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COMMUNITIES OF COLOR AND HAZARDOUS WASTE CLEANUP: EXPANDING PUBLIC PARTICIPATION IN THE FEDERAL SUPERFUND PROGRAM

Deeohn Ferris†

I. Introduction

Superfund is the nation's program to clean up the most dangerous hazardous waste sites. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)¹ created the Superfund program and authorized \$1.6 billion in funding to clean these sites. The Superfund law mandates that parties responsible for hazardous waste sites (i.e., waste generators, site owners, site operators, and waste transporters) shall be financially liable for cleaning them. If responsible parties cannot be located, are unable to perform cleanups, or refuse to do so, EPA can conduct the cleanup action and seek recovery of associated costs from these delinquent parties. CERCLA established a tax on petroleum products, oil, and certain chemicals to finance the Superfund. Since 1980, Congressionally authorized funding for the Superfund has increased to \$13.6 billion.

An important dimension of the Superfund program is citizen involvement at the local level in the decisionmaking that governs hazardous waste site cleanup actions. At each of the sites listed by The U.S. Environmental Protection Agency (EPA) on the National Priority List (NPL), public participation is required. The 1986 Amendments to CERCLA highlight the role of citizens, providing opportunities for public participation prior to the formal adoption of a cleanup plan by EPA.² EPA must provide citizens with notice, an opportunity to submit written and oral comments, and an opportunity to convene a public meeting at or near the site.³ Any

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1. Comprehensive Environmental Response, Compensation and Liability Act, codified as amended at 42 U.S.C. §§ 9601-9675 (1988).

2. 42 U.S.C. § 9617 (1988).

3. *Id.* § 9617(a).

final cleanup plan must be accompanied by both an analysis of significant modifications and responses to publicly received comments.

In addition, the 1986 Amendments⁴ authorized EPA to make grants of up to \$50,000 to citizens affected by an NPL site, which ostensibly enable community awareness and involvement in the remedy development, selection, and implementation process. Recognizing the importance of community awareness, Congress intended to promote well-informed public participation in site-specific cleanup strategies by authorizing expenditures for a Technical Assistance Grant (TAG) program of up to \$17.7 million through fiscal year 1992.⁵

As the Superfund reauthorization effort ensues, it is clear that few unequivocally applaud past Superfund performance. Collectively, communities, industry, and government⁶ are critical about whether the Superfund program has actually achieved Congressional goals—speedy, effective, efficient, and permanent cleanups. Discontent and frustration is especially pronounced within communities of color. A prominent 1987 study, *Toxic Wastes and Race in the United States* (the “UCC Report”),⁷ found that residence near contaminated waste sites is most closely correlated with race. Three out of every five African Americans and Latinos—a total of fifteen million African Americans and eight million Latinos—live in communities with one or more uncontrolled toxic waste sites.⁸ Approximately half of all Asians, Pacific Islanders, and Native Americans live in communities with uncontrolled toxic waste sites.⁹ Furthermore, African Americans were heavily over represented in centers with the largest number of uncontrolled sites which include such urban centers as Memphis (173 sites), Cleveland (106 sites), St. Louis (160 sites), Chicago (103 sites), Houston (152 sites), and Atlanta (94 sites).¹⁰

In ten metropolitan communities, more than ninety percent of the population of African Americans live near an uncontrolled

4. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

5. *Id.*

6. *See, e.g.*, U.S. ENVTL. PROTECTION AGENCY, FINAL REPORT, SUPERFUND ADMINISTRATIVE IMPROVEMENTS (June 23, 1993).

7. COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987) [hereinafter UCC REPORT].

8. *Id.* at xiv.

9. *Id.*

10. *Id.*

toxic waste site.¹¹ There are at least six metropolitan communities where more than 100,000 Latinos live in locales with such sites.¹² At least one study since 1987 verifies and expands on the UCC Report¹³ and confirms the significant impact of abandoned hazardous waste sites on communities of color in the United States.

Communities that are disproportionately exposed to environmental hazards across the board¹⁴ are also disproportionately affected by the ineffectiveness of Superfund. According to the widely acclaimed report by *The National Law Journal* entitled, "Unequal Protection: The Racial Divide in Environmental Law," ("*Unequal Protection*") communities of color wait up to four years longer than white communities to get a Superfund site cleaned up.¹⁵ This disparate treatment by the government is especially alarming in view of the findings reported in the UCC Report.

Not only is Superfund disproportionately ineffective, but it is also discriminatorily implemented. For example, according to *Unequal Protection*, permanent treatment remedies were selected twenty-two percent more frequently than containment technologies at sites surrounded by white communities.¹⁶ In contrast, at sites surrounded by communities of color, containment technologies were selected more frequently than permanent treatment by an average of seven percent.¹⁷ The findings not only show that people of color are differentially affected by pollution, but that they can also expect different treatment by the government.

Due to this deplorable record, environmental justice proponents and adversely affected communities have galvanized to develop and advocate a broad range of reforms for Superfund. Having experienced the most profound deficiencies of Superfund implementation, communities of color are uniquely positioned to offer meaningful suggestions for improving the program. These suggested reforms touch every phase of the Superfund process, includ-

11. *Id.* at 19-20.

12. *Id.* at 20.

13. RAE ZIMMERMAN, *Social Equity and Environmental Risk*, 13 RISK ANALYSIS, No. 6, 675 (1993).

14. See, e.g., Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCLOSURE (Bunyan Bryant & Paul Mohai eds., 1992).

15. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S4.

16. *Id.*

17. *Id.* Generally, the factors that EPA examines to determine the proper strategy include cost, potential health threats, potential for migration, and toxicity of the waste.

ing assessment of health risk, allocation of liability, and determinations of remedial technologies. As a primary reform, environmental justice activists demand innovative programs that will constitute significant improvements in the role of local communities.

This Essay focuses on several specific reforms which will provide immediate relief to communities in distress and will respond to the need for increased public participation in the Superfund process. These specific reforms involve the following areas:

1. Native American Programs
2. Technical Assistance Grants
3. Community Working Groups
4. Health Assessments
5. Technologies Clearinghouse
6. Citizen Suits

II. Congress Must Amend Superfund to Provide a Meaningful Community Role in the Cleanup Process

Environmental justice activists demand that citizens be both better informed and actively involved in the cleanup process and that government must be responsive to the concerns of the people in the communities that surround Superfund sites. Recognizing the need for improved public involvement, EPA stated in a report released in June, 1993, that "The EPA must increase its efforts to achieve earlier and more effective community involvement at each site."¹⁸ The push for "earlier and more effective community involvement" is of particular concern to communities of color and low-income communities, historically the least involved and the least heeded in the Superfund process.

Instead of providing opportunities for substantial public participation, however, the current Superfund statute, as amended and reauthorized in the 1986 Superfund Amendments and Reauthorization Act (SARA),¹⁹ provides for only public notice during Superfund cleanups. A remedial action or cleanup plan for a site must be available for public comment, and the statute has provisions for adequate notice and a reasonable opportunity to respond.²⁰ SARA also requires EPA to establish a publicly available administrative record upon which the government shall base its se-

18. U.S. ENVTL. PROTECTION AGENCY, *supra* note 5, at 31

19. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (amending CERCLA).

20. 42 U.S.C. § 9617(a) (1986).

lection of a response action.²¹ Further SARA authorizes issuance of technical assistance grants in order that those persons living near a National Priorities List (NPL) site may "obtain technical assistance in interpreting information" concerning all aspects of the Superfund process.²²

These sparse requirements are intended to improve public awareness but *not* public participation. As such, these statutory requirements are inadequate. The victims of contamination at Superfund sites demand to be *better informed* and *meaningfully involved* in the process which is intended to protect their health and environment. While EPA has instituted a number of administrative mechanisms²³ to improve public participation, these efforts are largely discretionary and largely intended as community relations efforts.²⁴

A central concern of low-income communities and communities of color is government accountability for protecting public health and the environment. Where EPA fails to adequately inform and involve the public, concerned citizens are often disconnected from the cleanup process and unable to act as a government watchdog. Therefore, only those communities that have greater access to legal and technical resources and political power are able to influence the Superfund decision making process. As a result, an odious and discriminatory pattern has emerged in which communities of color and low-income communities wait up to four years longer than white communities to have a Superfund site cleaned up.²⁵ Involving the public in the EPA decision making process is essential in guaranteeing that EPA is held accountable to all those whose health it is obligated by law to protect.

21. *Id.* § 9613(k).

22. *Id.* § 9617 (e)(1) "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."

23. In June, 1993, EPA announced a series of Superfund Administrative Improvements. These nine initiatives are designed to accelerate the cleanup process, reduce costs, and increase fairness to industry. The initiatives constitute enhancements to the existing program including (1) fostering allocations of responsibility among parties at a site, (2) streamlining the remedial process, (3) enhancing state roles in cleanup decision making, and (4) facilitating earlier community involvement by identifying sites that would benefit from an advanced community relations pilot program.

24. See Ellison Folk, *Public Participation in the Superfund Process*, 18 *ECOLOGY L.Q.* 173 (1991).

25. Lavelle & Coyle, *supra* note 15, at S4.

Public participation is not only *essential* but also *desirable* because it enhances the efficiency and effectiveness of the Superfund program. As EPA has recognized, "[e]ffective community involvement will speed-up the Superfund process by involving the community early in the process and resolving possible conflicts."²⁶ By mandating that EPA listen to public concerns, Congress will: (1) improve the quality of EPA decisions, (2) accelerate the speed of the cleanup process, and (3) reduce the ultimate cost of the Superfund program.

The quality of EPA decision making will be enhanced by mandatory public involvement as a result of the "different perspectives that private citizens bring to cleanup efforts."²⁷ As a recent study by the Office of Technology Assessment found, EPA often fails to consider alternative, but readily available technologies that may provide for more permanent remediation.²⁸ With a constant infusion of ideas from the perspective of those whose health is immediately threatened, EPA will more likely consider innovative and permanent technologies. This citizen perspective will provide an important balance to the close working relationship that exists between EPA and potentially responsible parties (PRPs). This close relationship has caused many communities to claim that the current decision making apparatus encourages the fox to guard the henhouse.²⁹

Public participation will accelerate the pace of the Superfund cleanup process by promoting a consensus between EPA, PRPs, and community groups. This consensus model will enhance public support for the cleanup and thereby avoid future controversies. Public distrust of, and discontent regarding, a Superfund decision can add to the already lengthy time frames associated with cleanups while citizens pursue legal remedies and apply political pressures. Early public participation will avoid excessive delays caused by communities who are understandably suspicious about a closed decision-making process.

Finally, public participation will reduce the ultimate cost of the Superfund program by avoiding the need to revisit sites and to implement permanent treatment technologies. The need to revisit an inadequately cleaned site could be far more costly than an original

26. U.S. ENVTL. PROTECTION AGENCY, *supra* note 6, at 33.

27. Folk, *supra* note 24.

28. OFFICE OF TECHNOLOGY ASSESSMENT, ARE WE CLEANING UP? 3 (1988).

29. *A Superfund Fable: The Fox, the Farmer, and the Henhouse*, THE CHICAGO ENVIRONMENT: A NEWSLETTER ON ENVIRONMENTAL ISSUES, No. 2, Fall 1992, at 1.

cleanup that takes into account the local community's perspective regarding future use of the land.³⁰

A mandate that explicitly provides for public involvement throughout the entire Superfund process is necessary to ensure that the law will protect all citizens equitably and expeditiously. This Essay outlines reforms in the six key areas that are necessary to statutorily secure a meaningful community role.

A. Native American Programs

To facilitate sovereign governance and the ability of Native Americans to protect themselves and their sacred sites from pollution exposures, Congress must ensure availability of adequate funding and training opportunities, as well as Tribal access to EPA Superfund program managers. Sovereign Tribal governments have not shared technical assistance and federal funding to develop environmental infrastructures at the same level as the states. In view of these deficiencies, Tribal governments are unable to adequately implement the Superfund program. As Tom Goldtooth, the Environmental Director of the Red Lake Band of Chippewa Indians and National Council Officer of the Indigenous Environmental Network, has observed, "[w]ithout tribal environmental programs in place, the protection of our lands and people is jeopardized."³¹

Pursuant to EPA's 1984 Indian Policy, recognized Tribes are to be accorded the same status as states with regard to administration of environmental programs.³² If EPA fully implemented this policy, Tribes could assume primary responsibility for implementation and enforcement of federal environmental programs in the same manner and with the same authority as states. Full implementation would fulfill the desire and right of tribes to sovereignty and self-determination vis-a-vis Superfund and other environmental programs.

30. The U.S. General Accounting Office (GAO) has questioned EPA's remedy selection process and has highlighted problems related to the completeness and consistency of cleanup decisions at Superfund sites. GAO expressed concerns about the sufficiency of remedies in terms of long-term protection of human health and the environment. See GENERAL ACCOUNTING OFFICE, SUPERFUND: PROBLEMS WITH THE COMPLETENESS AND CONSISTENCY OF THE SITE CLEANUP PLANS 92-138 (May 18, 1992).

31. *Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 102d Cong., 1st Sess. (March 4, 1993) (statement of Tom Goldtooth, National Council Officer, Indigenous Environmental Network).

32. *Id.*

Equally important, funding for development of Native American environmental infrastructures is woefully inadequate. Although Congress has authorized federal funding for Tribes, appropriations are far below authorized levels.³³ Furthermore, the EPA Indian Program budget is one tenth of one percent of the overall Agency budget.³⁴ The approximately \$10 million must cover over 500 Tribal communities, many without environmental infrastructures.³⁵ EPA must be compelled to adequately fund and work closely with Tribes to address the special cultural and jurisdictional issues encountered when cleaning Superfund sites that affect Tribal communities.

B. Technical Assistance Grants

Technical assistance grants (TAGs), of up to \$50,000 per community, are intended to "help ensure that affected individuals are well informed about the conditions and activities at Superfund sites in their communities."³⁶ Communities may use the grants to hire independent technical advisors to aid them in understanding and commenting on the technical aspects of cleanup and to inform residents about the status and progress of site cleanup work. Grant recipients must contribute twenty percent of the technical assistance for which the grant is made.³⁷ Despite explicit Congressional intent³⁸ to provide communities with the information necessary to understand the risks with which they live, the grant application process is itself an impediment to communities who seek the grants.

In 1992, in testimony before the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation, GAO reported on numerous deficiencies in the TAG program that were identified by community groups.³⁹ The GAO testimony discussed concerns about administrative barriers

33. *Hearing before the Subcommittee on Legislation and National Security of the House Committee on Government Operations*, 102d Congress, 1st Sess. (Apr. 28, 1993) (statement of Tom Goldtooth, National Council Officer, Indigenous Environmental Network).

34. *Id.*

35. *Id.*

36. U.S. ENVTL. PROTECTION AGENCY, SUPERFUND TECHNICAL ASSISTANCE GRANT HANDBOOK vi (1990).

37. 40 C.F.R. § 35.4085(a) (Technical Assistance Grants) (1992).

38. 42 U.S.C. § 9617(e)(1) (Supp. 1993).

39. *EPA's Superfund TAG program: Grants Benefit Citizens but Administrative Barriers Remain: Hearing Before the Subcommittee on Investigations and Oversight of the House Comm. on Pub. Works and Transp.*, 101st Cong., 1st Sess. (1992) (statement

that limit the number of communities that receive grants and prevent communities from effectively using them. Foremost, the number of communities that have been awarded grants appears disproportionately small when compared to the universe of potentially eligible communities (neighborhoods affected by one or more of the 1275 NPL sites).

Further, the GAO statement outlined TAG administrative requirements which are burdensome to grant applicants, including a lengthy and labor intensive application process, procurement procedures that make it difficult to hire a technical advisor, and TAG reimbursement procedures which delay grant payments to communities.⁴⁰ Finally, during the Congressional process to reauthorize Superfund, GAO identified two issues that merit attention: "(1) clarifying the extent to which TAG recipients may use grant monies to independently verify or clarify existing site cleanup analysis or information, and (2) assessing the impact that a proposed [EPA] model for accelerating the Superfund cleanup process will have on the TAG program and community involvement."⁴¹

Communities of color confirm the problems identified by GAO. The information required to complete the application is excessively detailed. In addition, complex information, such as a description of the economic and environmental impact of site contamination, a description of past performance in completing other projects and contracts, and signed assurance forms certifying compliance with a host of applicable federal statutes, complicate an already difficult process. It is clear that communities who are without professional assistance, who must interpret the application and federal requirements themselves, are disadvantaged.

The technical assistance grant process should be simplified and expedited, and eligible expenditures should be broadened. Lack of awareness, application complexity, and expenditure restrictions all contribute to the unfortunate fact that a mere 119 grants have been awarded for over 1200 NPL sites. The following improvements are essential to ensure accessibility and effectiveness of the grants.

1. Clarify the Grant Application

The current 341-page application handbook, which attempts to explain the TAG process, is far too lengthy and complicated. In

of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division).

40. *Id.* at 7-8.

41. *Id.* at 22-24.

addition, the required three-year itemized budget and detailed scope of work narrative are problematic at the application stage. To fulfill the latter requirement, the community must specify the tasks and list documents, reports, and work products that technical advisors must produce. Requiring this information at such an early stage can be prohibitive for communities that have no previous experience administering grants. Community organizers nearly unilaterally agree that the TAG application is an obstacle to receiving assistance. In addition to simplification of the grant application, EPA should be required to assist and expedite completion of the application process where communities do not have sufficient expertise.

2. *Make Grants Available Earlier*

Grants must be available *before* EPA has begun its response action at the site and *prior* to the development of EPA's formal Record of Decision regarding cleanup actions to be undertaken at the site. Without technical assistance prior to the commencement of remediation action, communities are effectively barred from participating in decisions that will affect their health and the character of their neighborhood. When information and data have been clearly presented, communities across the nation have demonstrated the ability to understand difficult problems and to actively participate in developing solutions. The TAG program should promote such participation by educating communities from the inception of the Superfund process.

3. *Notify Communities of Grant Availability*

EPA must be required to notify community groups of the availability of technical assistance grants. A number of environmental justice activists argue that a significant impediment to receiving funding is the lack of early notice from EPA that technical assistance is available.

4. *Relax Restrictions on Expenditures*

Currently, extensive restrictions regarding how grant funds can be utilized undermine the Congressional intent to provide assistance to communities.⁴² Technical assistance must be broadly interpreted to permit community discretion when deciding how best to use grant funds. For example, communities should be allowed to

42. See 40 C.F.R. §§ 35.4055, 35.4056 (1992); see also, 57 FED. REG. 45,311 (1992).

employ individuals with legal expertise so that they can better understand the legal issues associated with the cleanup process.

Expanding the list of allowable activities would enhance information and data collection capabilities related to Superfund cleanups and would facilitate community education about sites. Enabling access to more and better information would advance the goals of knowledgeable, productive input and active participation in decision making.⁴³

5. *Provide Multi-Lingual Grant Applications*

Applications in English are a barrier to those communities whose residents speak another language. Spanish-speaking residents surrounding at least two Superfund sites in the southwest have experienced difficulty with language barriers.⁴⁴ These communities should not be excluded from TAG eligibility merely because they are unable to read the application.

To ameliorate the impact of language barriers, EPA should (1) conduct a survey of sites to determine where language barriers exist, (2) where applicable, publish documents and materials in the primary language of the affected community and in a language understandable to that community, and (3) provide interpreters at public meetings and hearings where site cleanup issues are discussed.

6. *Raise The Grant Ceiling of \$50,000*

Because of the expense of securing technical experts and the voluminous amounts of information needed, communities are reporting that the \$50,000 ceiling is insufficient. One option for determining an appropriate grant amount is to reserve a certain percentage of the entire Superfund to be used for technical assistance grants. In comparison to the prodigious resources currently

43. Suggested expanded activities include organizing communities for participation in the cleanup process, verifying data and health assessments, generating new data to fill data gaps, or where there are special community concerns (e.g., off-site implications of contamination), providing language translation services, hiring experts (e.g., health experts, TAG preparation), presenting workshops on alternative technologies, and funding community monitors to observe on-site activities.

44. The two sites are the Tucson International Airport site and the Gateway neighborhood in Phoenix, which abuts the 52nd Street (Motorola) site. Both sites are in Arizona. Language barriers experienced at Superfund sites are analogous to language barriers experienced by citizens who attempt to become involved in the facility permit process, e.g. Kettleman Hills-Waste Management, Inc., which concerned an incinerator permit. See Charles J. McDermott, *Balancing the Scales of Environmental Justice*, 21 *FORDHAM URB. L.J.* 689, 700-04 (1994).

expended, increased grants would be moderate and should save both time and money by involving the public in decision making.

In addition, the matching requirement is burdensome for low-income communities and, therefore, should be eliminated.

7. *Make Technical Assistance Available to Communities Located Near Removal Sites*

TAGs are now available to communities affected by National Priority List (NPL) sites, but not to communities affected by EPA removal actions to remedy immediate threats to human health. People affected by emergency removal sites should also be informed and educated about the surrounding risks.

8. *Make Technical Assistance Grants Lump Sum Payments Rather Than Reimbursements*

The current system requires community groups to submit receipts in order to receive awarded monies. This system is burdensome and time-consuming. Instead, community groups could be accountable for the money spent by submitting to EPA quarterly accounting records with receipts.

C. Community Working Groups

To ensure effective public participation and to improve the pace and quality of the cleanup process, EPA should be required to work with communities to create Community Working Groups (CWGs) at each Superfund site. CWGs would consist of community leaders, community representatives, and, if desired by the community, other appropriate organizations (e.g. civil rights groups, environmental organizations, health professionals, and academic institutions). The CWG should receive regular notification about deliberations and meetings. In addition, CWGs would assume a key decision making role concerning health assessments, responses to hot-spots, remediation alternatives, cleanup schedules, and relocation decisions. Each of these stages is important from the perspective of communities affected by the contamination.

Community Working Groups are integral to public participation and essential to Congressional efforts to guarantee effective community involvement. CWGs will provide a community component to balance PRP and EPA roles in the decision-making process, enhance the quality of EPA decisions, and to expedite the Superfund

process through consensus-building and early controversy resolution.

One example of where a CWG could be instrumental is at sites where relocation of residents is warranted. In these cases, EPA should work primarily with the CWG to ensure that the nature and institutions of the community are preserved throughout the relocation process.

In cases where EPA tries, but is unable to establish a representative CWG, EPA should facilitate participation by individual community members in deliberations and meetings concerning health assessments and cleanup strategies.

D. Health Assessments

The 1986 Superfund Amendments mandate that the Agency for Toxic Substances and Disease Registry (ATSDR) perform health assessments for each NPL site. Although the role of ATSDR in remedy selection is nebulous, EPA must take action to reduce human exposure to hazardous substances where an assessment concludes that risk exists.⁴⁵

Communities question the adequacy of health assessments conducted by ATSDR and the responsiveness of these health assessments to public concerns. As observed in the widely acclaimed investigative study, *Inconclusive by Design: Waste, Fraud and Abuse in Federal Environmental Health Research*, “[o]ne of the most heinous and pervasive defects of the health assessments program has been a lack of ATSDR contact with local residents. The result has been an appalling absence of even the most basic understanding of local conditions.”⁴⁶

Even EPA is aware of ATSDR’s dismal history of reaching out to communities. In its report, *Environmental Equity: Reducing Risk for All Communities*, EPA admits that, “[p]oor and racial minority communities are rarely involved in Agency rulemakings and seem to be unaware . . . of their ability to petition ATSDR to perform health surveys on their communities.”⁴⁷

45. 42 U.S.C. § 9604(i)(11) (1984 & Supp. I 1993).

46. *Inconclusive by Design: Waste, Fraud and Abuse in Federal Environmental Health Research*, An Investigative Study by the Environmental Health Network and the National Toxics Campaign Fund, May 1992, at vii.

47. U.S. ENVTL. PROTECTION AGENCY, *ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES* 19 (June 1992). See generally, U.S. GEN. ACCOUNTING OFFICE, *SUPERFUND: PUBLIC HEALTH ASSESSMENTS INCOMPLETE AND OF QUESTIONABLE VALUE*, REPORT TO THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE (1991).

To avoid the widely held perception that ATSDR assessments are not objective and to ensure the integrity of ATSDR health assessments and the responsiveness of ATSDR to community needs, ATSDR should be independently funded. Environmental justice activists are deeply skeptical of the value of ATSDR's work when its assessments appear to merely reflect EPA's own determinations. Furthermore, Congress should mandate that ATSDR work closely and cooperatively with CWGs in order to ensure that its assessments are responsive to the concerns of the community whose health is at risk.

E. Technologies Clearinghouse

Technology is one aspect of the Superfund program which has a significant impact on the effectiveness and cost of cleanups.⁴⁸ Currently, available technologies are expensive, ineffective, or unacceptable to citizens.⁴⁹ Congress should establish a technologies clearinghouse for public use. Such a clearinghouse would catalogue and describe the advantages and disadvantages of technologies that have successfully been utilized to remediate hazardous waste sites.

The value of a technologies clearinghouse is twofold: first, access to technological information enhances a community's ability to understand cleanup methodologies and alternatives, thereby facilitating knowledgeable remedy selection; second, cataloguing available, effective technologies promotes implementation of new, alternative, and cost-effective cleanup techniques. On account of their serious concerns about protecting public health and the environment, community groups are more likely to locate and advocate a variety of alternative methods if such a technologies clearinghouse were established.

F. Citizen Suits

The Superfund statute authorizes suits by citizens to enforce its requirements against any person alleged to be in violation. The current statutory provision authorizes citizen suits against EPA, "where there is alleged a failure of the President or of such other officer to perform any act or duty under" CERCLA.⁵⁰ Unfortunately, courts have held that citizens may not challenge an EPA

48. U.S. GEN. ACCOUNTING OFFICE, SUPERFUND: EPA NEEDS TO BETTER FOCUS CLEANUP TECHNOLOGY DEVELOPMENT 92-92 (Sept. 15, 1992).

49. *Id.*

50. 42 U.S.C. § 9659(a)(2) (Supp. 1993).

remedial action until the remedial action, or that phase of the action which is under challenge, has been completed.⁵¹ Congress should amend the Superfund statute to allow community groups to enforce their right to participate in the Superfund process. Congress should explicitly authorize citizens to seek injunctive relief from EPA if EPA fails to provide adequate notice regarding substantive deliberations and meetings concerning Superfund remediation activities. Citizen suits also should be authorized where EPA fails to establish a representative CWG within a designated time period after the site is listed on the NPL. In addition to injunctive relief to compel EPA to comply with the requirements of public participation, Congress should authorize recovery of attorneys' fees, as provided in the Equal Access to Justice Act.⁵²

III. Conclusion

Public participation in the Superfund process should not be a discretionary, community relations mechanism. Public participation is essential to an effective, expeditiously implemented, and equitable Superfund program benefiting all affected communities. While the program has made some progress in responding to hazardous-waste emergencies, collecting response costs, and enforcing cleanup obligations, the Superfund law must be strengthened to ensure that EPA fulfills the elements of the program which value the need for citizens living near NPL sites to be well-informed.

Evidence that corroborates community concerns and desires to influence governmental decision making regarding cleanups is increasing. In 1992, the State of New York and Johns Hopkins University studied and correlated data on birth defects and other health effects associated with proximity to waste sites.⁵³ From the perspective of prevention, other scientists argue that one of the goals of promoting environmental health is to eliminate significant health risks posed by Superfund sites.⁵⁴ According to one commentary, "Residents may be exposed to a mixture of known toxic agents The role of public agencies should be to identify those persons exposed to the compounds of concern . . . [and] the role of

51. See *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990).

52. See 28 U.S.C. § 2412 (1978 & Supp. 1993).

53. JOHNS HOPKINS UNIV. SCHOOL OF HYGIENE AND PUBLIC HEALTH, *Risk of Congenital Malformations Associated with Proximity to Hazardous Waste Sites*, 135 AM. J. OF EPIDEMIOLOGY (July, 1992).

54. See, e.g., M.S. Legator & S.F. Strawn, *Public Health Policies Regarding Hazardous Waste Sites and Cigarette Smoking: An Argument by Analogy*, 101 ENVTL. HEALTH PERSP. J. (Nat'l Inst. Env'tl. Health Sciences Apr. 22, 1993).

regulatory agencies should be to eliminate the source of exposure or to relocate those persons exposed.”⁵⁵

As stated above, the ATSDR is not regarded as unbiased or independent. Even still, some of ATSDR’s findings about the impact of hazardous waste sites on human health reinforce these concerns about health risks:

- Data from Superfund sites suggest that proximity to hazardous waste sites is associated with a “small to moderate increased risk of some kinds of birth defects” and some types of cancers, though the cancer association is “less well-documented.”
- Investigations of some individual sites revealed increases in risk of birth defects, neurotoxic disorders, leukemia, cardiovascular abnormalities, respiratory and sensory irritation, and dermatitis.
- Human exposure has been documented at about 40% of the sites, and there is potential for exposure at another 40% although actual exposure levels vary widely by site.
- Elevated exposure levels of lead, PCBs, arsenic, cadmium, chlordane, mercury, and a herbicide have been found in individuals studied at 12 sites.⁵⁶

Although additional testing of highly toxic chemicals is warranted due to the lack of thorough data on use and health effects (particularly concerning synergism, multiple, and combination impacts), the above findings illustrate that exposure poses risks. As a result, people living near Superfund sites are major stakeholders in the Superfund dialogue. Congressional plans to reauthorize this nation’s hazardous waste cleanup law must incorporate provisions to foster and promote community interests in achieving safe, effective, and speedy cleanups.

Efforts to achieve earlier and more effective community involvement should work towards the following:

- Prioritizing cleanup programs on Native American land;
- Simplifying and expediting the process for issuing technical assistance grants;
- Expanding allowable grant activities and increasing the \$50,000 grant ceiling;
- Creating a publicly-accessible alternative technologies clearinghouse;

55. *Id.* at 11.

56. *In our Own Backyards: The Continuing Threat of Hazardous Waste*, 101 ENVTL. HEALTH PERSP. J. 484 (Nat’l Inst. Envtl. Health Sciences Nov. 1993) (discussing findings reported by ATSDR).

- Independently funding ATSDR to facilitate objective health reporting; and
- Authorizing citizen suits to enforce public participation requirements.

These elements increase EPA accountability to communities, thereby ensuring that EPA is responsible to those whose health it is obligated to protect. Statutory changes reflecting these components are crucial to enhancing the efficiency and effectiveness of the federal hazardous waste cleanup program.

