopted environmental indicators to measure when human exposure and groundwater migration were controlled at sites. However, so much attention was paid to the construction completion measure that EPA regions often failed to ensure that all measures were in place at sites to ensure long-term protectiveness when a site is reused (particularly institutional controls).

To address this issue, EPA began tracking when sites were ready for reuse and in FY 2007, the Superfund program adopted a new measure to capture site progress beyond the construction completion milestone: Site-Wide Ready for Anticipated Use. This measure tracks the number of NPL sites where the remedy is constructed (construction complete), cleanup goals for anticipated uses of the land have been met, and any necessary institutional controls are in place.

<http://www.epa.gov/superfund/programs/recycle/effects/swrau.html> Thus, EPA is focusing not only on remedy construction, but also on ensuring long-term protectiveness for communities.

### **III. Funding for Superfund Cleanups.**

Taxpayers are protected by monitoring use of appropriated dollars, relying on private parties to conduct cleanups, and making sure EPA uses non-appropriated funding from Special Accounts before using appropriated dollars.

## **A. EPA Funding.**

Funding available for EPA to expend on the Superfund each year is provided by annual appropriations and from Special Accounts that are in the Superfund Trust Fund. Most of EPA's appropriated dollars go for programmatic spending, including the salaries of EPA employees.

Figure 2 below shows annual appropriations and EPA's annual obligations for cleanup from both appropriations and Special Accounts.

Special Account funding comes from cash out settlements by private parties and state cost shares. These funds are placed in special accounts in the Superfund Trust Fund. These funds are not subject to appropriation. However, these funds are associated with specific sites and cannot be used for the Superfund program in general.

In 2006 and 2009 the EPA Inspector General recommended better management of these special account funds to ensure that they were being utilized<sup>7</sup>. The Inspector General had been told that some EPA Regions were spending appropriated dollars before using special account monies, treating the accounts as "rainy day funds." EPA responded by issuing guidance on the use of Special Accounts and by assigning people to oversee that use. In January 2012, the Government Accountability Office reviewed EPA's efforts and issued a report entitled: "Superfund, Status of EPA's Efforts to Improve Its Management and Oversight of Special Accounts" (GAO-12-109). GAO reported that of \$4 billion that had been collected in Special Accounts through October 2010, \$1.9 billion had been obligated and \$1.6 billion had been disbursed. GAO also reported that EPA planned to spend the remaining \$1.8 billion over the next 10 years.

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<sup>7</sup> EPA Office of Inspector General, Evaluation Report: EPA Can Better Manage Superfund Resources, Report No. 2006-P-00013, Feb. 28, 2006. EPA Office of Inspector General, Evaluation Report: Improved Management of Superfund Special Accounts Will Make More Funds Available for Clean-ups, Report No. 09-P-0119, Mar. 18, 2009.

Due to the timing of when funds are needed at Superfund sites, EPA is continuing to collect settlement dollars and place those funds in Special Accounts faster than those funds are being expended. According to the Appendix to the President's 2015 budget, the total unexpended balance of the Superfund Trust fund was \$3.23 billion at the end of FY 2103 and is estimated to be \$3.17 at the end of FY 2014.

### **B. Private Party Funding.**

The money spent by EPA on cleanup activities, whether from appropriations or Special Accounts, is far less than the amount spent each year by private parties carrying out cleanup work themselves. EPA tracks private party commitments on an annual basis. For example, in FY 2013, EPA obtained commitments from responsible parties to invest an estimated \$1.2 billion in Superfund site studies and cleanups. Private parties also fund EPA's work. In 2013, private parties agreed to reimburse the Agency for more than \$292 million spent cleaning up Superfund sites and EPA billed private parties for approximately \$93 million in oversight costs. These reimbursements go back to the Superfund Trust Fund or are placed into special accounts for additional work at a site. Thus, in 2013 alone, private parties committed to contributing nearly \$1.6 billion to Superfund cleanups.

### **C. Relationship between the Superfund Trust Fund and Appropriations.**

The amount of annual appropriations is unrelated to the balance of the Superfund Trust Fund. Like any tax increase, reinstating the Superfund taxes would generate more revenue for the U.S. Treasury. However, that revenue can offset any federal spending because the Superfund Trust

Fund is part of the Unified Federal Budget, and unlike the Highway Trust Fund, its revenue can offset any federal spending. Therefore, annual appropriations are unrelated to the balance of the Trust Fund. The current administration made this point in July 2009 in responding to a GAO Report:

*Specifically, the balance in the Superfund Trust Fund does not affect the funds available for current or future annual appropriations. Therefore, it cannot serve as a reliable indicator to responsible parties of EPA's ability to fund future cleanup actions. For example, in FY 1995, prior to the tax expiration on December 31, 1995, the Superfund Trust Fund end-of-year balance of \$3.7 billion was well above the FYs 1995 and 1996 annual appropriations levels from the Trust Fund of \$1.4 billion and \$1.3 billion, respectively.<sup>8</sup>*

This point is made even more dramatically by the President's budget request. In the 2015 Request, the President proposes to reinstate the Superfund Taxes and collect \$1.8 billion in revenue from excise taxes on oil and chemicals and an income tax on corporations. However, the President proposes to appropriate \$1.157 billion for the Superfund program, leaving an end of year balance of nearly \$2 billion in funds available for appropriation. The Appendix to the President's Budget shows the total unobligated balance of the Trust fund is projected to be over \$5 billion at the end of FY 2015.<sup>9</sup>

It also does not appear that OMB plans to increase Superfund funding in future years, even if the taxes were reinstated. The projection of budget authority in the Historical Tables accompanying the President's Budget show relatively flat spending for EPA out to 2019. See

<http://www.whitehouse.gov/omb/budget/Historicals>

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<sup>8</sup> June 26, 2009, letter from Catherine R. McCabe, EPA Office of Enforcement and Compliance Assurance to John Stephenson, Government Accountability Office, GAO-09-656, Appendix III. Unfortunately, the chart demonstrating relationship between appropriations and the unobligated trust fund balance that accompanied Ms. McCabe's letter is not reprinted in the report.

<sup>9</sup> The additional \$3 billion is in Special Accounts.

#### IV. Pace of Cleanup is Generally Unrelated to Funding.

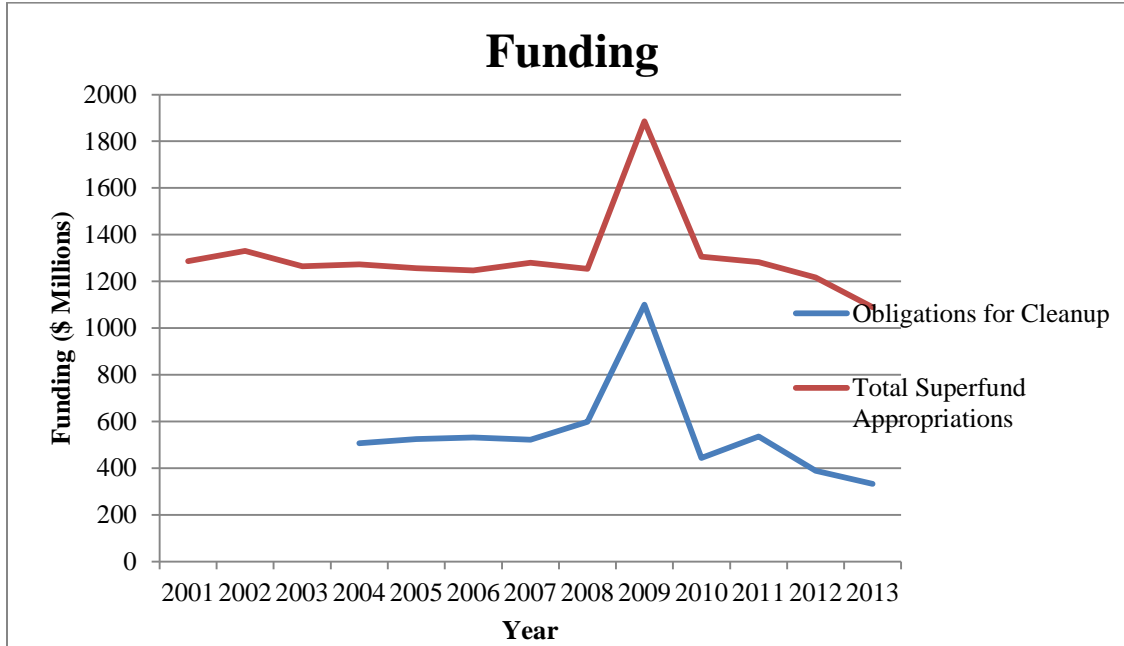
EPA has received criticism about the pace of cleanup, due primarily to the focus on construction completions. Some have suggested that increased funding will increase the pace of cleanup. While it appears intuitive that this would be the case, the data do not show it. If construction completions are used as the measure of pace, EPA's pace of cleanup continued to decline even though obligations (funding used by EPA from appropriations and special accounts) and appropriations spiked in 2009.

Figure 1. Construction Completions<sup>10</sup>.



<sup>10</sup> Data from Superfund end of year accomplishments reports. <http://www.epa.gov/superfund/accomplishments.htm>  
According to the OSWER National Program Manager Guidance, the targets for 2014 and 2015 are 15 and 13 construction completions, respectively. <http://www2.epa.gov/planandbudget/national-program-manager-guidances>

Figure 2. Appropriations and Obligations for Cleanup.<sup>11</sup>



These data support statements by EPA that the remaining Superfund sites are more complex and are taking longer by demonstrating that even with an additional \$600 million in funding in 2009, more sites have not been completed in the near term.<sup>12</sup>

This result is not unexpected. As discussed above, the NPL should be a list of sites that are truly national priorities and the complex sites that are national priorities take a long time to address. EPA could list many small sites and clean them up quickly, but that would simply divert funds from the sites that do need national attention and assistance.

<sup>11</sup> Obligations data are from the Superfund end of year accomplishments reports, supra, and include obligations of Special Account funds. Appropriations data are from a 2008 CRS Report Number No. RL31410 (for 2001 through 2008 appropriations, in inflation adjusted dollars), the President's Budget Appendix (showing prior year appropriations when proposing new appropriations) for 2009, 2010, 2012, and 2013; and P.L. 112-10 for FY 2011.

<sup>12</sup> The continued growth of the unobligated balance of the Superfund also supports this conclusion, as the availability of funding for sites in Special Accounts is not leading to more construction completions in the near term. Cleaning up Superfund sites takes time.

## **V. Conclusion.**

CERCLA requires cost-effective and protective cleanups. EPA Headquarters has provided guidance and tools to help EPA Regions meet these statutory mandates. Thus, ensuring that EPA Regions follow Headquarters guidance is essential. EPA also is proactively returning sites to productive use relying on private party work and funding, as well as its own appropriated dollars.