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AN EXAMINATION OF THE SUPERFUND REFORM ACT OF 1994*

DEEJOHN FERRIS**

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before you today to examine the Clinton Administration's proposed Superfund Reform Act of 1994.¹

The Lawyers' Committee for Civil Rights Under Law is a non-partisan, nonprofit 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 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.

THE SUPERFUND REAUTHORIZATION EFFORT

Based on my work with communities at risk due to toxic exposures at Superfund sites and a preliminary assessment of the Ad-

* These comments were originally presented as testimony before the Subcommittee on Transportation and Hazardous Materials Committee on Energy and Commerce, United States House of Representatives, on February 10, 1994.

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¹ H.R. 3800, 103d Cong., 2d Sess. (1994); *see also* Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1993).

ministration'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 among lower income communities and communities of color. These communities, disproportionately exposed to environmental hazards across the board,³ 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*,⁴ communities of color will wait up to four years longer than white communities in getting a Superfund site cleaned up. 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 twenty-two 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 seven percent.⁶ The findings are clear: not only are people of color differentially affected by pollution, they can expect different treatment from 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 "[t]hree out of every five Black and Hispanic Americans live in communities with uncontrolled toxic

² See U.S. E.P.A., SUPERFUND ADMINISTRATIVE IMPROVEMENTS, FINAL REPORT (1993).

³ See Bunyan Bryant & Paul Mohai, *Environmental Racism: Reviewing the Evidence*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 163, 167 (Bunyan Bryant & Paul Mohai eds., 1992).

⁴ Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S4.

⁵ *Id.*

⁶ *Id.*

waste sites.⁷ Similarly, an earlier report by the U.S. General Accounting Office ("GAO"), 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 Environmental Protection Agency ("EPA" or "Agency") 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"), the percentage of African Americans and Latinos in communities with the NPL sites is greater than is typical nationwide; and 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.

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

⁷ UNITED CHURCH OF CHRIST, COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

⁸ See U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH THE RACIAL ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983).

⁹ Rae Zimmerman, *Social Equity and Environmental Risk*, RISK ANALYSIS, Dec. 1993, at 649.

- C. State Role and Voluntary Response
 - D. Remedy Selection
- II. The Liability Scheme
- A. Liability and Allocation

II. 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 on 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.

III. AN 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 IV 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

1. 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

¹⁰ *Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 103d Cong., 1st Sess. (1993) (statement of Tom Goldtooth).

initial site assessment phase. Moreover, citizens should be granted an enforceable right to participate through cleanup.

In my testimony before the Senate Committee on Environment and Public Works Committee on Superfund, Recycling and Solid Waste Management (July 28, 1993), I provided a detailed plan for improving community access to and participating in the cleanup process, as well as the Technical Assistance Grant Program. I hereby submit this statement for today's hearing record.

2. 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 cleanup programs 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 score old sites under the new HRS.

If sites are rescored under a revised HRS which contemplates multiple score 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 private funding are other areas of concern. In view of the potential effects of multiple and disproportionate 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 clean up 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 groups,¹² community activists, the GAO,¹³ as well as the EPA¹⁴ are aware of ATSDR's dismal history of reaching out to communities. Comprehensive Superfund reform must address these deficiencies.

C. State Roles and Voluntary Response

Titles II and III of the Administration's draft cover the states' 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 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 clean up 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

¹¹ 42 U.S.C. § 9604(i) (1983 & Supp. 1994).

¹² AN INVESTIGATIVE STUDY BY THE ENVIRONMENTAL HEALTH NETWORK & THE NATIONAL TOXICS CAMPAIGN FUND, INCLUSIVE BY DESIGN: WASTE, FRAUD AND ABUSE IN FEDERAL ENVIRONMENTAL HEALTH RESEARCH (1992).

¹³ See generally U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-178, SUPERFUND: PUBLIC HEALTH ASSESSMENTS INCOMPLETE AND OF QUESTIONABLE VALUE (Aug. 1991).

¹⁴ U.S. E.P.A., ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 19 (1992).

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, communities of color and lower income individuals are coerced into choosing between jobs and environmental protection. While the Administration's objective to remove obstacles to redevelopment of areas is praiseworthy, Superfund must not exacerbate this dilemma.

D. Remedy Selection

1. 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 clean up 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 and other lenders and insurers, housing discrimination, and 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.*, resi-

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

2. 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 toxic. However, those sites or areas which do not meet this criteria, namely, minority or lower income neighborhoods, 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.

IV. 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 Fiscal Year 1993, only 52 of these sites were cleaned up and deleted from the NPL, and out of nearly 1300 sites, remedial action has begun at only 541.¹⁶ Although over the past three years the pace of cleanup has been some what faster, there is a considerable backlog of sites in communities that have yet to be evaluated by the EPA for inclusion on the NPL.

¹⁵ Deeohn Ferris, *Future Use Would Continue Past Inequities*, ENVTL. FORUM, Nov./Dec. 1993, at 36.

¹⁶ U.S. E.P.A., *FOURTH QUARTER FISCAL YEAR 1993 SUPERFUND MANAGEMENT REPORT* (1993) [hereinafter *SUPERFUND REPORT*].

To increase the number of completed cleanups, the Agency has shifted the focus away from the crucial task of evaluating sites, many of which are in communities of color. An examination of the Fiscal Year 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 clean up 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 the government and private parties alike. Among insurers and responsible parties in Superfund 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 principle 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

¹⁷ See SUPERFUND REPORT, *supra* note 16; see also U.S. E.P.A., FOURTH QUARTER FISCAL YEAR 1993 TARGETS AND ACCOMPLISHMENTS REPORT (1993).

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 high percentage of trust fund monies expended on agency administrative costs by EPA and Congress, is warranted.¹⁹ 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 issue 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 is usually limited to pilot projects in selected regions.²¹

Presently, the consequences of changing the liability standards 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 demonstrates that there is a difference between Funded cleanups and those involving responsible parties where liabil-

¹⁸ U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/T-RCED-92-92, SUPERFUND: EPA NEEDS TO BETTER FOCUS CLEANUP TECHNOLOGY DEVELOPMENT (1992); *Superfund: Progress, Problems and Reauthorization Issues*, Statement of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community and Economic Development Division, Apr. 21, 1993.

¹⁹ U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-92-45, SUPERFUND: EPA HAS NOT CORRECTED LONG-STANDING CONTRACT MANAGEMENT PROBLEMS (1991); U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-5, EPA'S CONTRACT MANAGEMENT: AUDIT BACKLOGS AND AUDIT FOLLOW-UP PROBLEMS UNDERMINE EPA'S CONTRACT MANAGEMENT (1990); U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-88-182, SUPERFUND CONTRACTS: EPA NEEDS TO CONTROL CONTRACT COSTS (1988); U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/AFMD-92-40, SUPERFUND: EPA COST ESTIMATES ARE NOT RELIABLE OR TIMELY (1988).

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; see also U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-90-22, SUPERFUND: A MORE VIGOROUS AND BETTER MANAGED ENFORCEMENT PROGRAM IS NEEDED (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 Used to Reduce Legal Expenses Have Not Been Used Often*, Keith Fultz, Director of Planning and Reporting, Resources, Community and Economic Development Division, Nov. 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, Nov. 8, 1993.

ity is at issue. It takes EPA approximately nine to ten percent longer to complete 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*

1. Final Covenants Not to Sue and Discretionary Covenants

Section 408 of Title IV modifies EPA authority to issue covenants not to sue. Deleting CERCLA section 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 environment.

Title IV also deletes CERCLA section 122(f)(3), which provides assurances that remedies will be completed prior to issuance of governmental releases for liability. Without section 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 CERCLA²⁴ also is eliminated. These seven factors form criteria integral to determining the appropriateness of a covenant not to sue. They are:

²² See *supra* note 18.

²³ 42 U.S.C. § 9622(f)(1)(A) (1983 & Supp. 1994).

²⁴ 42 U.S.C. § 9622(f)(3) (1983 & Supp. 1994).

- (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 resource damages and criminal activity.

2. *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.

3. Expedited Final Settlement

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.

4. 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 the EPA's June 6, 1989 guidance document, the Agency defines a prospective 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 to nonviable or irresponsible purchasers who may perpetuate or exacerbate the hazards posed by the site.

5. Allocation Procedures

Section 409 of the Administration's proposal creates an allocation system for dividing site response costs among responsible

²⁵ U.S. E.P.A., 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 (1989).

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 socioeconomic 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.

6. 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 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 most likely 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.