



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 13 2018

OFFICE OF
CONGRESSIONAL AND
INTERGOVERNMENTAL
RELATIONS


The Honorable John Shimkus
Chairman
Subcommittee on Environment
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Shimkus:

Enclosed please find the U.S. Environmental Protection Agency's responses to the Subcommittee's Questions for the Record following the January 18, 2018, hearing titled "Modernizing the Superfund Cleanup Program,"

I hope this information is helpful to you and the members of the Subcommittee. If you have further questions, please contact me or your staff may contact Carolyn Levine in my office at levine.carolyn@epa.gov or (202) 564-1859.

Sincerely, 


Troy M. Lyons
Associate Administrator

Enclosure

**U.S. Environmental Protection Agency
Responses to Questions for the Record
House Committee on Energy and Commerce
Subcommittee on Environment
Hearing on
“Modernizing the Superfund Program”
January 18, 2018**

The Honorable John Shimkus

- 1. EPA retains money received through settlements with Potentially Responsible Parties (PRPs) in site-specific accounts to conduct planned future cleanup work at the site based on the terms of the settlement agreement. Is EPA constrained or prevented from using special account funds to get these sites cleaned up?**

Response: While EPA has the authority to collect funds from parties to support Superfund investigations and cleanups, site specific account are set up separately and distinctly and may only be used for the sites and uses outlined in the settlement(s) with the party. Section 122(b)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorizes EPA to retain and use funds received pursuant to a settlement agreement with a party to carry out the purpose of that agreement. Funds are deposited in Superfund site specific special accounts for cleanup at the sites designated in individually negotiated settlement agreements. Special accounts are generally used before the agency’s annually appropriated funds for response actions identified in the terms of the settlement agreements. Special accounts are crucial to EPA’s ability to continue to fund investigations and construction projects at sites across the country and save taxpayer dollars for those sites where no viable or cooperating responsible party has been identified.

- a. If not, why is the balance in the account so high and why is the money not being spent?**

Response: EPA carefully manages the available resources in special accounts for site response work. EPA has plans to spend approximately \$1.3 billion of currently available special account funds over the next 5 years, but use of the funds are also planned for much further into the future to continue activities such as conducting five-year reviews or remedy optimization where waste has been left in place. In addition, the agency continues to receive site-specific settlement funds that are placed in special accounts each year, so progress on actual obligation and disbursement of funds may not be apparent upon review solely of the cumulative available balance. In FY 2017, EPA deposited more than \$289 million into special accounts and disbursed and obligated over \$357 million from special accounts.

b. Does CERCLA need to be updated to clarify what special account funds may be used for?

Response: The Administration's "Legislative Outline for Rebuilding Infrastructure in America" includes legislative proposals that could improve EPA's ability to facilitate cleanup and redevelopment of Superfund sites through the use of special accounts. The proposals include options for building in flexibilities in the use of special account funding and the ability to enter into administrative agreements with additional classes of entities such as bona fide prospective purchasers.

2. The recommendations of the Superfund Task Force included a recommendation that EPA "maximize the use of special accounts to facilitate site cleanup and/or redevelopment." Other than developing guidance, what is the plan for implementing this recommendation?

Response: The EPA's Special Accounts Senior Management Committee, comprised of agency senior managers, is responsible for the management and use of special accounts. The Committee monitors the use of special account funds on an ongoing basis to ensure that EPA is conducting cleanups and using the funds as quickly and efficiently as possible to address Superfund sites.

The Superfund Task Force identified a gap in current special account guidance, which will be addressed by providing clarifying guidance to EPA regions on the use of special account funds. The guidance will clarify that in appropriate circumstances, special account funds may be used as an incentive for potentially responsible parties or bona fide prospective purchasers (BFPPs) who agree to conduct CERCLA response actions at a site to address contamination and facilitate redevelopment of the site. Providing available special account funds to a BFPP that agrees to conduct CERCLA response actions will help address risks posed by Superfund sites and facilitate redevelopment.

In addition, the Administration's "Legislative Outline for Rebuilding Infrastructure in America" includes legislative proposals that could improve EPA's ability to facilitate cleanup and redevelopment of Superfund sites through the use of special accounts.

3. EPA drafted guidance that is expected to allow for or encourage the provision of Superfund's "special account" funds to bonafide prospective purchasers (BFPPs) as an incentive to conduct work on Superfund sites. Does EPA have the legal authority to reallocate special account funds in this way?

Response: The legal authority for using special accounts is found in Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), which authorizes EPA to "retain and use [funds] for purposes of carrying out the agreement." This authority enables EPA to use special account funds for EPA-lead cleanup at a site, or to provide those funds to other parties who agree to perform an EPA selected response action at that site under a CERCLA agreement. Consistent with this authority, CERCLA agreements generally establish that special account funds can be "retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund." Therefore, BFPPs may be eligible, at EPA's discretion, to receive special account funds when they conduct CERCLA

response actions at a site pursuant to an agreement under CERCLA that is consistent with the response actions agreed to in the settlement agreement that created the account.

- 4. One of the recommendations of the Superfund Task Force was the use of adaptive management. Does EPA intend to incorporate adaptive management into the Superfund cleanup program and if so, how?**

Response: The agency formed an Adaptive Management Workgroup following issuance of the Task Force recommendations. This workgroup is exploring options for incorporating adaptive management into the Superfund cleanup program. At this time, formal decisions have not yet been made regarding implementation.

- 5. How can EPA use incentives to encourage responsible parties to cooperate and come to the table early to avoid the increased transaction costs associated with protracted negotiations?**
- a. What incentives can EPA utilize to clean up a Superfund site faster and more efficiently?**
 - b. How can EPA use enforcement authorities as leverage to get a cleanup started or to help reach settlement?**

Response: One of the principal goals of the Superfund Task Force is to speed up cleanup; these questions go to the core of Recommendation 16: *Provide Reduced-Oversight Incentives to Cooperative, High-performing PRPs, and Make Full Use of Enforcement Tools as Disincentives for Protracted Negotiations, or Slow Performance Under Existing Cleanup Agreements*. The agency is examining these issues, as well as others, to identify and evaluate its existing best practices, as well as propose future methods to encourage timely cleanup and decrease transaction costs. EPA expects to issue guidance pursuant to this recommendation later this fiscal year and can provide an updated response to these questions at that time.

- 6. Please identify any statutory changes EPA believes need to be made to improve the Superfund cleanup program or to implement the recommendations of the Superfund Task Force.**

Response: The Administration's "Legislative Outline for Rebuilding Infrastructure in America" includes several legislative proposals that could improve EPA's ability to facilitate cleanup and redevelopment of Superfund sites. The proposals include additional funding opportunities such as through the Water Infrastructure Finance and Innovation Act (WIFIA) program and the creation of a low-interest revolving loan fund, as well as options for building in flexibilities in the use of Superfund funds and the ability to enter into administrative agreements with additional classes of entities such as bona fide prospective purchasers.

- 7. Would EPA support delegating certain aspects of the Superfund cleanup program to States that seek such authorization?**

Response: It is not necessary at this time to add additional delegation of authority to the states. The partnership between EPA and the states is an existing cornerstone principle under CERCLA and the National Contingency Plan. CERCLA includes key roles for states in the federal Superfund remedial program, and where appropriate, enables states to be designated as the lead agency for remedial action. In addition, EPA's policy calls for state concurrence in listing sites on the National Priorities List (NPL) and consults with the states on cleanup decisions. Through cooperative agreements, EPA provides states with funding to conduct work under the Superfund program including, but not limited to, site assessment, site characterization, review of remedy decision documents, remedy implementation and enforcement actions. In FY 2017, EPA provided approximately \$58 million to states to conduct activities at NPL sites, and to support state Superfund programs. Cost recovery authority is available to states under CERCLA.

Separately, state cleanup programs already address a wide variety and large number of contaminated sites that do not make it on the NPL. EPA will continue to seek and expand opportunities afforded by the existing statute to work closely with states to efficiently leverage our respective cleanup resources.

The Honorable David McKinley

- 1. Mr. Breen- It is our understanding, upon completion of assessment in the Pre-Remedial Program, sites are reviewed and considered for listing on the NPL. If a site is contaminated but not determined to be appropriate for the NPL, recommendations are made for remediation outside of the CERCLA Program. However, these recommendations are not enforced by EPA, and property owners without financial interest often do not act on the recommendations. These sites are generally encouraged to enter a state Voluntary Remediation Program, but the property owners cannot be forced to participate in a voluntary program. This issue, combined with a pressure to not list new sites on the NPL, has created a "black hole" where contaminated sites without proper remediation lay dormant and potentially dangerous for years. What reforms can be done to address this issue? Is any legislation needed to remedy the problem?**

Response: The Superfund program's site assessment/listing multi-phase evaluation process is used to determine and implement the appropriate responses to releases of hazardous substances, pollutants or contaminants to the environment. In close coordination with states and tribes, this process informs whether Superfund is the most appropriate program for cleanup or if a different authority would be a better fit (e.g., state RCRA corrective action program, state Superfund program, state voluntary cleanup program, or some other federal authority).

In the case of a referral of an NPL-eligible site to a state cleanup program, including a state voluntary remediation program, EPA uses the "Other Cleanup Activities" designation. EPA is not directly involved in the enforcement or oversight but does retain these sites in the agency's Superfund active site inventory and monitors the site until a state completes cleanup or determines that cleanup is warranted. In addition, should site conditions or cleanup plans change or if cleanup progress stalls, the state can refer the site back to EPA for reassessment under Superfund. The statute currently provides for a state to establish and submit, for EPA's consideration, state priorities for remedial action among known releases and potential releases.

The Honorable Richard Hudson

- 1. Mr. Breen, thank you for coming before the committee today. In your testimony you mention that cleaning up Superfund sites is not only a top priority for Administrator Pruitt, but also an important aspect of the EPA's core mission. In my home state of North Carolina there are 48 Superfund sites, six of which are in my district. These sites vary dramatically in how long they've been on the list ranging from 1984 to 2008. With that in mind how do you strike the balance between removing sites from the list and taking immediate actions to mitigate risk at new sites?**

Response: Addressing new sites and removing sites from the National Priorities List (NPL) is a balance. The Superfund program places the highest priority on addressing sites that warrant an emergency response or immediate removal action to address imminent risk to human health or the environment. The program also lists sites to the NPL that pose a threat to human health and the environment and require a longer term cleanup approach. Sites or parts of sites that are deleted from the NPL, are in the last stages of the Superfund process and no longer pose an unacceptable risk to human health and the environment. Long-term remedial action is typically necessary before a site is ready for deletion from the NPL. Deletion is an administrative process to document that all response actions have been fully implemented and remedial objectives have been achieved. EPA's appropriated resources for remedial actions, which are part a longer-term cleanup process that may eventually lead to a site deletion, are separate from the agency's appropriated resources for investigation and/or removal at newer sites that may pose immediate risks.

- 2. As part of the Superfund program it requires coordination with the EPA, Regional bodies, and individual states. Can you describe the level of coordination of these efforts? Is the EPA in a position to effectively lead these efforts or should it take the role more generally as a facilitator? Should more power be delegated down to the states?**

Response: The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes key roles for states and tribes in the federal Superfund remedial program. EPA's regional offices closely coordinate with their state and tribal counterparts on each site. CERCLA also enables states and tribes to be designated as the lead agency for remedial action in lieu of EPA.

Through cooperative agreements, EPA provides states and tribes with funding to conduct work under the Superfund program including site assessment, remedial action, review of remedy decision documents and enforcement actions. In FY2017, EPA provided approximately \$58 million to states to conduct activities at NPL sites and to support state and tribal Superfund programs.

EPA's policy calls for state and tribal concurrence in placing sites on the NPL. States and tribes can ask that EPA defer placing a site on the NPL if the state or tribe, or another party under a state or tribal agreement, is conducting a response action under the state or tribe's response program to protect human health or the environment, or if the state or tribe is actively pursuing an agreement with a responsible party to perform a response action. State and tribal cleanup

programs are used to address a wide variety and large number of contaminated sites that are not listed on the NPL.

The agency continues to seek and expand opportunities afforded by the existing statute to work closely with states to efficiently leverage our respective cleanup resources and responsibilities.

The Honorable Tim Walberg

1. **On December 8, 2017 the Administrator released a list of 21 sites that EPA targeted for “immediate and intense attention.” The list is comprised of sites with “critical, near-term milestones” that EPA determined would benefit from Administrator Pruitt’s direct engagement.**
 - a. **Who completed the analysis?**
 - b. **Other than impending milestones, what factors were considered in adding sites to the list?**
 - c. **What milestones rose to the level of being “critical” and resulted in the site being added to the list?**
 - d. **If no money is attached to being on the top 21 list – what does it mean to be on the list?**

Response: In formulating the list, senior career Superfund staff at EPA headquarters and in each region were consulted and they identified potential sites that may be worthy of special attention now or in the future to advance those sites through the cleanup process. The recommended sites represent the EPA regions’ best professional judgment where the Administrator’s involvement would facilitate site progress. The Administrator reviewed the recommendations and personally selected the sites for inclusion. The list includes sites that require timely resolution of specific issues to expedite cleanup and redevelopment efforts. The specific issue or milestone that may benefit from the Administrator’s attention is noted for each site on the list, which can be found on the EPA website at <https://www.epa.gov/superfund/superfund-sites-targeted-immediate-intense-action>.

The list is designed to spur action at sites where opportunities exist to act quickly and decisively. The Administrator will receive regular updates on each of these sites. Further, the list is intended to be dynamic and sites will move on and off the list as appropriate. At times, there may be more or fewer sites based on where the Administrator’s attention and focus is most needed.

2. **On January 17, 2018 EPA released another list of sites, these with the greatest expected redevelopment and commercial potential – the Redevelopment Focus List.**
 - a. **Were all superfund sites analyzed and just the 31 on the list made the cut?**
 - b. **Who made the decision and what factors were considered?**
 - c. **The list directs interested developers and potential owners to Superfund sites with redevelopment potential, but notes that it does not necessarily include all possible sites with similar potential. What distinguished these 31 sites from the others?**

d. What does it mean to be on this list?

Response: In formulating the Redevelopment Focus List, EPA headquarters staff reached out to the EPA regional Superfund Redevelopment Initiative (SRI) coordinators to inquire about sites where there has been a strong interest in reuse or at sites appearing to have the strongest near-term reuse potential. This inquiry formed an initial list. Consistent with the Task Force Recommendation #33: *Focus Redevelopment Efforts on 20 NPL Sites with Redevelopment Potential and Identify 20 Sites with Greatest Potential Reuse*, EPA headquarters staff then narrowed the list based on the following criteria:

- Previous outside interest;
- Transportation access;
- Land values;
- Other critical development drivers.

This refined list of sites was shared with the agency's regional Superfund offices, which vetted the sites with SRI experts, remedial project managers, attorneys and regional management. The regional offices also contacted property owners, as appropriate, to let them know that EPA was considering their sites for the list, and reached out to EPA's state counterparts to ask if they had additional sites with redevelopment potential that the Agency should consider. Once EPA headquarters and the regions reached agreement, the list was made public.

The Redevelopment Focus List is intended to easily direct interested developers and potential owners to Superfund sites with redevelopment potential. EPA plans to focus redevelopment training, tools and resources towards the sites on this list. The agency also plans to work with developers interested in reusing these and other Superfund sites; identify potentially interested businesses and industries to keep them apprised of redevelopment opportunities; and continue to engage with community groups in cleanup and redevelopment activities to promote the successful redevelopment and revitalization of their communities. This list is intended to be dynamic with sites moving on and off the list as appropriate.

The current list of sites may be found at: <https://www.epa.gov/superfund-redevelopment-initiative/superfund-redevelopment-focus-list>

For additional information about the Superfund Redevelopment Initiative, please go to: <https://www.epa.gov/superfund-redevelopment-initiative>

- 3. Similarly, the EPA also relies on responsible parties to cooperate in remediation efforts. How can EPA use incentives to encourage responsible parties to cooperate and come to the table early in order to avoid the increased transaction costs associated with protracted negotiations? What incentives can EPA utilize in order to clean up a Superfund site faster and more efficiently?**

Response: One of the principal goals of the Superfund Task Force is to speed up cleanup, and EPA is working to address these issues under the Task Force Report Recommendation 16: *Provide Reduced-Oversight Incentives to Cooperative, High-performing PRPs, and Make Full Use of Enforcement Tools as Disincentives for Protracted Negotiations, or Slow Performance*

Under Existing Cleanup Agreements. The agency is planning to identify and evaluate its existing best practices in this area, as well as propose future methods to encourage timely cleanup and decrease transaction costs. EPA expects to issue guidance pursuant to this recommendation later this fiscal year and can provide an updated response to these questions at that time.

The Honorable Paul Tonko

1. Migratory Pollutants at Sites

- a. How does EPA consider the impact of migratory pollutants on natural resources outside a defined cleanup unit when determining 5-Year Review findings and issuing Certificates of Completion?**

Response: Site-specific monitoring plans are developed for projects where waste is left in place above levels that allow for unrestricted land and resource use. As part of a five-year review, the results of the monitoring and other available information are assessed to determine whether the remedy is or will be protective of human health and the environment. As part of this assessment, an examination of contaminant characteristics and toxicity, such as the nature and extent of contaminant migration and the effects on receptors, including ecological receptors, is considered. If monitoring indicates a change in site conditions or receptors, EPA will determine whether additional actions are necessary. Certification of Remedial Action Completion is issued when EPA determines that the remedial action has been performed in accordance with the consent decree and generally when the remedy-specific performance standards have been achieved. The consideration of monitoring data when making this determination is based on the language in the specific consent decree as well as the requirements outlined in the accompanying remedial design/remedial action statement of work.

- b. What experience does EPA have relying upon natural attenuation as the principle strategy for a site when there is a possibility that it could result in contamination of downstream resources?**

Response: EPA typically employs monitored natural recovery (MNR) at sediment sites as a component of remedies that use dredging and/or capping technologies. Where remedies employ MNR, EPA applies its extensive experience in monitoring and assessing the impacts both on the site and the downstream to ensure the anticipated recovery is actually occurring. As part of the agency's five-year review process, EPA will evaluate monitoring information to assess the remedy's protectiveness and, if additional action is deemed appropriate to protect human health and the environment, the agency will initiate actions to do so.

2. Certificate of Completion

- a. What are the conditions upon which a Certificate of Completion is issued to the liable party for a Superfund cleanup?**

Response: The exact conditions upon which a Certificate of Completion is issued to the liable party for a Superfund Site depends upon what the particular CERCLA consent decree states. CERCLA Section 122(f)(3), 42 U.S.C. § 9622(f)(3), states “a covenant not to sue for future liability to the United States shall not take effect until the President certifies that remedial action has been completed in accordance with the requirements of this chapter at the facility that is the subject of such covenant.” EPA’s guidance states:

EPA interprets completion of the remedial action as that date at which remedial construction has been completed. Where a remedy requires operational activities, remedial construction would be judged complete when it can be demonstrated that the operation of the remedy is successfully attaining the requirements set forth in the [Record of Decision] and [Remedial Design].

The exact point when EPA can certify completion of a particular remedial action depends upon the specific requirements of that remedial action. Each consent decree should include a detailed list of those activities which must be completed before certification can occur.

Certification of completion under section 122(f)(3) does not in any way affect a settling party’s remaining obligations under the consent decree. All remedial activities, including maintenance and monitoring, must be continued as required by the terms of the consent decree.

Covenants Not to Sue Under SARA, 52 Fed. Reg. 28036, at 28041.

b. What is the role of the Record of Decision and Consent Decree in this context?

Response: Performance standards for cleanups are often established in Records of Decision and, as described above, EPA’s Model Remedial Design/Remedial Action Consent Decree generally ties the issuance of the Certification of Remedial Action Completion to the achievement of those standards.

3. Hudson River Site

a. Does the agency intend to wait until the Remediation Goals have been achieved and the remedy is protective of human health and the environment before issuing the Certificate of Completion?

Response: The Consent Decree for the Hudson River PCBs site does not require EPA to wait until the Remediation Goals have been achieved before issuing the Certification of Completion of the Remedial Action. With regard to this certification, the Consent Decree states:

If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion of the Remedial Action and after a reasonable opportunity for review and comment by the State and by the Federal Trustees for Natural Resources, that the Remedial Action has been performed in accordance with this Consent Decree, EPA will so certify in writing to [General Electric]. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this consent decree including, but not limited to, Section XXI (Covenants Not to Sue by Plaintiff). Certification of Completion of

the Remedial Action shall not affect [General Electric's] remaining obligations under this Consent Decree. [Consent Decree, parag. 57.d]

The Consent Decree defines Remedial Action as "those activities, except for Remedial Design and Operation, Maintenance and Monitoring, to be undertaken to implement the [2002 Record of Decision], in accordance with the [Statement of Work], the final Remedial Design plans and reports, the Remedial Action Work Plans, and other plans approved by EPA." (Consent Decree, parag. 4) General Electric has informed EPA that it believes that it completed the Remedial Action portion of the cleanup as required by the Consent Decree and has requested EPA's Certification of Completion of the Remedial Action. EPA is reviewing input from the New York State Department of Environmental Conservation, the National Oceanic and Atmospheric Administration, the U.S. Fish & Wildlife Service, and the New York State Attorney General's office as it considers GE's request.

The Certification of Completion of the Remedial Action does not in any way suggest that the cleanup is finished. In the Record of Decision, EPA projected that construction of the remedy (including dredging, backfilling, and habitat reconstruction) would be performed over six years, to be followed by decades of "monitored natural attenuation" or "MNA," during which PCBs remaining in the river after dredging would gradually decrease until the remedial goals are achieved. MNA is also part of the cleanup, and during the entire period of MNA, GE is required to perform "Operation, Maintenance and Monitoring" of the remedy, which includes an extensive program that includes monitoring of sediments, water quality and fish, as well as monitoring of the caps that were installed on portions of the river bottom, and repairing those caps should any damage occur. Once all the work required by the consent decree is complete, the consent decree authorizes EPA to issue a further certification, known as a Certification of Completion of the Work. We do not anticipate issuing this certification any time before the remedial goals are achieved.

EPA is currently working with our state partner, the New York State Department of Environmental Conservation (NYSDEC) to review some 1,800 sediment samples collected by NYSDEC. EPA is working in cooperation with NYSDEC to review the data and work towards developing joint findings on the results of the sampling. As such, EPA is refraining from any decision making regarding the issuance of the Certificate of Completion of Remedial Action until the data from these samples have been fully analyzed.