



**MEMORANDUM**

**May 11, 2021**

**To: Subcommittee on Environment and Climate Change Members and Staff**

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

**Re: Hearing on “The CLEAN Future Act: Superfund Proposals to Advance Cleanups, Equity, and Climate Resilience”**

On **Thursday, May 13, 2021, at 10:30 a.m. (EDT) via Cisco Webex online video conferencing**, the Subcommittee on Environment and Climate Change will hold a legislative hearing entitled, “The CLEAN Future Act: Superfund Proposals to Advance Cleanups, Equity, and Climate Resilience.”

**I. BACKGROUND**

**A. The Risks of Contaminated Sites**

Contaminated sites across the country pose significant risks to human health and the environment. According to a recently updated U.S. Environmental Protection Agency (EPA) report, approximately 73 million people live within three miles of a Superfund site, and 21 million people live within one mile of a Superfund site.<sup>1</sup> The communities living near Superfund sites are disproportionately communities of color, living below poverty level, linguistically isolated, and have less than a high school education.<sup>2</sup> These sites pose immediate and long term risks to human health and the environment from exposure to contaminants including asbestos, dioxin, lead, mercury, and radiation.

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 five and 15 percent as public awareness of contamination concerns grew. Another study showed that property values suffer further when Superfund site cleanup is delayed for a decade or more.<sup>3</sup>

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<sup>1</sup> U.S. Environmental Protection Agency, Office of Land and Emergency Management, *Population Surrounding 1,857 Superfund Remedial Sites* ([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)).

<sup>2</sup> *Id.*

<sup>3</sup> Alan K. Reichert, *Impact of a Toxic Waste Superfund Site on Property Values*, *The Appraisal Journal* (Oct. 1997).

## **B. History of the Superfund Program**

Congress enacted the Comprehensive Environmental Response, Liability, and Compensation Act (CERCLA) in 1980 to coordinate a federal response to clean up the most contaminated sites.<sup>4</sup> In 1986, Congress enacted Superfund Amendments and Reauthorization Act of 1986 (SARA) which amended the law to apply to federal facilities and incorporate the requirements of the Emergency Planning and Community Right to Know Act (EPCRA), including the Toxic Release Inventory.<sup>5</sup>

CERCLA authorizes EPA to compel responsible parties to clean up contaminated sites or to conduct cleanups and then seek reimbursement from responsible parties. The authority covers actual or threatened releases of hazardous substances (excluding petroleum) into the environment. Sites are evaluated and given a score under the Hazard Ranking System (HRS) based on the severity of contamination and the potential threat to human health or the environment.

The most contaminated sites are added to a National Priorities List (NPL), where they receive priority access to limited federal cleanup funds and resources. Other 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. In order for cleanup costs to be recoverable in court from responsible parties, cleanups must be carried out in a manner consistent with the National Contingency Plan.

In 1983, the first National Priorities List (NPL) was created and added 406 sites using the HRS.<sup>6</sup> There are currently 1,327 Superfund sites listed on the NPL.<sup>7</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. 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 HRS score below the threshold for NPL listing).

## **C. Superfund Tax**

CERCLA established the Hazardous Substance Superfund Trust Fund to pay for the cleanup of sites where the responsible parties cannot be found or cannot pay. The Trust Fund was designed to be financed through taxes assessed on polluting industries, and originally was filled through an excise tax imposed on oil producers and petrochemical industries. As originally authorized in 1980, the tax had an end date of five years. SARA reinstated the tax for

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<sup>4</sup> 42 U.S.C. §103.

<sup>5</sup> Pub. L. No. 99-499 (1986).

<sup>6</sup> U.S. Environmental Protection Agency, *Superfund: National Priorities List (NPL)* (updated Feb. 8, 2021) ([www.epa.gov/superfund/superfund-national-priorities-list-npl](http://www.epa.gov/superfund/superfund-national-priorities-list-npl)).

<sup>7</sup> *Id.*

an additional five years until 1990. The Revenue Reconciliation Act of 1990 extended the Superfund tax through December 31, 1995, the date on which the tax expired.<sup>8</sup>

Currently, as the Trust Fund has been exhausted, it has been replenished by annual appropriations, with some contribution from cost-recoveries from responsible parties, enforcement actions, and interest on the Trust Fund balance. Over the last ten years, there has been a six percent overall cut in the Superfund program's budget. There are currently 34 sites without funding in the program's backlog, the highest it has been for the last 15 years.<sup>9</sup>

Since the tax expired in 1995, Members of Congress have repeatedly introduced legislation to reinstate it. Most recently, Chairman Pallone (D-NJ) introduced H.R. 2703 to amend the Internal Revenue Code of 1986 to extend the financing of the Superfund program. Additionally, Representatives Blumenauer (D-OR), Pallone and others introduced H.R. 2674, the "Superfund Reinvestment Act", to reinstate the tax and update the amounts based on inflation.<sup>10</sup> President Biden's American Jobs Plan also calls for reinstatement of the tax.<sup>11</sup>

#### **D. Federal Facilities**

Since 1986, CERCLA's requirements have applied to contaminated federal facilities. Most federal superfund sites are owned or operated by the Department of Defense but the Departments of Energy, the Interior and Agriculture, and NASA also own some superfund sites. Currently, federal agencies that administer contaminated sites are authorized to take response actions, with oversight and enforcement authority reserved to EPA and the states in which the facilities are located.<sup>12</sup>

The cleanup of federal facilities is not funded with Superfund Trust Fund monies under the Superfund program, but with other federal monies appropriated to the agencies responsible for administering the facilities. However, EPA and the states remain responsible for overseeing and enforcing the implementation of CERCLA at federal facilities to ensure that applicable cleanup requirements are met.

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<sup>8</sup> Brian Francis, *Federal Excise Taxes, Including the Slow Death of Expired Taxes*, Internal Revenue Service (1999) ([www.irs.gov/pub/irs-soi/98excise.pdf#:~:text=These%20excise%20taxes%20went%20around%20twice%3B%20the%20first,goal%20was%20not%20quite%20realized%20at%20the%20time](http://www.irs.gov/pub/irs-soi/98excise.pdf#:~:text=These%20excise%20taxes%20went%20around%20twice%3B%20the%20first,goal%20was%20not%20quite%20realized%20at%20the%20time)).

<sup>9</sup> U.S. Environmental Protection Agency, *Superfund Sites with New Construction Projects Awaiting Funding* (updated July 2, 2020) ([www.epa.gov/superfund/superfund-sites-new-construction-projects-awaiting-funding](http://www.epa.gov/superfund/superfund-sites-new-construction-projects-awaiting-funding)).

<sup>10</sup> U.S. Congressman Earl Blumenauer, *Blumenauer Introduces Legislation to Reinstate Superfund Taxes; End 25-Year Polluter Tax Holiday That Slowed Toxic Cleanup* (Apr. 20, 2021) (press release).

<sup>11</sup> The White House, *FACT SHEET: The American Jobs Plan* (Mar. 31, 2021).

<sup>12</sup> 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).

## **E. Threats from Climate Change**

Climate change can exacerbate the public health impacts of Superfund sites. There are countless examples of extreme weather events impacting Superfund sites, including the numerous flooding events during Hurricane Harvey over the Houston Ship Channel<sup>13</sup> and Hurricane Sandy over the northeastern shore region.<sup>14</sup>

A recent report by the Government Accountability Office identified 945 NPL sites that could be impacted by climate change, 60 percent of the total non-federal NPL sites.<sup>15</sup> These sites are in areas that may be impacted by wildfires, flooding, and other natural hazards that are exacerbated by climate change.

## **II. H.R. 1512, THE “CLEAN FUTURE ACT” – SUPERFUND PROVISIONS**

Chairmen Pallone (D-NJ), Rush (D-IL), and Tonko (D-NY) introduced H.R. 1512, the “Climate Leadership and Environmental Action for our Nation’s Future Act” or the “CLEAN Future Act.” The CLEAN Future Act includes several provisions relating to the Superfund program.

### **A. Section 234 – Environmental Protection Agency Support to Repower Communities**

This section establishes an EPA grant program within Superfund to remediate sites formerly home to a fossil fuel-powered generating unit and develop clean energy projects on the remediated land. The grant program is authorized at \$10 million per year from fiscal year (FY) 2022-2031.

### **B. Section 631 – Climate Impacts Financial Assurance and User Fees**

Under this section, EPA will promulgate requirements that classes of facilities establish and maintain evidence of financial assurance consistent with the risk associated with the effects of climate change and extreme weather on their sites. This section also amends the definition for “act of God” to add that those releases due to the “plausible causal connection to climate change and its effects” are not shielded from liability.<sup>16</sup>

### **C. Section 636 – National Priorities List Cleanup**

This section sets a ten-year deadline for the identification and remediation of federal NPL sites that are vulnerable to the effects of climate change.

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<sup>13</sup> *A growing toxic threat – made worse by climate change*, NBC News (Sept. 24, 2020).

<sup>14</sup> *Sandy Stirs Up Superfund Site In New Jersey*, NPR (Nov. 19, 2012).

<sup>15</sup> U.S. Government Accountability Office, *Superfund: EPA Should Take Additional Actions to Manage Risks from Climate Change* (Nov. 18, 2019) (GAO-20-73).

<sup>16</sup> H.R. 1512.

### III. WITNESSES

The following witnesses have been invited to testify:

**J. Alfredo Gómez**

Director

Natural Resources and Environment

U.S. Government Accountability Office (GAO)

**Amanda Goodin, J.D.**

Staff Attorney

Earthjustice

**Laurie Droughton Matthews, J.D.**

Of Counsel

Morgan, Lewis & Bockius LLP

*On behalf of* the Superfund Settlements Project

**Amy Catherine Dinn, J.D.**

Managing Attorney

Environmental Justice Team, Equitable Development Initiative

Lone Star Legal Aid