

**KATE BROWN**  
**GOVERNOR**



March 9, 2018

Kelly Collins, Legislative Clerk  
Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, DC 20515

Dear Ms. Collins,

The State of Oregon thanks Representative John Shimkus, Chairman of the Subcommittee on Environment, for the opportunity to testify before the subcommittee regarding “Modernizing the Superfund Cleanup Program” and to provide responses to the nine follow-up questions presented in the Chairman’s letter to Mr. James McKenna, dated February 15, 2018.

The State’s responses to the nine questions are attached for subcommittee consideration and to be added to the record.

Thank you for your consideration of these recommendations.

Sincerely,

A black rectangular redaction box covers the signature of Jim McKenna. A blue ink scribble is visible above the redaction.

Jim McKenna  
Office of Governor Kate Brown  
Portland Harbor Policy Analyst

JM:ec

Attachment 1: State of Oregon Responses to Nine Questions

- 1. How can States help reduce the number of sites on the National Priorities List?** In general, the State of Oregon recommends three approaches to reducing the number of NPL sites: a) prevent releases of hazardous substances; b) restore a sustainable source of federal funding for orphaned sites; and c) prioritize early delisting of sites that are in the long-term monitoring/institutional controls phase.

**Support State Prevention Programs.** Reducing or eliminating the use of hazardous substances, along with promoting best-management practices for the storage, transport, handling and use of these substances, is the best way to reduce the number of newly contaminated sites and minimize the need for new sites to be added to the NPL. Compliance with state and federal regulatory requirements will greatly reduce the potential for new releases of hazardous substances. Many states operate with inadequate funding to perform activities involving technical assistance, permitting, compliance, inspection and enforcement related to hazardous substances. Underfunded programs are less likely to prevent releases that might create a new NPL site in the future.

**Restore Superfund Tax.** The Superfund pollution tax on particular industries expired over two decades ago. This fund provided critical resources to EPA and the states to timely implement removal and remedial action at sites involving recalcitrant or financially incapable responsible parties. Most facilities that states refer to EPA for potential listing on the NPL involve recalcitrant responsible parties or unknown or unable responsible parties.

Reinstatement of the Superfund tax (or some other form of revenue for the Fund) would provide a mechanism for federal financial assistance to states to take response actions at facilities with unknown or unwilling responsible parties. EPA has employed a similar approach for corrective action of leaking underground storage tanks. In Oregon this has facilitated cleanup of over 9000 tanks systems to federal standards in the past 30 years. Similarly, EPA's Brownfield Program provides funding assistance to the state and communities to address non-NPL caliber sites. Having a sustained federal funding mechanism available to the states to address NPL-caliber sites would help keep them off the NPL, and likely result in timelier cleanup of these sites. In the absence of adequate federal funding, Oregon's limited funds for orphan sites will continue to be inadequate to timely address the orphaned sites, and hence DEQ will continue to refer many of them to EPA.

**Delist NPL Sites Earlier.** Most NPL sites are "closed" (i.e., active cleanup has been completed). However, most of these sites require some form of long-term engineering and institutional controls. As such, they may take decades, if ever, to meet NPL delisting requirements. This results in perpetually-listed NPL sites. These sites often become underutilized brownfields due to the liability risk posed to prospective purchasers (i.e.,

the site is still on the NPL list). EPA should make it a priority to de-list these sites (e.g., defer them to states to oversee the long-term monitoring and institutional controls), and provide the necessary resources to timely and aggressively negotiate prospective purchaser agreements that do not compromise protection of human health and the environment, but which promotes economic development and prudent land use.

**2. How can States assume more of a leadership role in addressing NPL sites?**

Many states like Oregon have promulgated cleanup laws modelled after CERCLA. These states have developed robust cleanup programs with highly experienced staff. State cleanup programs are often integrated throughout the state's regions and have a detailed understanding of the technical, economic, community and political issues within these regions. For example, DEQ's cleanup program employs over 50 technical staff in in three separate regions, and with offices throughout the State. The staff have degrees in engineering, toxicology, chemistry, geology, biology, environmental science and more. Approximately 60% of these staff have more than 20 years of experience working in the environmental field. Since DEQ's cleanup program was established in 1987, more than 2000 sites have been cleaned up and closed. Many of these sites would have qualified for listing on the NPL.

Many states like Oregon have experience coordinating CERCLA cleanups with EPA. The Oregon DEQ is or has been the support agency on 17 NPL sites in Oregon and is the lead agency on two NPL sites: the McCormick & Baxter Superfund Site located in Portland Harbor and the UPRR Tie Treating Plan located in The Dalles. EPA has also deferred five NPL-caliber sites to DEQ for management under the state's cleanup program. EPA also denominated a NPL site because DEQ had successfully led a multi-party area-wide groundwater cleanup that restored the City of Portland's backup regional water supply well field.

Allowing states with established cleanup programs and demonstrated success to manage and oversee a greater number of NPL sites (actual or proposed) could free up EPA's limited resources for those NPL sites that are most suited for federal oversight and management.

**3. Your written testimony noted that sites with low-level risk or sites that are in the long-term Operations and Maintenance Phase could be transferred to State environmental agencies that are willing and able to oversee these sites. Why are States positioned to take over site in O&M.**

As described under question #2, many states have established cleanup programs and experienced staff. Also, many states have acceptable risk range standards that either mirror or are more stringent than those under CERCLA. In addition, the states are

typically better positioned and have the established processes in place to manage sites subject to land or water use restrictions. The states have close relationships and processes in place with local jurisdictions and municipalities to facilitate safe and timely reuse of these facilities. The states, not EPA, have the authorities to restrict land and water use, and EPA relies on states to file and track land and water use restrictions in the form of an easements and equitable servitudes.

Superfund modernization could include reevaluating delisting criteria. This could include delisting when a site meets the upper acceptable risk range of  $1 \times 10^{-4}$  excess cancer risk with the state taking on risk management responsibilities under state authorities. Consideration should be given to delist sites following construction completion and an operational and functional determination subject to the state having an enforceable agreement with the responsible party that includes financial assurance. A memorandum of understanding between EPA and the state that articulates clear roles and responsibilities for the respective entities would provide the public a formal mechanism by which to determine if the state is delivering effective project oversight.

Delisting and transferring low-risk NPL sites to willing and able state cleanup programs would allow the residual risk of these sites to be addressed using the full range of tools that have been developed and refined over the past several decades by state agencies.

#### 4. **How can EPA better utilize enforcement as a tool for getting sites cleaned up?**

**Dispute resolution.** Technical disputes under EPA consent orders are typically resolved by the manager of the EPA staff who made the decision under dispute. Opportunities for meaningful dispute resolution can be an important incentive for settling parties, but lack of independent review diminishes the value of this right. Nonetheless, performing parties may feel obligated to pursue dispute resolution for a number of reasons, including administrative exhaustion and cost recovery/contribution. EPA could standardize independent technical review under consent orders simply by revising its model orders. Doing so would not require legislation or rulemaking.

“When scientific and technical information is used as part of the basis for a public-policy decision, peer review can substantially enhance not only the quality but also the credibility of the scientific or technical basis for the decision. After-the-fact criticisms of the science are more difficult to sustain if it can be shown to have been properly and independently peer reviewed.” (*Strengthening Science at the U.S. Environmental Protection Agency: Research-Management and Peer-Review Practices*, National Academy of Sciences [2000]).

**5. How can EPA use incentives for PRPs to get sites cleaned up?**

EPA should pursue more early settlements with de minimis or de micromis PRPs. Settlement funds could be made available to PRPs entering an order to implement the remedial action (i.e., Performing Parties), in cases where the de minimis and de macromis PRPs lack sufficient resources or financial assurance to complete the cleanup.

**6. Can you explain the benefit of EPA allowing parties to engage in early or interim actions?**

Implementing interim actions provides several benefits. Interim actions provide early control of on-going releases of contaminants from highly concentrated source zones. Removal of those hot spots often increases the understanding of site conditions and the contaminant fate and transport processes and complexities. Applying treatment technologies in a localized area can facilitate the scoping, development and design of a final remedial action alternative based on the performance of the technology during an interim action. Implementing these interim actions concurrent with the RI/FS should not delay final remedy selection and implementation. A responsible party will be more willing to implement a costly cleanup using technology that has demonstrated effectiveness in a pilot scale application at their facility.

**7. What is adaptive management and do you think it would make Superfund cleanups faster and more efficient?**

Adaptive management is a structured, iterative process of robust decision making in the face of uncertainty with an aim of reducing uncertainty over time through performance monitoring.

The concept has been applied in water quality monitoring for many years, but has been used rarely on federal CERCLA or RCRA sites. As applied to an NPL site, the concept would allow greater flexibility on the scope and phasing of remedial action elements and decision-making process during remedial design and remedial action to achieve the remedial action objectives set out in a Record of Decision. The level of uncertainty on remedy performance can be evaluated as remedies are implemented to provide greater certainty and clarity for future decision-making. After remedial actions are implemented, adjustments to the remedy can be made based on performance monitoring during remedy operations and maintenance.

The State of Oregon has some experience applying adaptive management for various situations. Groundwater cleanups often reach a point of diminishing returns and not predicted to meet cleanup standards in a reasonable time. Because these conditions can be anticipated, the Record of Decision (ROD) issued by DEQ include contingencies that

allow transitioning from an active groundwater pump and treat to in-situ treatment. In one case, passive control of the groundwater contamination required under the ROD was achieved using poplar trees that also provided other environmental benefits. The inclusion of contingency options in RODs to avoid rework saves time and money and facilitates getting the site cleaned up more efficiently.

**8. Why is it important that EPA incorporate flexibility in cleanup design and implementation?**

NPL sites are notorious for the slow pass in reaching the Record of Decision. Time is needed to characterize the site, conduct human health and ecological risk assessments and prepare the feasibility study. Interpreting site data often results in differences of opinion between EPA, PRPs, Tribes, stakeholders and the public. This has the tendency to lead to more data collection and additional cycles of interpretation and debate before EPA is comfortable enough with the uncertainties that a ROD can be issued. Yet, a vast amount of data is gathered during remedial design, particularly at complex sites. Providing more flexibility during remedial design may accelerate the overall schedule, reduce the cost of unnecessary data collection, result in a more site-specific remedy and garner a more collaborative working relationship between EPA and the PRPs.

A more constructive approach using interim actions and adaptive management strategies to facilitate measured and constructive progress in achieving remedial action objectives could avoid long delays in negotiation due to remedial action implementation uncertainties.

**9. Your testimony stated that “EPA should develop tools that give PRPs enough certainty so they can settle-out in ways that will allow cleanup to move forward, while maintaining the government’s need for prudent reopeners.” Can you explain what you mean by that?**

The data and information upon which EPA establishes a ROD for a Superfund Site should also be adequate for the PRPs to resolve the allocation of cleanup costs. This will allow de minimis, de micromis, and other PRPs to settle their respective liabilities soon after issuance of the ROD. The remaining PRPs will comprise the Performing Parties (i.e., the PRPs committing to conduct the Remedial Design/Remedial Action).

It is recognized that RODs are typically based on 20-30% design (e.g., a conceptual design of the final cleanup). Additional data and information is collected during the Remedial Design phase of the project (post-ROD), to refine the delineation of contaminants and support the final remedial design of cleanup. EPA should ensure the ROD is clear enough to promote timely settlement for non-performing PRPs, yet flexible enough so that the Performing Parties can incorporate innovative approaches and

technologies into the final cleanup design, including serious consideration of area-specific conditions and future land use(s). Flexibility in ROD implementation provides the performing parties an avenue to develop cost-effective, efficient, timely, and protective cleanup actions, without obviating EPA's rights for prudent reopeners necessary to protect human health and the environment.