



LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

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TESTIMONY OF DEEOHN FERRIS

PROGRAM DIRECTOR

ENVIRONMENTAL JUSTICE PROJECT

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

BEFORE THE

SUBCOMMITTEE ON SUPERFUND, RECYCLING, AND SOLID WASTE MANAGEMENT

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

U.S. SENATE

JULY 28, 1993

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before you today to examine environmental justice issues and the need to meaningfully involve communities in the Superfund¹ process.

The Lawyers' Committee for Civil Rights Under Law is a non-partisan, non-profit organization formed in 1963 at the request of President John F. Kennedy to involve the private bar in the

¹ Comprehensive Environmental Response, Compensation and Liability Act, as amended 42 U.S.C. § 9601 et seq. (CERCLA).

provision of legal services to victims of racial discrimination. The Lawyers' Committee implements its mission through legal representation, public policy advocacy and public education on civil rights matters. I am Program Director of the Lawyers' Committee's Environmental Justice Project, which focuses on developing interdisciplinary cooperation and strategies to prevent and remedy the disproportionate environmental risks experienced by people of color and the poor.

The goal of the Environmental Justice Project is to promote equal environmental protection and develop remedies for the adverse consequences of prior discrimination. Our objective is to obtain environmental equality by providing legal and technical resources to communities of color and the poor in their efforts to combat environmental discrimination and eliminate all barriers to equal environmental protection.

I. Introduction

Based on my work with communities who are at risk due to toxic exposures at Superfund sites, I will outline for you in my testimony suggested reforms to achieve public awareness and community involvement in the U.S. Environmental Protection Agency's (EPA) Superfund cleanup process.

As we approach the Superfund reauthorization effort, it is clear that few unequivocally applaud past Superfund performance.

Collectively, communities, industry, and government² are critical about whether the Superfund program has actually achieved Congressional goals. Discontent and frustration is especially pronounced amongst the low-income communities and communities of color whom I represent. These communities, who are disproportionately exposed to environmental hazards across the board³, have also been disproportionately affected by Superfund's ineffectiveness.

For example, according to the widely acclaimed National Law Journal report, "Unequal Protection: The Racial Divide in Environmental Law," communities of color will wait up to four years more than white communities in getting a Superfund site cleaned up.⁴ This disparate treatment by the government is especially alarming given the 1987 Toxic Wastes and Race in the United States report which found that, "Three out of every five Black and Hispanic Americans live in communities with uncontrolled toxic waste sites."⁵

Not only is Superfund disproportionately ineffective, but

² See, e.g. Superfund Administrative Improvements, U.S. Environmental Protection Agency, Final Report, June 23, 1993.

³ See e.g., Environmental Racism: Reviewing the Evidence, Paul Mohai and Bunyan Bryant (Paper delivered at the University of Michigan Law School Symposium on Race, Poverty, and the Environment, January 1992).

⁴ The National Law Journal, Vol. 15, No. 3, September 21, 1992, Page S4.

⁵ Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites, Commission for Racial Justice, United Church of Christ, New York, New York, 1987.

Superfund is also discriminatorily implemented. For example, according to the National Law Journal report, permanent treatment remedies were selected 22 percent more frequently than containment technologies at sites surrounded by white communities.⁶ In contrast, at sites surrounded by communities of color, containment technologies were selected more frequently than permanent treatment by an average of 7 percent.⁷ As stated by Robert Bullard, a noted sociologist and researcher on environmental justice issues, "Not only are people of color differentially impacted by...pollution, they can expect different treatment by the government."⁸

Due to this deplorable record, environmental justice activists and communities whom I represent have galvanized to develop and advocate for a broad range of reforms to Superfund. Having experienced the most profound deficiencies of the Superfund implementation, communities of color and low-income communities are uniquely positioned to offer meaningful suggestions for improving the program. These suggested reforms touch every phase of the Superfund process, including assessment of health risk, allocation of liability, and determinations of remedial technologies. As a primary reform, environmental justice activists are demanding innovative programs that will constitute significant improvements

⁶ The National Law Journal, Vol. 15, No. 3, September 21, 1993.

⁷ Id.

⁸ The Environmental Justice Framework: A Strategy for Addressing Unequal Protection, Robert Bullard, Draft, Unpublished 1992.

in the role of local communities.

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

- a. Native American Programs
- b. Technical Assistance Grants
- c. Community Working Groups
- d. Health Assessments
- e. Technologies Clearinghouse
- f. Citizen Suits

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

Environmental justice activists demand that citizens must be both better informed and actively involved in the cleanup process and that government must be responsive to the concerns of those people in communities who surround Superfund sites. Recognizing the need for improved public involvement, EPA stated in a report as recent as last month that, "The EPA must increase its efforts to achieve earlier and more effective community involvement at each

site."⁹ The need for "earlier and more effective community involvement"¹⁰ is of particular concern to communities of color and low-income communities that are historically the least involved and the least heeded in the government process.

However, instead of providing opportunities for substantial public participation, the current Superfund statute, as amended and reauthorized in the 1986 Superfund Amendments and Reauthorization Act (SARA)¹¹, provides for minimal public notice in the Superfund process. For example, a remedial action or cleanup plan for a site must be available for public comment, including provisions for adequate notice and a reasonable opportunity to respond.¹² EPA is also required by SARA to establish a publicly available administrative record upon which the government shall base its selection of a response action.¹³ SARA also provides for technical assistance grants in order that those persons living near a National Priority List (NPL) site may, "obtain technical assistance in interpreting information..." concerning all aspects of the Superfund process.¹⁴

⁹ Superfund Administrative Improvements, U. S. Environmental Protection Agency, Final Report, June 23, 1993.

¹⁰ Id.

¹¹ Pub.L. No. 99-499, 100 Stat. 1613 (1986) (amending CERCLA).

¹² CERCLA § 117, 42 U.S.C. § 9617 (a)

¹³ CERCLA § 113 (k), 42 U.S.C. § 9613 (k).

¹⁴ CERCLA § 117 (e)(1), 42 U.S.C. § 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

These sparse requirements are intended to improve public awareness 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. While the EPA has instituted a number of administrative mechanisms to improve public participation, these efforts are largely discretionary and largely intended as community relations efforts.¹⁵

A central concern of low-income communities and communities of color is governmental accountability for protecting public health and the environment. Where the Agency 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 which have greater access to political power and legal and technical resources are able to influence the Superfund decision-making process. As a result, an odious and discriminatory pattern has emerged where communities of color and low-income communities will wait up to four years longer than white communities to have a Superfund site cleaned-up.¹⁶ Involving the public in the EPA decision-making process is essential to guarantee that EPA is accountable to all

design, selection and construction of remedial action, operation and maintenance, or removal action at such facility."

¹⁵ See Public Participation in the Superfund Process, Ellison Folk, 18 ECOLOGY L.Q. 173 (1991).

¹⁶ Supra, note 4.

those whose health it is obligated by law to protect.

Public participation is essential because it ensures that EPA is accountable to those whose health it is obligated to protect, and it is desirable because it enhances the efficiency and effectiveness of the Superfund program. As EPA has recognized, "Effective community involvement will speed-up the Superfund process by involving the community early in the process and resolving possible conflicts."¹⁷ 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."¹⁸ As a recent study by the Office of Technology Assessment found, EPA often fails to consider the use of alternative, but readily available technologies, which may provide for more permanent remediation.¹⁹ With a constant infusion of ideas from the perspective of those whose health is immediately threatened, EPA

¹⁷ Superfund Administrative Improvements, U. S. Environmental Protection Agency, Final Report, June 23, 1993.

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

¹⁹ Are We Cleaning Up?, Office of Technology Assessment 3 (1988).

will more likely consider innovative and permanent technologies.²⁰ This citizen perspective will provide an important balance to the close working relationship between EPA and potentially responsible parties (PRPs), which has caused many communities to claim that the current decision-making apparatus encourages the fox to guard the henhouse.²¹

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

²⁰ "At a groundwater contamination site in California's San Fernando Valley, for example, members of the public expressed concern that the use of an aeration tower to strip pollutants from groundwater would contribute to the air pollution problem in Los Angeles. In response to this concern, EPA recommended that cleanup proceed through a combination of air stripping and carbon adsorption, which would reduce the impact on air quality. EPA had not originally planned to use the carbon adsorption system, but in the face of public opposition, the idea that EPA would contribute to the air quality problem in the Los Angeles air basin was considered politically unacceptable." Supra note 18, accompanying text of notes 81 - 83.

²¹ "A Superfund Fable: The Fox, the Farmer, and the Henhouse," The Chicago Environment: A Newsletter on Environmental Issues, Vol.II, No.2, Fall 1992, Page 1.

the Superfund program by avoiding the need to revisit sites and implement permanent treatment technologies. The need to revisit an inadequately cleaned site is far more costly than an original cleanup which takes into account the local community's perspective regarding future use of the land.

A mandate which explicitly provides for public involvement throughout the entire Superfund process is necessary to ensure that the law will fulfill the promise of protecting all citizens equitably and expeditiously. This testimony outlines reforms in the six key areas which are necessary to statutorily secure a meaningful community role. These key areas include Native American programs, technical assistance grants, community working groups, health assessments, a technologies clearinghouse, and citizen suits.

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 levels provided to 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, "Without tribal environmental programs in place, the protection of our lands and people is jeopardized."²² EPA must be compelled to adequately fund and work closely with Tribes to address the special cultural and jurisdictional issues encountered when cleaning a Superfund site affecting Tribal communities.

b. TECHNICAL ASSISTANCE GRANTS

Technical assistance grants (TAG) are intended to "help ensure that affected individuals are well informed about the conditions and activities at Superfund sites in their communities."²³ Despite explicit Congressional intent²⁴ to provide communities with the information necessary to understand the risks with which they live, the application process is an impediment to communities who seek the grants.

My own experience with assisting communities secure TAGs is revelatory. Law clerks in my office assigned to unravel the complex TAG application process often encounter confusion at EPA. Few staff at the Agency seem certain of the exact requirements that a community must fulfill in order to receive a grant. As we proceed through the grant process, it is clear that communities

²² Statement of Tom Goldtooth before the Subcommittee on Civil and Constitutional Rights, The U.S. House of Representatives Committee on the Judiciary, March 4, 1993.

²³ Superfund Technical Assistance Grant Handbook, U.S. Environmental Protection Agency, April 1990, p.vi.

²⁴ CERCLA § 117 (e)(1), 42 U.S.C. § 9617 (e)(1).

without professional assistance are disadvantaged, where they must interpret the application and federal requirements themselves.

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.

i. The grant application must be clarified. The current 341 page application handbook which attempts to explain the TAG process is far too lengthy and complicated. Community organizers unilaterally agree that the TAG application is an obstacle to receiving assistance.

ii. Grants must be available before EPA has begins its response action at the site and prior to the development of the Record of Decision. Without technical assistance prior to commencement of remediation action, communities are effectively barred from participating in decisions which will affect their health and the character of their neighborhood. When information and data are clearly presented, communities across the nation have demonstrated their ability to understand difficult problems, and actively participate in developing

solutions. The TAG program should promote such participation by educating communities from inception of the Superfund process.

iii. 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. Further, EPA should be required to assist and expedite completion of the application process where communities do not have sufficient expertise.

iv. Restrictions on expenditures must be relaxed. Currently, extensive restrictions regarding how grant funds are to be utilized undermine Congressional intent to provide assistance to communities. Technical assistance must broadly interpreted to permit community discretion when deciding how best to use grant funds. For example, communities should be allowed to employ individuals with legal expertise so that they can better understand the legal options associated with the cleanup process. In addition, the matching requirement is burdensome for low-income communities and should, therefore, be eliminated.

v. Grant applications must be multi-lingual. Applications in English are a barrier to those communities who speak another language. These communities should not be excluded from eligibility from the TAG because they are unable to read the application.

vi. The grant ceiling of \$50,000 should be raised. Because of the expense of securing technical experts and the voluminous amounts of information, 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 (e.g. many activists have suggested 3%). In comparison to the prodigious resources currently expended, increased grants would be moderate and should save both time and money by involving the public in decision-making.

vii. Technical assistance should be available to communities located near removal sites. TAGs are now available to communities affected by National Priority List (NPL) sites, but not where EPA conducts removal actions to remedy immediate threats to human health. People affected by emergency removal sites urge that they too should be informed and educated about the surrounding risks.

viii. Technical assistance grants should be a lump sum payment rather than a reimbursement program. The current system requires community groups to submit receipts in order to receive awarded monies. This system is burdensome. Instead, community groups could be accountable for the money spent by submitting to EPA quarterly accounting records with receipts.

d. COMMUNITY WORKING GROUPS

To ensure for effective public participation and improve the pace and quality of the cleanup process, EPA should be required to work with communities to create Community Working Groups (CWG) at each Superfund site consisting of community leaders and community representatives, and if desired by the community, other appropriate organizations (e.g. civil rights groups, environmental organizations, health professionals, and academic institutions).

The Community Working Group would receive regular notification about deliberations and meetings and 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 vitally 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 PRP and EPA roles in the decision-making process, enhance the

quality of EPA decisions, and expedite the Superfund process through consensus-building and early controversy resolution.

One example of where a CWG could be instrumental is sites where relocation of residents is warranted. In these cases, EPA would work primarily with the Community Working Group 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, the Agency should facilitate participation by individual community members in deliberations and meetings concerning health assessments and cleanup strategies

e. HEALTH ASSESSMENTS

Communities question the adequacy of health assessments conducted by the Agency for Toxic Substances and Disease Registry (ATSDR)²⁵ 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,

One 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

²⁵ CERCLA § 104 (i), 42 U.S.C. § 9604 (i).

local conditions.²⁶

Even EPA is aware of the ATSDR's dismal history of reaching out to communities. In its report Environmental Equity: Reducing Risk for all Communities, the Agency admits that,

Poor 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.²⁷

To avoid the widely held perception that ATSDR assessments are not objective²⁸ and ensure the integrity of ATSDR health assessments and the responsiveness of ATSDR to community needs, ATSDR should be independently funded. In addition, more money should be spent on the agency's basic research into health effects and exposure pathways of toxic chemicals. Environmental justice activists are deeply skeptical of the value of ATSDR's work when its assessments appear to merely reflect EPA's own determination. Furthermore, Congress should mandate that ATSDR work closely and cooperatively with Community Working Groups to ensure that its

²⁶ 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, page vii.

²⁷ Environmental Equity: Reducing Risk for all Communities, Volume 2: Supporting Document, U.S. Environmental Protection Agency, June 1992, page 19.

²⁸ See generally, Superfund: Public Health Assessments Incomplete and of Questionable Value, U.S. General Accounting Office Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, August 1991.

assessments are responsive to the concerns of the community whose health is at risk.

f. TECHNOLOGIES CLEARINGHOUSE

Congress should establish a technologies clearinghouse for public use that catalogues and describes the advantages and disadvantages of technologies which 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. Due to their serious concerns about protecting public health and the environment, community groups are more likely to locate and advocate for a variety of alternative methods.

g. CITIZEN SUITS

The United States Congress should amend the current Superfund statute which authorizes for citizen suits so that community groups can enforce their right to participate in the Superfund process.²⁹ The current statutory provision authorizes citizen suits against EPA, "where there is alleged a failure of the President or of such

²⁹ CERCLA § 310, 42 U.S.C. § 9659

other officer to perform any act or duty under" CERCLA.³⁰ Unfortunately, courts have held that citizens may not challenge an EPA remedial action until the remedial action or that phase of the action which is under challenge has been completed.³¹

Congress should explicitly authorize citizens to seek injunctive relief from EPA if the Agency fails to provide adequate notice regarding substantive deliberations and meetings concerning Superfund remediation activities. Citizen suits should also be authorized where EPA fails to establish a representative Community Working Group 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 attorney's fees, as provided in the Equal Access to Justice Act.³²

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. I strongly urge that the United States Senate incorporate the

³⁰ CERCLA § 310 (2)

³¹ Schalk v. Reilly, 900 F.2d 1091 (7th Cir.1990).

³² 28 U.S.C. § 2412

provisions outlined in my testimony in the Superfund reauthorization legislation.

This concludes my prepared remarks. I would be happy to answer any questions that Committee members may have.

TESTIMONY OF DEEOHN FERRIS
PROGRAM DIRECTOR
ENVIRONMENTAL JUSTICE PROJECT
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
BEFORE THE
SUBCOMMITTEE ON TRANSPORTATION AND HAZARDOUS MATERIALS
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES
FEBRUARY 10, 1994

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before you today to examine the Clinton Administration's proposed "Superfund¹ Reform Act of 1994."

The Lawyers' Committee for Civil Rights Under Law is a non-partisan, non-profit organization formed in 1963 at the request of President John F. Kennedy to involve the private bar in the provision of legal services to victims of racial discrimination. The Lawyers' Committee implements its mission through legal representation, public policy advocacy and public education on civil rights matters. I am Program Director of the Lawyers' Committee's Environmental Justice Project, which focuses on developing interdisciplinary cooperation and

¹ Comprehensive Environmental Response, Compensation and Liability Act, as amended 42 U.S.C. § 9601 et seq. (CERCLA).

strategies to prevent and remedy the disproportionate environmental risks experienced by people of color and the poor.

The goal of the Environmental Justice Project is to promote equal environmental protection and develop remedies for the adverse consequences of prior discrimination. Our objective is to obtain environmental equality by providing legal and technical resources to communities of color and the poor in their efforts to combat environmental discrimination and eliminate all barriers to equal environmental protection.

Introduction

Based on my work with communities at risk due to toxic exposures at Superfund sites and a preliminary assessment of the Administration's proposal, my testimony highlights issues connected with positioning protection of public health and the environment as the foundation upon which this nation's hazardous waste cleanup law is built.

As we approach the Superfund reauthorization effort, it is clear that few unequivocally applaud past Superfund performance. Collectively, communities, industry, and government² are critical about whether the Superfund program has actually achieved Congressional goals. Discontent and frustration is especially pronounced amongst low-income communities and communities of color. These communities, disproportionately exposed to environmental hazards across the board³

² See, e.g., Superfund Administrative Improvements, U.S. Environmental Protection Agency, Final Report, June 23, 1993.

³ See, e.g., Environmental Racism: Reviewing the Evidence, Paul Mohai and Bunyan Bryant (Paper delivered at the University of Michigan Law School Symposium on Race, Poverty, and the Environment, January 1992).

have also been disproportionately affected by Superfund's ineffectiveness.

For example, according to the widely acclaimed National Law Journal report, "Unequal Protection: The Racial Divide in Environmental Law," communities of color will wait up to four years longer than white communities in getting a Superfund site cleaned up.⁴ Not only is Superfund disproportionately ineffective, but Superfund is also discriminatorily implemented. For example, according to The National Law Journal report, permanent treatment remedies were selected 22 percent more frequently than containment technologies at sites surrounded by white communities.⁵ In contrast, at sites surrounded by communities of color, containment technologies were selected more frequently than permanent treatment by an average of 7 percent.⁶ The findings are clear: Not only are people of color differentially affected by pollution, they can expect different treatment by the government.

This disparate treatment by the government is especially alarming in view of the 1987 Toxic Wastes and Race in the United States report which found that, "Three out of every five Black and Hispanic Americans live in communities with uncontrolled toxic waste sites."⁷ Similarly, an earlier report by the U.S. General Accounting Office (GAO),

⁴ The National Law Journal, Vol. 15, No. 3, September 21, 1992, Page S4.

⁵ Id.

⁶ Id.

⁷ Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites, Commission for Racial Justice, United Church of Christ, New York, New York, 1987.

catalyzed by the PCB landfill protest of an African American community in Warren County, North Carolina, revealed the connection between race and the prevalence of off-site hazardous waste landfills in eight EPA Region IV states.⁸ Studies conducted in 1993 extend these findings. According to a report published in Risk Analysis, with respect to site location and distribution of cleanup plans or EPA Records of Decision (ROD) across communities with sites listed on the Superfund National Priority List (NPL): (1) the percentage of African Americans and Latinos in communities with NPL sites is greater than is typical nationwide; and (2) communities with relatively higher percentages of people of color have fewer cleanup plans (signed RODs) than other NPL sites.⁹

Due to this deplorable record, environmental justice activists have galvanized to develop and advocate a broad range of reforms to Superfund. Having experienced the most profound deficiencies of Superfund implementation, communities of color and low income communities are uniquely positioned to offer meaningful suggestions for improving the program. These suggested reforms touch every phase of the Superfund process, including assessment of health risks, allocation of liability, and selecting remedial technologies. As a primary reform, environmental justice activists are demanding innovative programs that will constitute significant improvements in the role of local communities, and positioning public health as the centerpiece of reform is essential.

⁸ U.S. General Accounting Office "Siting of Hazardous Waste Landfills and Their Correlation with the Racial and Economic Status of Surrounding Communities," (Washington, DC, 1983).

⁹ "Social Equity and Environmental Risk," R. Zimmerman, Risk Analysis, Volume 13, No. 6, December, 1993.

This testimony provides input on reforms which would provide immediate relief to communities in distress and is organized as follows:

(I) Overview of the Proposed "superfund Reform Act of 1994."

- A. Native American Programs
- B. Community Participation and Human Health
- C. State Role and Voluntary Response
- D. Remedy Selection

(II) The Liability Scheme

- A. Liability and Allocation

Background

Fairness is the mantra in the current public policy debate regarding Superfund reform. The fairness issue and solutions to achieve it are essential to remedying the consequences of discriminatory environmental programs and policies. The paramount concern is achieving fairness in communities experiencing disproportionate impact, and preventing unfairness in the future is primary. In contrast, countless studies have been funded and conducted concerning costs to government and industry while few inquiries are underway concerning the cost of failure to protect human health and the environment. These and other deficiencies reinforce the critical need for early, often and continuous involvement in decisionmaking on Superfund reform by people most and worst affected by these risks.

Historically, the community-based environmental justice movement has concentrated on discriminatory exposures encompassing ambient, indoor workplace, and economic environments. Through this lens, activists promote a comprehensive Superfund reauthorization platform

encompassing revisions to how sites are ranked for listing on the NPL, establishing cleanup standards, selecting treatment technologies, performing health assessments, assuring that liable parties are held responsible for cleanup costs, and enhancing public input.

I. OVERVIEW OF THE PROPOSED "SUPERFUND REFORM ACT OF 1994."

While the entire Presidential proposal is relevant to environmental justice concerns, based on a preliminary analysis, these comments focus on four parts:

- A. Native American Programs
- B. Community Participation and Human Health
- C. State Role and Voluntary Response
- D. Remedy Selection

The liability provisions of the proposal are examined in Part II below.

A. Native American Programs

The proposed "Superfund Reform Act of 1994" is silent on facilitating sovereign governance and the ability of Native Americans to protect themselves and their sacred sites from pollution exposures. A more holistic approach to statutory reauthorization ensures availability of adequate funding and training opportunities, as well as Tribal access to EPA Superfund program managers. Sovereign Tribal governments have not shared in technical assistance and federal funding to develop environmental infrastructures at levels provided to the States. In view of these deficiencies, Tribal governments are unable to adequately implement the Superfund program. As Tom Goldtooth, who as National Council Officer heads the Indigenous Environmental Network,

has observed, "Without tribal environmental programs in place, the protection of our lands and people is jeopardized."¹⁰ EPA must be compelled to adequately fund and work closely with Tribes to address the special cultural and jurisdictional issues encountered when cleaning a Superfund site affecting Native American communities.

B. Community Participation and Human Health Concerns

(i) Community Involvement:

It is commendable that Title I of the Clinton Administration's proposed bill underscores the significance of community input and protecting public health. Section 102 of Title I would be strengthened by a few modifications. Briefly, the proposal should require mandatory, early and more active citizen participation. As drafted, this section grants extensive discretion to government by attenuating public input until the remedial investigation/feasibility study (RI/FS) stage of the cleanup process. Instead of postponing public input until the RI/FS, the government should be required to solicit community views as early as possible during the initial site assessment phase. Moreover, citizens should be granted an enforceable right to participate throughout cleanup.

In my testimony before the Senate Committee on Environment and Public Works Subcommittee on Superfund, Recycling and Solid Waste Management (July 28, 1993), I provided a detailed plan for improving community access to and participation in the cleanup process, as well

¹⁰ Statement of Tom Goldtooth before the Committee on Government Operations Subcommittee on Legislation and National Security, U.S. House of Representatives, April 28, 1993.

as the Technical Assistance Grant Program. I, hereby, submit this statement for today's hearing record.

(ii) Human Health:

Multiple cumulative and combination exposures and synergistic effects are virtually unexamined areas of inquiry in terms of impact on communities of color and low income areas inundated with pollution sources. Favorably, Sections 106 through 108 of Title I center on multiple risk sources. These sections authorize pilot projects in communities experiencing disproportionate exposure, require assessment of multiple risks and augment the hazard ranking system (HRS) by adding multiple risk as a scoring factor. Studies mandated by these sections should be accompanied by an agenda which prioritizes cleanups in these areas. Sanctioning studies without creating a remedy leaves the effect of these provisions unclear. Equally important, nothing in the proposal responds to communities in distress by requiring EPA to re-score old sites under the new HRS.

If sites are re-scored under a revised HRS which contemplates multiple source exposure, more communities adversely affected by these hazards will be listed on the NPL and, thus, eligible for Superfund cleanup. Additional issues to be considered in the ranking hierarchy are socio-economic factors, lack of access to adequate health care, nutrition deficiencies, and other environmental factors which could elevate risks from exposure to hazardous waste.

The small number of pilot projects and project funding are other areas of concern. In view of the potential effects of multiple and disproportional exposures, ten demonstration projects in ten communities over five years is too few over too long a period of time

in relation to the numbers of affected people of color. Also, the \$30 million authorization to finance this venture may be inadequate if circumstances in these areas are complex.

Notably, the titles concerning human health protection do not deal with the role of the Agency for Toxic Substances and Disease Registry (ATSDR),¹¹ problems associated with the role of ATSDR in cleanup decisionmaking, fulfilling the Agency's mandate to develop the Toxic Substances Disease Registry and conducting meaningful assessments of community health. As noted in my July 28, 1993, statement before the Senate, communities question the adequacy of assessments performed by ATSDR and the responsiveness of these assessments to citizen concerns. Public interest groups¹², community activists, GAO¹³, as well as EPA¹⁴ are aware of ATSDR's dismal history of reaching out to communities. Comprehensive Superfund reform must address these deficiencies.

State Roles and Voluntary Response

Titles II and III of the Administration's draft cover the state role in cleanups, facilitating voluntary cleanups and economic redevelopment. With regard to these three components there are three central issues. First, state implementation and enforcement of

¹¹ 42 U.S.C. § 9604(i).

¹² 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.

¹³ See generally, Superfund: Public Health Assessments Incomplete and of Questionable Value, (GAO/RCED-91-178, August 1, 1991).

¹⁴ Environmental Equity: Reducing Risk for all Communities, Volume 2: Supporting Document, U.S. Environmental Protection Agency, June 1992, page 19.

environmental programs in communities of color and federal oversight of these programs must afford equal environmental protection. Concomitant with responsibility for equal environmental protection is the federal obligation to ensure that states are fulfilling this guarantee. Currently, decisions made by federal and state governments perpetuate unequal protection. Therefore, provisions in Superfund legislation which would confer upon states a greater role must ensure fulfillment of the obligation to cleanup communities of color facing hazardous waste risk. The United States government must retain the authority to take action when states cannot or refuse to do so.

Second, the Administration's economic development goals are laudable. However, caution is the watchword to prevent the law from encouraging placement of new polluting industries in cleaned up areas. Attention should be focused on locating economic development opportunities which will not replicate negative health and environmental consequences. Due to industrialization of residential communities of color, neighborhoods are faced with hazardous waste sites and other deleterious environmental exposures. The cornerstone of any scheme to reform Superfund is preventing repetition of these mistakes.

*- Third, consistently, communities of color and low income communities are coerced into choosing between jobs and environmental protection. While the Administration's objective to remove obstacles to redevelopment of contaminated sites is praiseworthy, Superfund must not exacerbate this dilemma.

D. Remedy Selection

(i) Cleanup Standards:

The core of Title V of the Administration's proposal relates to establishing generic cleanup standards for specific chemicals and a national protocol for conducting risk assessment. Sites located in areas where state standards are more stringent would be remediated to state levels instead of generic cleanup levels or federal site-specific risk-based levels. The provisions governing cleanup standards would be strengthened by adding language to limit EPA discretion to utilize site-specific risk assessments to instances where they are more protective of human health and the environment. In the past, site specific risk assessment has led to cleanup inconsistencies from region to region, state to state, city to city, and neighborhood to neighborhood.

Commendably, Title V encourages removal actions which, historically, have proven effective in eliminating immediate threats to health and the environment. However, this advancement is negated by provisions which encourage cleanup decisionmaking based on future land use without consideration of the impact of discrimination and segregation on land use planning and zoning in communities of color.

In the past, lack of access to the political process, red-lining by banks, other lenders and insurers, housing discrimination, economic and educational disadvantages have adversely affected the mobility and quality of life of people of color. These disadvantages are manifested by incompatible land uses, i.e., residential neighborhoods surrounded by pollution sources. Cleanup decisions based on future land use that fail to address these defects will perpetuate

discrimination.¹⁵ The Administration's proposal creates community working groups (CWG), ostensibly, which will assist with determining future land use. Even so, it appears that the voice of an affected community could be diluted by other interests represented on the CWG. Furthermore, the proposal should include a presumption of residential use in cases where people are living on or adjacent to a site.

(ii) Remedial Alternatives:

Section 503 of Title V eliminates the statutory preference for permanent treatment remedies. Permanent treatment is recommended only for discrete areas where wastes are highly mobile and highly toxic. However, those sites or areas which don't meet this criteria are vulnerable to a preference for containment technologies which could fail to eliminate risk. If a containment remedy is selected, the Administration's proposal does not provide assurances that institutional controls will be established and continuous monitoring will occur to safeguard the integrity of the site and public health over the long term.

II. THE LIABILITY SCHEME

Consistently, critics of the Superfund program cite existing impediments to achieving the original risk-elimination objective of the statute -- accomplishing effective, efficient hazardous waste cleanups which are protective of human health and the environment. The regulated community, community organizations, public interest groups and experts agree that the pace of site cleanups is slow. At the end of FY 1993, only 52 of these sites have been cleaned up and deleted

¹⁵ "Future Use Would Continue Past Inequities," D. Ferris, The Environmental Forum, November/December 1993.

from the NPL, and out of nearly 1300 sites, remedial action has begun at only 541.¹⁶ Although over the past 3 years the pace of cleanup has been somewhat faster, there is a considerable backlog of sites in communities that have yet to be evaluated by EPA for inclusion on the NPL.

To increase the numbers of completed cleanups, the Agency has shifted focus away from the crucial task of evaluating sites, many of which are in communities of color. An examination of the FY 1993 targets reveals that while remedial design and remedial action work has accelerated, several regions have fallen short of their targets for site investigations.¹⁷ As a result of the emphasis on pace of cleanups, the liability scheme and transaction costs have further diverted attention and resources away from the most critical problems, i.e., getting sites listed so that federal cleanup action can be initiated.

Critics point to mounting cleanup costs including high administrative costs, contract mismanagement and wasted trust fund resources. Citizens are concerned about whether cleanups are protecting human health and the environment. The permanence of remedies is uncertain and the long-term efficacy of cleanup remedies is unclear. The most intensive focus of criticism relates to claims that transaction costs associated with Superfund enforcement and the liability scheme escalate expenditures by government and private parties alike. Among insurers and responsible parties in Superfund

¹⁶ 4th Quarter FY 1993 Superfund Management Report, December 6, 1993, U.S. Environmental Protection Agency.

¹⁷ 4th Quarter FY 1993 Superfund Management Report, December 6, 1993; 4th Quarter FY 1993 Targets and Accomplishments Report, September 30, 1993, U.S. Environmental Protection Agency.

cases, the surrogate for cost-cutting across-the-board is eliminating retroactive strict, joint and several liability.

These concerns, as well as recommendations to improve EPA performance in cost-cutting are well-documented. However, it is important to note that experts agree that costs can be reduced within the present liability system. While some parties and insurers have called for changes to the Superfund enforcement and liability system to reduce litigation (which is cited as the principal reason for cleanup delays) and transaction costs as the most critical cost-cutting measures, before such a change can be justified, the federal government should explore the possibility of streamlining the cleanup process and reducing costs within the present system.

For example, one area that has significant impact on the effectiveness and cost of cleanup is technology. The Agency's inability to develop innovative technologies, identify cleanup technology needs, and compile reliable cost and efficacy data contribute to high costs and are additional areas of inquiry with regard to implementing improvements within the present system.¹⁸ Also, emphasis on improving contract management controls and oversight, as well as scrutiny of the high percentage of trust fund monies expended on Agency administrative costs by EPA and Congress is warranted.¹⁹

¹⁸ Superfund: EPA Needs to Better Focus Cleanup Technology Development, (GAO/T-RCED-92-92, September 15, 1992).

"Superfund: Progress, Problems and Reauthorization Issues," Statement of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community and Economic Development Division, April 21, 1993.

¹⁹ Superfund: EPA Cost Estimates Are Not Reliable or Timely, (GAO/AFMD-92-40, July 29, 1988).

Superfund Contracts: EPA Needs to Control Contractor Costs, (GAO/RCED-88-182, July 29, 1988).

Additionally, a better-managed enforcement program and stepped-up cost recovery actions accompanied by regular evaluations of the adequacy of ongoing cost recovery efforts is likely to achieve cost savings.²⁰ Under existing law, EPA has not aggressively pursued the use of settlement authority which, according to GAO, could reduce some of the more controversial litigation connected with the program. GAO reports that use of settlement tools is not encouraged among EPA regional offices and their use is not fully operational, but usually is limited to pilot projects in selected regions.²¹

Presently, the consequences of changing the liability standard are unknown and there is insufficient information to show that the liability scheme is slowing the process in communities of color. For example, an examination of how long it takes to complete RI/FS studies

EPA's Contract Management: Audit Backlogs and Audit Follow-Up Problems Undermine EPA's Contract Management, (GAO/RCED-91-5, December 11, 1990).

Superfund: EPA Has Not Corrected Long-Standing Contract Management Problems, (GAO/RCED-92-45, October 24, 1991).

²⁰ "Superfund: EPA Action Could Have Minimized Program Management Costs," Statement of Richard Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, July 10, 1993.

Superfund: A More Vigorous and Better Managed Enforcement Program Is Needed, (GAO/RCED-90-22, December 14, 1989).

²¹ "Superfund: Little Use Made of Techniques to Reduce Legal Expenses," Statement of Richard Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, June 30, 1993.

"Superfund: Techniques to Reduce Legal Expenses Have Not Been Used Often," Keith Fultz, Director of Planning and Reporting, Resources, Community and Economic Development Division, November 4, 1993.

"Superfund: Limited Use Made of Techniques to Reduce Legal Expenses," Keith Fultz, Director of Planning and Reporting, Resources, Community and Economic Development Division, November 8, 1993.

demonstrates that there is a difference between Fund-led cleanups and those involving responsible parties where liability is at issue. It takes EPA approximately 9-10% longer to complete an RI/FS in Fund-led cleanups where liability is not an issue.²² There is an expectation among proponents of this change that ipso facto industry and government will hire fewer lawyers, pay fewer legal and expert fees, sue less and the cleanup process will be streamlined. There is insufficient information, however, about the ultimate impact in terms of whether the change will actually result in speedier, more effective cleanups. Furthermore, in the absence of information about the consequences, changing the liability standard cannot be justified without first attempting to reduce costs within the present system. Instead of enacting a new program which, essentially, nullifies the standard, Congress should explore a pilot program which tests the efficacy as a cost-reduction measure of such new initiatives as allocation.

A. Liability and Allocation

(i) Final Covenants Not To Sue and Discretionary Covenants:

Section 408 of Title IV modifies EPA authority to issue covenants not to sue. Deleting CERCLA § 122(f)(1) and replacing it with the proposed language repeals a key rubric of existing law which mandates that all covenants not to sue must be in the public interest.²³ Final covenants not to sue must be conditioned upon achieving adequate protection of health and the environment.

Title IV also deletes CERCLA § 122(f)(3), which provides assurances that remedies will be completed prior to issuance of

²² Supra, note 18.

²³ 42 U.S.C. § 9622(f)(1)(A).

governmental releases for liability. Without § 122(f)(3), the public must rely solely on government foresight related to covering unexpected costs and the "premium" which would be assessed under the Administration's proposal to ensure that sites are completely cleaned up. The potential deficiencies of this approach are acutely important in view of the absence of a citizen role in deciding about releases from future liability.

Section 122(f)(4) of CERCLA also is eliminated.²⁴ These seven factors form criteria integral to determining the appropriateness of a covenant not to sue. They are:

- (a) the effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned;
- (b) the nature of the risks remaining at the facility;
- (c) the extent to which performance standards are included in the order or decree;
- (d) the extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility;
- (e) the extent to which the technology used in the response action is demonstrated to be effective;
- (f) whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility; and
- (g) whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

Finally, the Administration's proposal appears to be silent on retaining liability for natural resources damages and criminal activity.

²⁴ 42 U.S.C. § 9622(f)(3).

(ii) De Micromis Liability:

Section 403 appears to define small parties who are exempted from liability for response costs. If this section is intended to address the problems associated with so-called de micromis parties, it falls short of addressing their concerns. Struggling small businesses, some of which are operated by entrepreneurs of color, disadvantaged by suits for contribution will remain unprotected by the Administration's proposal. The amounts of contribution which characterize the de micromis exemption from liability in Section 403 ("contributed less than 500 pounds of municipal solid waste [garbage] or 10 pounds or liters of materials containing hazardous substances") are so low that very few parties will ever qualify for the exemption. Small businesses or individuals could easily contribute more than 500 pounds of garbage at any one site in a matter of months.

(iii) Expedited Final Settlements:

Section 408(k) appears to create an expedited procedure for resolving de minimis and de micromis liability. However, the procedure is discretionary and the language fails to establish timing. Without safeguards to limit the Administrator's discretion, there is no assurance that the Agency will aggressively pursue expedited settlements for de minimis and de micromis parties.

(iv) Prospective Purchaser Liability:

Section 403(b) and Section 605 cover prospective purchaser liability. The definitions in Section 605(i) are particularly problematic. On its face, the Administration's proposal combines the term "bona fide prospective purchaser" with de minimis and innocent landowners. In EPA's June 6, 1989 guidance document, the Agency defines a prospective purchaser as a person who or entity that wishes to purchase property but seeks to limit future liability.²⁵ In accord with this definition, they do not currently own the property, are not otherwise involved with the site and, therefore, are not yet liable under existing law.

The Administration's proposal changes that definition so that it applies retroactively to current owners. This confuses defenses available to de minimis and innocent landowners and could result in expanding those defenses to ineligible parties. It is unclear whether this is an intended result.

Several key components of EPA's guidance document are omitted from Section 605(i). Safeguards afforded under the guidance not contained in this section are the mandate imposed on prospective purchasers to (1) exercise due care and (2) not aggravate or contribute to releases at the site. In addition, under the current guidance, prior to entering into a prospective purchaser agreement, the government is required to consider health impact, financial viability of the prospective purchaser, and effects on the community. Without these safeguards, communities exposed to hazardous waste risk are vulnerable

²⁵ "Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, De Minimis Settlements Under Section 122(g)(1)(B) of CERCLA and Settlements With Prospective Purchasers of Contaminated Property," U.S. Environmental Protection Agency, June 6, 1989.

to non-viable or irresponsible purchasers who may perpetuate or exacerbate the hazards posed by the site.

(v) Allocation Procedures:

Section 409 of the Administration's proposal creates an allocation system for dividing site response costs among responsible parties. Based on the premise that community participation will yield government accountability to those whose health and environment it is obligated to protect, the proposal fails to establish a public role. Early public participation avoids excessive delays which could be caused by communities who are understandably suspicious about a closed decisionmaking process. An open allocation process will encourage decisionmaking in the public interest. Equally important, diluting the impact of retroactive strict, joint and several liability may eradicate existing incentives to waste minimization, reduction of toxics use, recycling, reuse and techniques to advance pollution prevention.

Another area of concern is the language regarding non-binding allocations. It is unclear why the government selected non-binding in lieu of a binding allocation scheme. If response cost allocation is the goal, the scheme utilized must be expeditious and constitutionally sound. Unless due process requirements are met, there is a likelihood that the allocation efforts will result in constitutional challenges. Congress should instruct EPA to undertake a detailed constitutional analysis of the legality of this binding/non-binding scheme.

Finally, the factors listed on Page 77 of the Administration's proposal should include the impact of the site on the socio-economic status and health of adversely affected communities. Other equitable factors, such as degree of care (E), degree of involvement (D), and degree of cooperation (F) are taken into consideration in determining

allocation of percentage shares. Instead of being considered in a vacuum, they should be considered in the context of the community where the disposal took place. For example, the existence of an abandoned hazardous waste site may have contributed to the reluctance of new business to locate in the area, job loss and elevated health risks.

(vi) Funding of Orphan Shares:

Proposed Section 409(e) governs funding of orphan shares. The Administration's proposal sets aside \$300 million per fiscal year to pay unallocated shares at sites. This figure is a cap on the amount the government will pay in any given year, and it is unclear how or if orphan shares will be paid if the cap is exceeded. In addition, it appears as though the language in this provision creates an industry entitlement to reimbursements for costs incurred that are attributable to the orphan share. The question is where is the source of this \$300 million since there are no new taxes associated with funding the orphan share? On its face, this proposal creates the potential for diverting funds from site cleanups in order to reimburse industry for orphan shares. Once funds are diverted, communities of color are likeliest to be hardest hit.

Conclusion

Core provisions of the "Superfund Reform Act of 1994" promote the concept of fairness to industry. Presidential efforts to ensure that industry parties are not unfairly treated are commendable. Efforts to protect human health and the environment must be equally vigorous, particularly in the cases of those most susceptible to adverse health effects, such as sensitive populations and people who are disproportionately exposed.

Favorably, the President's reform proposal moves forward the environmental justice agenda by factoring in multiple exposures, creating community working groups and fostering public involvement. This testimony recommends additional improvements to the draft bill which would balance the Superfund cleanup process to promote the interests of communities adversely affected by hazardous waste sites, both those on the NPL and those which need to be listed.