SUPERFUND SETTLEMENTS PROJECT

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ON BEHALF OF THE SUPERFUND SETTLEMENTS PROJECT

Before the Subcommittee on Superfund and Waste Management

of the Senate Committee on Environment & Public Works

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EXECUTIVE SUMMARY

Superfund today is a mature program that has largely accomplished its goals. Private parties are cleaning up most of the sites on the NPL and paying the full cost of those cleanups. Superfund has also addressed most of its original workload; construction of the remedy has already been completed at most of the sites on the NPL.

Despite Superfund's accomplishments, there is still considerable potential for improvement. In particular, EPA can do more with the Superfund appropriation it receives from Congress each year.

Specifically, EPA can take action to conserve more of its annual appropriation for the core mission of the Superfund program – completing long-term cleanup at sites on the NPL. Among the steps EPA should take are the following:

- revisiting the amount of money transferred each year to EPA offices other than OSWER;
- providing greater transparency on key decisions, such as adding sites to the NPL;
- exercising greater management authority over remedy selection decisions, which increase Superfund's long-term financial obligations;
- reducing spending on oversight of work performed by experienced private parties; and.
- reducing spending on non-emergency removal actions.

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STATEMENT

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 eight major companies from various sectors of American industry.[1/] 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.

INTRODUCTION

The members of the Project share an extraordinary degree of practical, hands-on experience with the Superfund program. These companies have been involved at 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, these eight companies have spent well over six billion dollars on site cleanups and site studies since 1980. That spending covered not only the companies'

1/ The current members of the Project are Chevron, Ciba Specialty Chemicals Corporation, the DuPont Company, FMC, General Electric Company, Honeywell International Inc., United Technologies Corporation, and Waste Management, Inc.

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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 eight 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.

The Project regards Superfund as a mature program that has largely accomplished its goals (albeit at a cost that was not always justified by the risks being addressed[2/]). 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. Today, private parties are cleaning up most of the sites on the National Priorities List ("NPL"), and they are paying the full cost of those cleanups. The Superfund Trust Fund is paying for cleanups at the "orphan" sites where no responsible party exists.[3/]

2/ Superfund does consider "cost-effectiveness" to a limited extent. After EPA develops a list of remedial alternatives that are protective, meet applicable or relevant and appropriate requirements (ARARs), satisfy the statutory preferences for treatment and permanence, etc., then Superfund asks whether the cost of each alternative is "proportional to" its effectiveness. 40 C.F.R. § 300.430(f)(1)(ii)(D) (2005). But the more fundamental questions -- such as the benefits of meeting ARARs and satisfying the statutory preferences in the first place -- are not asked.

3/ 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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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.

OVERVIEW

In this statement, we address several key aspects of the Superfund program's past, present, and future. First, we describe the evolving partnership between EPA and industry that has enabled the program to achieve notable successes, particularly since EPA's announcement of the administrative reforms in October of 1995.

Second, we describe the current need for EPA to do more with the Superfund appropriation it receives each year from Congress.

Third, we note that a significant fraction of EPA's Superfund appropriation is transferred every year to other EPA program offices that are not involved in actual cleanup work. We recommend that EPA conserve more of its appropriation for the core mission of the Superfund program – completing long-term cleanup at NPL sites.

Fourth, we urge that the process of listing sites on the NPL be focused and transparent. The NPL should continue to be "the tool of last resort." EPA should also begin explaining to the public why it is listing on the NPL sites with viable Potentially Responsible Parties ("PRPs").

Fifth, we recommend that EPA Headquarters have a major role in making the key decisions about cleanups, in order to achieve more effective management of Superfund's long-term costs.

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Sixth, we urge EPA to reduce spending on oversight of work performed by experienced private parties and to redirect this money to the program's core mission.

Seventh, and last, we propose refocusing the removal action program on its original purpose of addressing "emergency" threats to human health or the environment.

I. SUPERFUND TODAY REPRESENTS 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 operates relatively effectively and 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; and
- construction is underway at most of the remaining 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 which 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

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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. Perhaps unfairly, industry initially bore the brunt of criticism for past disposal practices that in essence reflected the values and scientific knowledge of society in an earlier era. Stung by such criticism and offended by a liability system that many regarded as totally unfair, much of industry initially protested and resisted the obligations imposed on it by the Superfund statute.

By the mid- to late 1980s, however, those attitudes had changed, and most national corporations accepted the imperative that they must participate constructively in addressing this national problem. At site after site across the country, those companies rose to the 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

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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 do more 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 sites. Importantly, all of the measures that we recommend here are steps that EPA can take without the need for legislative action or rulemaking.

II. EPA CAN DO MORE WITH THE MONEY IT RECEIVES EACH YEAR FROM CONGRESS.

The Superfund program today faces a variety of challenges relating to financial management. The central theme that connects all of these issues is the pressing need for EPA to manage its annual appropriation more effectively.

Currently, the Superfund program:

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

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In sum, EPA is not yet managing either its Superfund "income" or its Superfund "expenses" as well as it can.

We offer below a series of recommendations aimed at helping EPA address these challenges. In particular, EPA should:

- conserve more of its annual Superfund appropriation for the program's core mission -- completing long-term cleanup work at NPL sites;
- provide greater transparency for key decisions;
- exert greater management control over the key decisions that increase Superfund's long-term financial obligations; and
- reduce unnecessary spending wherever possible.

We address each of these topics below in greater detail.

III. EPA SHOULD CONSERVE MORE OF ITS SUPERFUND APPROPRIATION FOR CLEANING UP NPL 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

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- Office of General Counsel ("OGC").

The net effect of these transfers is that nearly one-fifth of the total Superfund appropriation is diverted "right off the top" to other EPA offices that are not actually involved in cleaning up any Superfund sites. This is significant for several reasons.

First, the amount of money involved here is large, particularly in comparison to the total amount that EPA actually spends on cleanup work. For example, the amount transferred to these 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, which is the core mission of the Superfund program. To put it another way, Superfund has been spending about as much on indirect support in non-Superfund offices as it spends on actual cleanup of NPL sites.

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 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, and 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.

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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. In sum, we recommend that EPA carefully scrutinize its use of its Superfund budget so as to conserve more for the core mission of the Superfund program.

IV. THE NPL LISTING PROCESS SHOULD BE FOCUSED AND TRANSPARENT.

Each new site listed on the NPL effectively 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 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 on these issues. We address these two points in turn.

A. THE NPL 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 program.

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

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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 impacted 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. These factors mean that contaminated sites should be managed by leveraging all appropriate private and public resources. The framework for response should emphasize state, local, and private efforts, rather than "making a federal case" out of each site.

Second, the choices available to society to address contaminated sites are far greater today than those in existence 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's strengths and weaknesses as a cleanup program can be seen more clearly today based on 25 years of experience. As to its strengths, Superfund has focused attention on the need to remediate sites contaminated due to the inadequacies of pre-1980 disposal requirements. It has galvanized cleanup efforts, and it has

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achieved cleanups at most of the roughly 1,500 sites listed on the NPL. Superfund has also performed many successful emergency removal actions, most of them at non-NPL sites.

As to its weaknesses, 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, at least, it seems clear that many sites addressed under Superfund did not present major risks to human health or the environment.[4/] 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 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 continue to 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 –

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

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"the tool of last resort" -- as its unofficial policy some years ago, 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 the 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" might include sites that:

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

But apart from the sites that meet the above criteria for NPL listing, nearly all other sites should be managed under other programs. This would include 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.[5/]

It is fully expected that PRPs – mostly private companies, as well as governmental departments and agencies -- will continue to perform and fund cleanups,

5/ This same approach should also govern NPL delistings or deletions. The core idea is that if the studies and cleanup work performed at an NPL site have brought it to the point where the remaining risk would no longer justify application of "the tool of last resort," then EPA should find a way to remove that site from the NPL so it can be addressed in a more appropriate way. Whatever the criteria for NPL listing, it makes little sense to keep a site in the NPL universe once it no longer meets those criteria.

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either individually or in conjunction with regulatory agencies, at sites they have contaminated. The point here is simply that Superfund is not the proper mechanism to address most of these sites.

We now turn to the process used to list sites on the NPL, with a focus on the need for greater transparency regarding the reasons why sites are being listed.

B. NPL LISTINGS SHOULD BE TRANSPARENT.

When it comes to transparency in government, more is better. Yet for a process with such high stakes, EPA's NPL listing decisions are somewhat opaque.

EPA adds sites to the NPL each year. It does so without offering any public explanation of what other options EPA considered for addressing those sites, or why EPA decided that the other options were inadequate.[6/] This means that the local communities and other interested parties have no way, as a practical matter, to submit meaningful comments on proposed NPL listings, because EPA has never said why it wants or needs to list the sites.

To address this deficiency, EPA should include a brief statement along with each proposed NPL listing. In that statement, EPA should note any other approaches it has considered for addressing the site (e.g., state voluntary cleanup program). EPA should also explain why it believes the NPL is the best approach for this particular site.

6/ EPA's Federal Register notices provide the names of the sites that are proposed to be listed, but no explanation of what EPA hopes to accomplish by listing them on the NPL. *See, e,g.,* 71 Fed. Reg. 20052 (April 19, 2006) (proposing to list 6 sites on the NPL without explaining what EPA hopes to accomplish by listing them).

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Based on EPA's brief statement, the public could then submit comments that address these issues. 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.

In sum, two aspects of the NPL listing process present room for improvement. First, strong Headquarters management of the NPL listing process will help insure that the NPL remains "the tool of last resort." Second, greater transparency in the listing process is also critically needed.

V. EPA HEADQUARTERS SHOULD HAVE A MAJOR ROLE IN MAKING THE KEY DECISIONS ABOUT CLEANUPS.

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

As a practical matter, each of these new RODs effectively 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.

Because the RODs are so important to Superfund's budget, it would seem important to have Superfund management at EPA Headquarters review them closely in advance 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.

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Under a delegation of authority dating back to 1994, most new RODs are signed by Division Directors in EPA's Regional Offices. Review by Superfund program management at EPA Headquarters is typically very limited. For all practical purposes, then, 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:

- EPA should revise its delegation of authority so that Superfund managers at Headquarters review all, or virtually all, new RODs before they are signed;
- EPA should expand the National Remedy Review Board so it can review more sites and help insure that future remedy decisions are both technically sound and also (as required by section 121(a) of CERCLA) cost-effective; and
- EPA should 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.

VI. EPA SHOULD REDUCE ITS SPENDING 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 FTEs to monitoring the studies and cleanup work performed by private parties ("oversight"). In a 1995 Administrative

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Reform, and again in guidance a 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. In fact, EPA has yet to embrace 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.[7/]

Moreover, EPA does not separately track its own spending on Superfund oversight, thereby limiting the potential for sound financial management. What is clear is that EPA could free up additional resources for remedial construction by fulfilling its 10-year old pledge to reduce its oversight of work performed by experienced private parties. Accordingly, we recommend that EPA take the necessary actions to reduce its oversight spending.

VII. THE REMOVAL PROGRAM SHOULD BE REFOCUSED ON ITS ORIGINAL PURPOSE OF ADDRESSING EMERGENCY SITUATIONS.

The Superfund removal action program was designed primarily to address emergency situations. Yet today, emergencies account for barely one-fourth of all removal actions taken by EPA. The other three-fourths consist of "time-critical" actions, where EPA believes work should be commenced within six months, and "non-time-critical" actions. Of the 2,440 removal actions commenced during the period from FY

7/ EPA's RCRA corrective action program, on the other hand, embraced the policy of tailored oversight some years ago. *See* 65 Fed. Reg. 58,275 (Sept. 28, 2000) (continued).

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1992 through FY 1999, a total of 1,892 (77.5%) were either "time-critical" or "non-time-critical" actions.[8/]

Many of these non-emergency actions are undoubtedly beneficial. But it is unclear why a continuing $250 MM/yr federal program is needed to perform primarily non-emergency actions. Superfund removal actions should focus on those sites, orphan or otherwise, that need immediate action to address an actual emergency.

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 definition, do not involve emergencies in any sense of the term. Accordingly, the removal program should be refocused on its original purpose. As with all of the measures that we are recommending today, EPA can accomplish this change as a matter of policy, without the need for legislative action or rulemaking.

(announcing release of guidance document entitled ''Results-Based Approaches to Corrective Action: Tailored Oversight'').

8/ K. Probst, et al., *Superfund's Future – What Will It Cost?* at 25, Table 2-4 (2001).

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