

Environmental Justice as a Catalyst for Superfund Reform

By: Kenneth J. Warren* / *The Legal Intelligencer*

On Jan. 5, the EPA released a draft environmental justice action plan for its Superfund and other land protection and cleanup programs administered by its Office of Land and Emergency Management. An important element of the plan is improving community engagement in selection of the Superfund remedy and in the future reuse of the site. Properly administered, granting communities a meaningful role in remedy and reuse decisions would benefit the population most impacted by hazardous waste sites and initiate the types of Superfund reforms that many stakeholders seek.

Congress created the Superfund program to address the most contaminated sites in the nation. Enacted in 1980, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is designed to address waste disposal sites posing a threat to human health and the environment.

Over its history, the Superfund program has achieved mixed results. To be sure, emergency response actions have controlled pollutant releases, and long-term remedial actions have returned some sites to productive use. Yet administrative, technical and other challenges frequently hamper efficient implementation. Few participants would contest that despite Superfund's successes, the length of time to complete remediations and the administrative costs imposed on potentially responsible parties (PRPs) funding cleanups are troublesome. In addition, at times community input is considered only late in the Superfund process, thereby limiting meaningful input by people most affected by releases of hazardous substances.

In 1995, the EPA issued a guidance document, OSWER Directive 9355.7-04, explaining how land use would be considered in the CERCLA remedy selection process. The directive recommended early community involvement in selecting the future uses of the Superfund site,

and encouraged outreach to disadvantaged communities. The directive promoted making realistic assumptions about a site's future use to inform the baseline risk assessment and remedy selection.

The 1995 directive and the requirement in Section 117 of CERCLA to afford the public the opportunity to participate in the remedial action plan demonstrate a legal basis for community involvement. And commendably, the EPA has conducted numerous public meetings and solicited comments from community members. Nevertheless, the EPA continues to be criticized for engaging the public too late in the process, disregarding community input on future site use, and continuing to unnecessarily delay and increase the cost of cleanups.

In 2017, the EPA responded to criticisms of the Superfund program by forming the Superfund Task Force to develop recommendations for expediting cleanups, reducing costs and promoting site redevelopment. The task force report recognized the benefit of engaging partners and stakeholders, including disadvantaged communities, in the Superfund process. As a result of the task force's recommendation, the EPA requested its multi-stakeholder federal advisory committee, the National Environmental Justice Advisory Council (NEJAC), to identify barriers and opportunities related to cleanup and reuse of Superfund sites. Reflecting the view that the existing Superfund process was too lengthy and cumbersome, then EPA administrator Andrew Wheeler noted that the measure of the success of the task force's recommended improvements would be how well communities are transformed by reclaiming and returning land to productive use. Wheeler also created an "emphasis list" of Superfund sites and targeted them for immediate and intense EPA attention.

Soliciting the views of the NEJAC was appropriate because Superfund sites are disproportionately located in areas with high concentrations of minority and low-income populations. In February 2020 and May 2021, the NEJAC issued reports on integrating environmental justice into the remediation and redevelopment of Superfund and contaminated sites. The NEJAC emphasized the importance of involving the impacted community

commencing at the planning stage when site remediation and redevelopment goals are established. It also recommended the EPA implement more intensive community engagement practices at Superfund sites.

Central to the NEJAC's recommendations is involving the community in visioning what the future uses for the Superfund site will be following remediation, and leveraging site redevelopment and reuse to accelerate the site cleanup. Some communities may advocate cleaning a site as completely as possible, regardless of the length of time involved. But other communities may prefer promoting prompt reuse of a site to obtain the resulting economic and other benefits. Cleanups could be expedited by remediating to non-residential standards and imposing deed restrictions and other institutional controls to limit the types of future site uses. Health impact assessments could ensure that following remediation the sites would be protective of human health for the intended uses.

The EPA appears to be taking the NEJAC's recommendations seriously, particularly because they provide avenues for implementing Superfund in a manner consistent with President Joe Biden's executive orders directing federal agencies to advance racial equity and combat climate change. The EPA's 2022 draft environmental justice action plan seizes upon the NEJAC's ideas and expresses support for the NEJAC's goal of expediting Superfund cleanups. The plan's four goals are all community oriented: strengthening compliance, incorporating environmental justice into the regulatory process, improving community engagement, and implementing the president's Justice 40 initiative by directing EPA grants to disadvantaged communities.

The plan recommends that the EPA enhance compliance and incorporate environmental justice considerations in EPA programs by, among other things, strengthening risk management and accident prevention requirements in disadvantaged communities, increasing inspections of oil storage facilities, improving the planning and management of disaster debris for neighborhoods at risk due to climate change, and promoting recycling of waste materials.

Significantly, the plan affords environmental justice concerns a greater role in Superfund site remedies. Consistent with the NEJAC recommendations, the plan states: “Effective and inclusive engagement as early as possible in the cleanup process is the foundation of equitable and successful reuse outcomes, in addition to being critical for the long-term protection of community members’ health.”

The plan recognizes that community involvement in reuse planning and redevelopment will not only support site cleanups, but also help address longstanding local priorities. Avoiding gentrification of the community following remediation, enhancing local residents’ access to jobs, promoting communitywide revitalization and increasing climate change resiliency are among the common community priorities recognized in the plan.

The plan’s emphasis on early engagement with the public in Superfund remedies and consideration of community objectives presents possibilities for introducing flexibility and innovation into the Superfund program. Although remediation of Superfund sites to eliminate increased risk to human health and the environment remains a fundamental statutory goal, focusing on future site use would permit this goal to be realized while simultaneously meeting other community needs. As Pennsylvania’s Brownfields program recognizes, cleanup goals may properly vary depending on the risk posed by the intended future use of the site.

If community input aided by technical assistance from the EPA were seriously weighed in determining future site use, the EPA’s bias toward selecting remedies that assume residential or other unlikely future use might change. More sites may be incubators of economic development and jobs creation due to faster cleanups. Deed restrictions and other institutional controls could be used to ensure the protectiveness of the remedy.

The EPA’s plan could be further improved by better employing stakeholder partnerships. If public or private funds were applied to address the causes of community vulnerability, such as health disparities, the community would further benefit. Businesses currently located in the community, those interested in future use of the site, or those obligated to fund the cleanup may

be willing community partners in activities to reduce risk and promote redevelopment. A collaborative stakeholder approach to setting cleanup goals in the context of the broader community interest in revitalizing communities and addressing economic and health disparities may enhance outcomes. Environmental justice may serve as the catalyst for improving the Superfund program.

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