Testimony of Robert D. Fox, Esquire

Submitted to the U.S. Senate Committee on Environment and Public Works
Hearing on April 9, 2025

Chairman Capito, Ranking Member Whitehouse and Members of the Environment and Public Works Committee, thank you for the opportunity to testify. My name is Robert Fox. After graduating from Harvard Law School, I have practiced environmental law for 40 years. I have taught Superfund as an adjunct professor for 27 years at Penn Carey Law School. My clients on Superfund matters range across all industry sectors and municipalities, including the City of New York.

My testimony identifies common sense approaches to achieve Superfund's primary goals. For the past forty-five years, courts and Superfund's legislative history make clear that Superfund has two primary goals: (1) incentivizing the prompt, voluntary cleanup of the nation's most contaminated sites; and (2) ensuring that polluters pay for those cleanups. Undoubtedly, there have been significant accomplishments under Superfund. It is equally clear that the Superfund program has strayed from meeting those goals. However, solutions exist within Superfund's existing statutory language, its existing policies and with minor regulatory adjustments to re-align Superfund with its primary goals.

First, let's start with promptness. Superfund cleanups take too long and that increases costs. I am aware of Superfund sites listed on the National Priorities List in the early 2000's with no remedy selected to date. I am also aware of Superfund sites where private parties submitted remedial investigation reports to EPA and did not receive comments for years and years.

Here is a proposed solution. EPA requires that private parties adhere to strict deadlines for submitting required cleanup reports, with penalties for non-compliance. Yet, EPA has no timeframe for its own report reviews. Many states administered cleanup programs that for years experienced similar cleanup delays, but then adopted mandatory agency review times. That cleared the backlog. EPA should adopt a policy to do the same.

Second, incentivizing private parties to perform the cleanup and making the polluter pay are two sides of the same coin. To create proper incentives for private parties to perform cleanups, their share of cleanup costs must be fair. Otherwise, you don't get polluter pays, you get polluter overpays.

EPA has relied upon joint and several liability under Superfund to require the same deep pocketed parties at site after site to pay for 100% of the cleanup costs, leaving those parties to pursue tens and often hundreds of other responsible parties through costly and time consuming litigation. That approach is both unfair and inefficient and dissuades private parties from coming forward to perform cleanups. The solutions to this problem already exist within the Superfund statute and EPA's policies. EPA just has to use them.

For example, section 122(b)(1) of Superfund describes what is known as "mixed funding" for cleanups. This takes the form of (i) EPA pre-authorizing the Superfund to reimburse parties performing the cleanup for a portion of the costs not attributable to those parties; or (ii) EPA agreeing to perform a portion of the cleanup itself, with the remainder performed by the private parties. In either case, EPA pursues other parties to recover EPA's costs. That saves tremendous transaction costs for the parties performing the cleanup.

EPA acknowledges that mixed funding promotes expeditious cleanups rather than protracted litigation. Despite this clear statutory authority, the Superfund program rarely uses mixed funding. That should change.

Similarly, EPA has an "orphan share" policy. Pursuant to this policy, EPA can settle with private parties who desire to perform the cleanup, and compromise a portion of EPA's past and future costs attributable to liable parties who are either insolvent or defunct. EPA's orphan share policy expressly states that it aims to provide incentives to voluntarily perform cleanups and to

keep transaction costs low. Once again, the Superfund program uses this policy too sparingly. And by the policy's own terms, EPA's compromise is limited to the lesser of twenty-five percent of the cleanup costs or the total amount of EPA's unreimbursed costs. The statute contains no such limitation on an orphan share or past cost forgiveness.

One final suggestion. When private parties perform a cleanup, EPA charges those parties with EPA's oversight costs, a term not defined in the statute. Oversight cost include costs for EPA's contractors. Oversight costs also include costs attributable to the time spent by EPA's personnel, with no limitation on how many people work on a matter or how many hours they spend. In other words, private parties are required to reimburse EPA for work performed by all internal EPA employees on that matter. Then, on top of these direct costs, EPA also pursues reimbursement of an "indirect cost" premium for its overhead expenses throughout a regional office, including rent, utilities, computers, etc. This indirect cost premium can sometimes exceed 100%. Personnel costs and a premium for overhead are not appropriately reimbursable, foster inefficiency and create a disincentive for parties to perform a cleanup.

In conclusion, the Superfund program has proven accomplishments. But going forward, the program needs these common sense solutions to ensure that the program returns to meeting its primary goals.