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BROWNFIELDS CLEANUP: A LOOK BACK AND AHEAD TOWARD SUPERFUND AUTHORITY

ABA SECTION ON ENVIRONMENT, ENERGY, AND RESOURCES
50TH SPRING CONFERENCE ON ENVIRONMENTAL LAW
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Did you know that the U.S. Environmental Protection Agency, through the Superfund program within each of the ten regional offices across the United States, has millions of dollars to spend each year for cleaning up contaminated sites that are *not* designated “Superfund” sites? Not many people seem to know that, even lawyers who practice in environmental law, or even law professors who teach it. If these elite folks do not know that, then how would ordinary community members know that, people with busy lives who don’t do Superfund for a living? The short answer is, they probably don’t know either.

The Public Interest Environmental Law Conference (PIELC)¹ is one of oldest and the largest conferences of its kind, held every March on the lush Eugene campus of the University of Oregon. It is an excellent place to reconnect with friends engaged in public interest law, or to learn how to handcuff yourself to a tree. Many years ago, I sat through a panel at PIELC about “brownfield sites”² and how to clean them up. The panelists included someone from local

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¹ See www.pielc.org.

² As established by the Small Business Liability Relief and Brownfields Revitalization Act of 2002, the term “brownfield site” means “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” CERCLA § 101(39)(A), 42 U.S.C. § 9601(39)(A) (2002).

government who had experience applying for brownfields grants from the state. There was also much discussion about community organizations holding fundraisers (like, *bake sales?*) to raise money for matching funds or site cleanup. After an hour of this, in the Q&A session, I stood up from the back row and asked if anyone had ever considered engaging with the EPA and the CERCLA removal program to get a contaminated site cleaned up? After blank stares around the crowded room, I quietly sat back down.

EPA's primary authority for responding to contaminated sites is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),³ known popularly as "Superfund." As the popular name suggests, there is indeed a "fund" that EPA may use to investigate and clean up contaminated sites. That fund, known officially as the "Hazardous Substance Superfund,"⁴ allows the EPA to receive appropriated funds from Congress as well as recovered funds from judgments and settlements with responsible parties, for purposes specified in the statute.⁵ Authorized uses of the Fund include "[p]ayment of governmental response costs incurred pursuant to" CERCLA Section 104.⁶

CERCLA Section 104, in turn, provides the EPA with its primary authority for cleaning up contaminated sites. Under this provision –

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present any imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time....⁷

³ 42 U.S.C. § 9601 *et seq.*

⁴ 26 U.S.C. § 9507.

⁵ *See* CERCLA § 111, 42 U.S.C. § 9611 ("Uses of Fund").

⁶ *Id.* § 111(a)(1), 42 U.S.C. § 9611(a)(1).

⁷ *Id.* § 104(a)(1), 42 U.S.C. § 9604(a)(1).

The authority of “the President” in Section 104 is largely delegated to the U.S. EPA.⁸ The term “hazardous substance” is defined to incorporate by reference hazardous materials regulated by other environmental statutes⁹ as well as by a long list of designated “hazardous substances” in the National Contingency Plan.¹⁰ The “term “pollutant or contaminant” is defined more narrowly, to include just those substances that may pose certain threats, such as “death, disease, behavioral abnormalities, cancer, genetic mutations ... or physical deformities, in such organisms or their offspring....”¹¹

Notice that nothing in Section 104 requires designation of a “Superfund site” before the EPA may respond to a release of hazardous substances or pollutants or contaminants. Without designation of a Superfund site (or more properly, listing on the National Priorities List),¹² the EPA may exercise its authority under Section 104 to clean up contaminated sites, up to a statutory cap of \$2 million,¹³ unless exemptions are invoked. One exemption allows for expenditures above \$2 million in order to “prevent, limit, or mitigate an emergency.”¹⁴ Another exemption is spending for remedial actions¹⁵ at a designated “Superfund site” on the National Priorities List (NPL). The potential for expenditures from the Fund above \$2 million is the primary benefit of NPL listing for a site. NPL sites often require cleanup on the order of

⁸ Exec. Order 12580 (1987), § 1(g), 52 Fed. Reg. 2923 (Jan. 29, 1987).

⁹ CERCLA § 101(14), 42 U.S.C. § 9601(14).

¹⁰ 40 C.F.R. Table 302.4.

¹¹ CERCLA § 101(33), 42 U.S.C. § 9601(33).

¹² *See id.* § 105(c), 42 U.S.C. § 9605(c).

¹³ *Id.* § 104(c)(1), 42 U.S.C. § 9604(c)(1). Note that this is only a cap on expenditures from the Fund; there is no cap on expenditures from other sources, including expenditures by responsible parties under settlement agreements.

¹⁴ This emergency exemption was used by EPA, for example, to expend more than \$30 million to respond to the blowout at the Gold King Mine in August 2015. *See* Clifford J. Villa, *Gold King Mine Spill: Environmental Law and Legal Protections for Environmental Responders*, 2019 UTAH L. REV. 263, 322-323 (2019).

¹⁵ “Remedial actions” are generally defined as “those actions consistent with permanent remedy,” 42 U.S.C. § 9601(24). Remedial actions are distinguished from “removal actions,” which are generally defined to mean “cleanup ... of released hazardous substances from the environment” that does not necessarily provide a permanent remedy. *See* 42 U.S.C. § 9601(23).

hundreds of millions of dollars and take decades to complete.¹⁶ However, far more sites are actually addressed through Superfund’s removal program, for \$2 million or less. In fiscal year 2019, for example, while only 12 NPL sites reached full completion of cleanup, 223 removal actions were completed: a factor of 1 to 18.¹⁷

Given the fact that removal actions at non-NPL sites can provide for cleanups of up to \$2 million, and are far more numerous than remedial actions at NPL sites, why is anyone concerned about brownfields or bake sales or other ways that communities might raise money for cleanup? For one thing, there are a *lot* of brownfields, by one early estimate, perhaps 450,000 of them in the United States,¹⁸ far exceeding the 200 or so removal actions that may be completed in any one year. For another thing, there are some important legal limitations on removal actions. One of the most important limitations is the CERCLA “petroleum exclusion,” which excludes from the definitions of “hazardous substance” and “pollutant or contaminant” any form of “petroleum, including crude oil or any fraction thereof” as well as “natural gas, natural gas liquids, liquefied natural gas, , or synthetic gas usable for fuel....”¹⁹ By contrast, “brownfields” under CERCLA explicitly may include sites “contaminated by petroleum or a petroleum product” excluded by the “petroleum exclusion.”²⁰ As such, brownfields funding may be useful for cleaning up old

¹⁶ For a case study of one such “mega-site” in northern Idaho, where mining contamination may require cleanup exceeding one billion dollars, see Clifford J. Villa, *Superfund vs. Mega-Sites: The Coeur d’Alene River Basin Story*, 28 COLUMBIA J. ENVTL. L. 255 (2003).

¹⁷ U.S. EPA, SUPERFUND FY 2019 ANNUAL ACCOMPLISHMENTS REPORT 10 (2020).

¹⁸ CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT, STATE OF THE STATES ON BROWNFIELDS: PROGRAMS FOR CLEANUP AND REUSE OF CONTAMINATED SITES 2 (1995). See also Joel Eisen, *‘Brownfields of Dreams’?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883 n.29 (1996) (providing multiple estimates of brownfield sites in the United States, up to 500,000).

¹⁹ 42 U.S.C. § 9601(14), (33).

²⁰ *Id.* § 9601(39)(D)(ii)(II)(aa).

gas stations, used car lots, residential properties with heating oil leaks, and other sites potentially contaminated by fuel spills.²¹

Even with its limitations, CERCLA remains one important resource for cleaning up contaminated spaces in communities. For advocates who understand this resource, one challenge is how to engage the resource for work in their communities. The Appendix below provides a comprehensive compilation of opportunities for public involvement required by the CERCLA statute and its implementing regulations. But for present purposes, if you have a contaminated site in your neighborhood that is not already receiving attention by authorities, one easy place to start is by calling this phone number: 1-800-424-8802. This is the phone number of the National Response Center in Washington, D.C., staffed 24/7 by the U.S. Coast Guard. Within minutes, your call will be routed to the appropriate EPA Regional office, which could choose to respond directly or notify other appropriate response authorities.²²

If the EPA chooses to respond, it may deploy an “On-Scene Coordinator” (OSC) to investigate and potentially oversee a cleanup.²³ OSCs work for EPA Regional offices, other Federal agencies, as well as state and tribal agencies.²⁴ OSCs, together with their support teams and contractors, train for cleanup actions. They carry credentials, stockpile supplies, and maintain response vehicles in warehouses across the United States. They *want* to clean up sites.

²¹ As one example of brownfields funding used to help clean up and redevelop petroleum contamination, a former gas station in Southeast Portland, Oregon, with tremendous community support, was converted to a community space known today as Tabor Commons, which among things has hosted a café/play space and school music programs. See <https://www.seuplift.org/tabor-commons/>.

²² For an example of how this system works, see Clifford J. Villa, *Gold King Mine Spill: Environmental Law and Legal Protections for Environmental Responders*, 2019 UTAH L. REV. 263, 268 (2019).

²³ For one dramatic story of an OSC being deployed to investigate a site on the eve of Thanksgiving 1999, and discovering one of the most deadly cases of contamination in U.S. history, see ANDREW SCHNEIDER & DAVID MCCUMBER, *AN AIR THAT KILLS* (2004) (asbestos contamination in Libby, Montana). See also *United States v. W.R. Grace, et al.*, 429 F.3d 1224 (9th Cir. 2005).

²⁴ See National Oil and Hazardous Substances Contingency Plan, 40 C.F.R. § 300.120 (OSC designation and responsibilities).

And for every removal action they complete, their supervisors collect “beans” when it comes time for reporting at the end of the fiscal year.

For a quick view of EPA removal actions happening all the time, all across the country, visit this public website: <https://response.epa.gov>. Through this website, you can sort by removal actions in your state and you can reach back in time almost 20 years. Among the removal actions you may find here is the “Yakima Mercury Release.” In this case, the EPA received notification on Sunday, April 15, 2007, about a residential property in Yakima, Washington, where two boys, plus other neighborhood children, played with mercury from a liter bottle for a number of months. The oldest boy, 16 years old, was hospitalized and diagnosed with mercury poisoning. After initial response by the Yakima Fire Department and other agencies, the EPA was called to assist with the investigation and cleanup. The EPA deployed an OSC to the scene the next day, eventually supported by a response team of at least ten EPA staff and contractors. The EPA found high mercury vapors outside and inside of the residential home. Over a period of months, the EPA expended at least \$400,000 to clean up the residential property, which required demolition, disposal, and replacement of many contaminated house structures, to include flooring, plumbing, kitchen cabinets, and countertops.²⁵

The residential property in the Yakima Mercury case had a market value substantially less than half the cost to clean it up.²⁶ But imagine if the EPA had not exercised its CERCLA removal authority in this case. 14 years later, with a lack of development potential, the property would likely still be contaminated, still uninhabitable, but an “attractive nuisance” for crime and neighborhood kids. It would be a gross example of environmental injustice, situated in a low-

²⁵ See U.S. EPA ACTION MEMORANDUM, AMENDMENT #1 (May 1, 2007), available online at https://response.epa.gov/site/site_profile.aspx?site_id=2910.

²⁶ A Zillow search in 2021 found the property to have a “Zestimate” of \$153,975.

income, Spanish-speaking community.²⁷ It would be an urban blight. It would be a classic “brownfield,” but not the kind likely to rally community spirit and energy to address through tools such as the Brownfields Assessment Grants²⁸ and the Revolving Loan Fund.²⁹ There are many thousands, perhaps *hundreds* of thousands, of places across the country where these brownfields tools – and bake sales – may be used to help communities. But where they may not work to clean up contaminated sites fully or expeditiously, CERCLA removal authority should be considered as well.

APPENDIX

CERCLA § 105(a) (42 U.S.C. § 9605(a)): National contingency plan. (a) ... The [EPA] shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances....

CERCLA § 105(d) (42 U.S.C. § 9605(d)): Petition for assessment of release. Any person who is, or may be, affected by a release or threatened release of a hazardous substance or pollutant or contaminant may petition the [EPA] to conduct a preliminary assessment of the hazards to public health and the environment... If the [EPA] has not already conducted a preliminary assessment of such release, the [EPA] shall, within 12 months after receipt of any such petition, complete such assessment or provide an explanation of why the assessment is not appropriate. If the preliminary assessment indicates that the release or threatened release concerned may pose a threat to human health or the environment, the [EPA] shall promptly evaluate such release ... to determine [whether the site should be added to the National Priorities List].

CERCLA § 117 (42 U.S.C. § 9617): Public Participation.

(a) Proposed plan. Before adoption of any plan for remedial action ... the [EPA] or State, as appropriate, shall take both of the following actions:

(1) Publish a notice and brief analysis of the proposed plan and make such plan available to the

²⁷ A search on EJSCREEN within one half-mile of the residential property indicated the site ranked in the 99th percentile regionally for Low Income Population and 98th percentile regionally for People of Color Population. In addition to the mercury contamination, the site was already clearly overburdened with adverse environmental impacts, ranking 98th percentile regionally for Particulate Matter, 97th percentile regionally for Ozone, and 99th percentile for Lead Paint Indicator.

²⁸ See generally, EPA FY21 GUIDELINES FOR BROWNFIELD ASSESSMENT GRANTS, available online at <https://www.epa.gov/grants/fy21-guidelines-brownfield-assessment-grants>.

²⁹ See generally, EPA, BROWNFIELDS REVOLVING LOAN FUND (RLF) GRANTS, available online at <https://www.epa.gov/brownfields/brownfields-revolving-loan-fund-rlf-grants>.

public.

(2) Provide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue....

(b) Final plan. Notice of the final remedial action plan adopted shall be published and the plan shall be made available to the public before commencement of any remedial action. Such final plan shall be accompanied by a discussion of any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments....

(d) Publication. For the purposes of this section, publication shall include, at a minimum, publication in a major local newspaper of general circulation. In addition, each item developed, received, published, or made available to the public under this section shall be available for public inspection and copying at or near the facility at issue.

(e) Grants for technical assistance. (1) Authority. [T]he EPA may make grants available to any group of individuals which may be affected by a release or threatened release at any facility which is listed on the National Priorities List.... Such grants may be used to obtain technical assistance in interpreting information with regard to the nature of the hazard, remedial investigation and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, or removal action at such facility.

(2) Amount. The amount of any grant under this subsection may not exceed \$50,000 for a single grant recipient. The [EPA] may waive the \$50,000 limitation in any case where such waiver is necessary to carry out the purposes of this section.... Not more than one grant may be made under this subsection with respect to a single facility, but the grant may be renewed to facilitate public participation at all stages of remedial action.

CERCLA § 113 (42 U.S.C. § 9613):

(j) Judicial review. (1) Limitation. In any judicial action under [CERCLA], judicial review of any issues concerning the adequacy of any response action ... shall be limited to the administrative record....

(k) (1) Administrative record. The [EPA] shall establish an administrative record upon which the [EPA] shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The [EPA] may place duplicates of the administrative record at any other location.

(2) Participation procedures.

(A) Removal action. The [EPA] shall ... establish[] procedures for the appropriate participation of interested person in the development of the administrative record on which the [EPA] will base the selection of removal actions and on which judicial review will be based.

(B) Remedial action. The [EPA] shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record ... on which judicial review of remedial actions will be based.... The [EPA] shall promulgate regulations ... to

carry out the requirements of this subparagraph.

CERCLA § 122 (42 U.S.C. § 9622): Settlements.

(d) Enforcement. (1)(A) Consent decree. Whenever the [EPA] enters into an agreement ... with any potentially responsible party with respect to remedial action ... the agreement shall be entered in the appropriate United States district court as a consent decree.

(2) Public participation. (A) Filing of proposed judgment. At least 30 days before a final judgment is entered under paragraph (1), the proposed judgment shall be filed with the court.

(B) Opportunity for comment. The [U.S. Department of Justice] shall provide an opportunity to ... comment on the proposed judgment before its entry by the court as a final judgment. The [DOJ] shall consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment. The [DOJ] may withdraw or withhold its consent to the proposed judgment if the comments ... disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

(i) Settlement procedures. (1) At least 30 days before any settlement [for the recovery of response costs] may become final ... [the lead agency] shall publish in the Federal Register notice of the proposed settlement....

(2) For a 30-day period beginning on the date of publication of notice ... the [lead agency] shall provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement.

(3) The [lead agency] shall consider any comments filed under paragraph (2) in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.

CERCLA § 310 (42 U.S.C. § 9659): Citizen suits. (a) Except as provided [elsewhere in CERCLA], any person may commence a civil action on his own behalf (1) against any person (including the United States...) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to [CERCLA] (including any provision of an agreement under [CERCLA § 120] relating to Federal facilities); or (2) against the [EPA] where there is alleged a failure of the [EPA] to perform any act or duty under [CERCLA] which is not discretionary....

NCP at 40 C.F.R. § 300.5: Definitions. *Community relations* means EPA's program to inform and encourage public participation in the Superfund process and to respond to community concerns. The term "public" includes citizens directly affected by the site, other interested citizens or parties, organized groups, elected officials, and potentially responsible parties (PRPs).

NCP at 40 C.F.R. § 300.155: Public information and community relations. (a) When an incident occurs, it is imperative to give the public prompt, accurate information on the nature of the incident and the actions underway to mitigate the damage. OSCs/RPMs and community relations personnel should ensure that all appropriate public and private interests are kept informed

and that their concerns are considered throughout a response. They should coordinate with available public affairs/community relations resources to carry out this responsibility by establishing, as appropriate, a Joint Information Center bringing together resources from federal and state agencies and the responsible party.

NCP at 40 C.F.R. § 300.185: Nongovernmental participation. [Area Contingency Plans] shall establish procedures to allow for well organized, worthwhile, and safe use of **volunteers**, including compliance with [regulations] regarding worker health and safety.... ACPs also should identify specific areas in which volunteers can be used, such as beach surveillance, logistical support, and bird and wildlife treatment. Unless specifically requested by the OSC/RPM, volunteers generally should not be used for physical removal or remedial activities.

NCP at 40 C.F.R. § 300.415(n): Community relations in removal actions.

(1) In the case of all CERCLA removal actions ..., a spokesperson shall be designated by the lead agency. The spokesperson shall inform the community of actions taken, respond to inquiries, and provide information concerning the release.

(2) For CERCLA actions where ... the lead agency determines that a removal is appropriate, and that less than six months exists before on-site removal activity must begin, the lead agency shall:

(i) Publish a notice of availability of the administrative record file ... in a major local newspaper of general circulation or use one or more other mechanisms to give adequate notice to a community within 60 days of initiation of on-site removal activity;

(ii) Provide a public comment period, as appropriate, of not less than 30 days from the time the administrative record file is made available for public inspection...

(iii) Prepare a written response to significant comments....

(3) For CERCLA removal actions where on-site action is expected to extend beyond 120 days from the initiation of on-site removal activities, the lead agency shall ...

(i) Conduct interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns, information needs, and how or when citizens would like to be involved in the Superfund process.

(ii) Prepare a formal community relations plan (CRP) based on the community interviews and other relevant information, specifying the community relations activities that the lead agency expects to undertake during the response; and

(iii) Establish at least one local information repository....

(4) Where ... the lead agency determines that a CERCLA removal action is appropriate and that a planning period of at least six months exists prior to initiation of the on-site removal activities, the lead agency shall at a minimum:

(i) Comply with the [above] requirements

(ii) Publish a notice of availability and brief description of the [Engineering Evaluation / Cost

Analysis (EE/CA)] in a major local newspaper of general circulation or use one or more other mechanisms to give adequate notice to a community....

(iii) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written and oral comments after completion of the EE/CA....; and

(iv) Prepare a written response to significant comments....

NCP at 40 C.F.R. § 300.430(c): Community relations. (2) The lead agency shall provide for the conduct of the following community relations activities, to the extent practicable, prior to commencing field work for the remedial investigation:

(i) Conducting interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns and information needs, and to learn how and when citizens would like to be involved in the Superfund process.

(ii) Preparing a formal community relations plans (CRP), based on the community interviews and other relevant information, specifying the community relations activities that the lead agency expects to undertake during the remedial response....

(iii) Establishing at least one local information repository...

(iv) Informing the community of the availability of technical assistance grants.

NCP at 40 C.F.R. § 300.430(e): Feasibility study. (9)(iii) Nine criteria for evaluation. (I) Community acceptance. This assessment includes determining which components of the alternatives interested persons in the community support, have reservations about, or oppose. This assessment may not be completed until comments on the proposed plan are received.

NCP at 40 C.F.R. § 300.435(c): Community relations in remedial design/remedial action.

(1) Prior to the initiation of [Remedial Design], the lead agency shall review the [Community Relations Plan] to determine whether it should be revised to describe further public involvement activities during RD/RA that are not already addressed or provided for in the CRP.

(2) After the adoption of the ROD, if the remedial action ... differs significantly from the remedy selected in the ROD with respect to scope, performance, or cost, the lead agency ... shall either:

(i) Publish an explanation of significant differences when the differences ... do not fundamentally alter the remedy selected in the ROD...; or

(ii) Propose an amendment to the ROD....

(3) After the completion of the final engineering design, the lead agency shall issue a fact sheet and provide, as appropriate, a public briefing prior to the initiation of the remedial action.

NCP at 40 C.F.R. § 300.825: Record requirements after the decision document is signed.

(b) The lead agency may hold additional public comment periods or extend the time for the submission of public comment after a decision document has been signed on any issues concerning

selection of the response action....

(c) The lead agency is required to consider comments submitted by interested persons after the close of the public comment period only to the extent that the comments contain significant information not contained elsewhere in the administrative record file which could not have been submitted during the public comment period and which substantially support the need to significantly alter the response action....