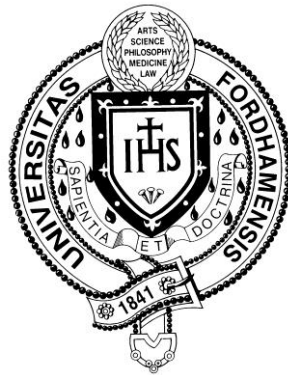


FORDHAM ENVIRONMENTAL LAW REVIEW



SQUARING THE CERCLA: SUPERFUND AND THE SUPERFUND TASK FORCE

Manny Marcos

SQUARING THE CERCLA:
SUPERFUND AND THE SUPERFUND TASK FORCE

*Manny Marcos**

ABSTRACT

The Superfund Task Force recently released its final report on the implementation of its recommendations for improving the Superfund program. The Task Force was given five goals for improving the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA’s”), implementation. These goals are to expedite cleanup and remediation, re-invigorate responsible party cleanup and reuse, encourage foreign investment, promote redevelopment and community revitalization, and engage with partners and stakeholders. While the Task Force’s recommendations have improved CERCLA’s implementation, many of CERCLA’s structural flaws remain intact. Specifically, CERCLA still has a severe shortage of funding, an unfair liability scheme, perverse incentives, due process concerns, excessive litigation costs for PRPs, and social justice concerns. To resolve these flaws, this Note proposes that the legislature take legislative and administrative action to remove the petroleum exclusion; reimpose and expand the superfund taxes; remove CERCLA’s retroactive, joint, and several liability scheme; create an independent board to evaluate CERCLA liability using the gore factors; create an objective and racially just NPL-placement policy and fines imposition policy, and engage with nonprofit organizations.

| | |
|--|-----|
| INTRODUCTION | 508 |
| I. OVERVIEW OF CERCLA | 510 |
| A. <i>Owners</i> | 515 |
| B. <i>Operators, Transporters, and Arrangers</i> | 518 |
| II. THE FLAWS OF CERCLA | 519 |
| III. HOW THE TASK FORCE ADDRESSED MANY – BUT NOT ALL – OF CERCLA’S FLAWS | 525 |
| CONCLUSION | 533 |

INTRODUCTION

On September 9, 2019, the Superfund Task Force released its final report on its recommendations for improving CERCLA’s implementation.¹ The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), commonly known as Superfund, was enacted to deter parties from releasing hazardous substances at sites and to establish a means for the EPA to clean up abandoned hazardous waste sites.² To accomplish these goals, CERCLA imposes retroactive, strict, joint, and several liability on all potentially responsible parties (“PRPs”).³ Such PRPs include (1) current owners or operators of a facility, (2) past owners or operators of a facility at the time the hazardous substances were released, (3) arrangers who arranged for the disposal or treatment of the hazardous substances, and (4) transporters of the hazardous substances.⁴

CERCLA also grants the EPA the authority to pursue cleanup and enforcement actions in response to the release or threatened

* Manny Marcos, J.D. Candidate, 2021, Fordham University School of Law. Thank you to Professor Nicholas Johnson for his invaluable guidance and advice, to the editors and staff of the *Fordham Environmental Law Review* for their helpful assistance, and to my family for their loving encouragement and support.

¹ See *Superfund Task Force Final Report*, EPA.GOV (Sept. 9, 2019), https://www.epa.gov/sites/production/files/2019-09/documents/sftfreport_v17-9-5_for508s.pdf [hereinafter *Final Report*].

² See Roger Armstrong, *CERCLA’s Petroleum Exclusion: Bad Policy in a Problematic Statute*, 27 *LOY. L.A. L. REV.* 1157, 1190 (1994).

³ See 42 U.S.C. §9607(a-c) (2012).

⁴ 42 U.S.C. §9607(a)(2012).

release of hazardous substances.⁵ To ensure a site's cleanup, the EPA may pursue either an enforcement action to compel the PRPs to clean up the polluted site or a cleanup action to clean up the polluted site itself.⁶ In cleaning up a site, the EPA may use the money collected from either the PRPs⁷ or the Hazardous Substance Superfund Trust Fund ("Superfund").⁸

On May 22, 2017, former EPA administrator E. Scott Pruitt formed a Superfund Task Force and gave it thirty days to provide recommendations and strategies for improving CERCLA's implementation.⁹ Specifically, the Task Force was given five goals for improving CERCLA's implementation.¹⁰ These five goals are (1) to expedite cleanup and remediation, (2) to re-invigorate responsible party cleanup and reuse, (3) to encourage foreign investment, (4) to promote redevelopment and community revitalization, and (5) to engage with partners and stakeholders.¹¹ One month later, the Task Force outlined forty-two recommendations for the EPA to pursue to achieve these five goals.¹² On September 9, 2019, the Task Force submitted its final report on the successful implementation of these recommendations.¹³

While these recommendations have improved CERCLA's implementation as evidenced by the Task Force's final report, many of CERCLA's structural flaws remain intact and will require legislative changes to resolve. Specifically, CERCLA still has (a) a severe shortage of funding, (b) an unfair liability scheme, (c) perverse incentives, (d) due process concerns, (e) excessive litigation costs for PRPs, and (f) social justice concerns.

⁵ 42 U.S.C. §9604(a)(1)(2012).

⁶ *See id.*

⁷ 42 U.S.C. §9607(a).

⁸ 42 U.S.C. §96011(a)(2012).

⁹ *Superfund Task Force Recommendations*, EPA.GOV. i, iii (July 25, 2017), https://www.epa.gov/sites/production/files/2017-07/documents/superfund_task_force_report.pdf [hereinafter *Task Force Recommendations*].

¹⁰ *Id.* at iv.

¹¹ *Id.*

¹² *Id.* at iv.

¹³ *See* Final Report, *supra* note 1.

This Note will explore how the Task Force resolved or failed to resolve CERCLA's many flaws. This Note will also provide its own solutions for correcting flaws that the Task Force failed to resolve. Unlike the Task Force's recommendations, many of these solutions will require structural changes to CERCLA's legislative framework. Part I of this Note provides an in-depth overview of CERCLA's doctrinal structure and enforcement mechanisms. Part II of this Note describes the myriad of flaws inherent in CERCLA's structure and enforcement mechanisms. Part III of this Note explores how the Task Force's recommendations solve or fail to solve many of CERCLA's flaws. Part III also proposes legislative and administrative changes to address these structural and surface flaws that the Task Force failed to resolve. This Note maintains that these legislative and administrative changes to CERCLA are necessary for a more effective, efficient, and equitable CERCLA.

I. OVERVIEW OF CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), commonly known as Superfund, is a hastily drafted statute that is notorious for its vague terminology and its confusing legislative history.¹⁴ The legislature enacted CERCLA to correct the remedial gaps in the Resource Conservation and Recovery Act's ("RCRA's") cradle-to-grave program and to establish a means for cleaning up abandoned hazardous waste sites.¹⁵ To accomplish these two goals, CERCLA grants the EPA the authority to pursue cleanup and enforcement actions in response to the release or threatened release of a variety of hazardous substances.¹⁶ Such substances, however, do not include petroleum or gas usable for fuel.¹⁷

To finance cleanup and enforcement actions and to deter prospective polluters, CERCLA imposes retroactive, strict, joint, and several liability on all potentially responsible parties ("PRPs").¹⁸ Such

¹⁴ Jeffrey M. Moss, *Impact of CERCLA On Real Estate Transactions: What Every Owner, Operator, Buyer, Lender, . . . Should Know*, 6 BYU J. PUB. HEALTH 365, 367 (1992).

¹⁵ Armstrong, *supra* note 2.

¹⁶ See 42 U.S.C. §9604(a)(1)(2012).

¹⁷ 42 U.S.C. §9601(14)(2012).

¹⁸ See 42 U.S.C. §9607(a-c)(2012).

liability is retroactive because parties may be held liable for acts that occurred before CERCLA was enacted, strict because the EPA need not prove causation or intent, and joint and several because PRPs may be held liable for the entire cost related to a site when the harm cannot be apportioned or there are no other solvent PRPs.¹⁹

To ensure a site's cleanup, the EPA may either (1) pursue an enforcement action to compel the PRPs to clean up the polluted site or (2) pursue a cleanup action to clean up the site itself.²⁰ In cleaning up a polluted site, the EPA may use the money collected from either the PRPs²¹ or the Hazardous Substance Superfund Trust Fund ("Superfund").²² The Superfund was initially funded by revenues derived from special taxes on the chemical and petroleum industries and large firms,²³ but is now financed almost entirely by the general tax revenue, resulting in a precipitous decline in Superfund funding²⁴ and a slowing down of site completion.²⁵

When cleaning up a site itself, the EPA can pursue two types of cleanup actions: removal operations and remedial operations.²⁶ Removal operations are short-term actions taken by the EPA in response to the imminent release or threatened release of hazardous substances.²⁷ By contrast, remedial operations are long-term actions taken by the EPA to permanently reduce the risk of the release of hazardous substances.²⁸ Remedial operations, however, can only be taken at places listed on the National Priority List ("NPL").²⁹ To be listed on the NPL, a proposed site is first subject to a Preliminary

¹⁹ *See id.*

²⁰ 42 U.S.C. §9604(a)(1).

²¹ 42 U.S.C. §9607(a).

²² 42 U.S.C. §96011(a)(2012).

²³ *The Return of the Superfund Tax*, ENVTL. NEWS NETWORK (June 22, 2010), <https://www.enr.com/articles/41458-the-return-of-the-superfund-tax>.

²⁴ Jessica Morrison, *Polluted Sites Linger Under U.S. Cleanup Program*, CHEMICAL & ENGINEERING NEWS (Apr. 3, 2017), <https://cen.acs.org/articles/95/i14/Polluted-sites-linger-under-US-clean-up-program.html>.

²⁵ *Id.*

²⁶ 42 U.S.C. §9604(a)(1).

²⁷ 42 U.S.C. §9601(23)(2012).

²⁸ 42 U.S.C. §9601(24)(2012).

²⁹ 42 U.S.C. §9604(a)(1).

Assessment / Site Inspection (“PA / SI”).³⁰ If the proposed site is found to have significant environmental issues, it is then subject to a Remedial Investigation / Feasibility Study (“RI / FS”).³¹ Once the RI / FS is complete, the EPA conducts a hearing that produces a Record of Decision (“ROD”), which sets forth the cleanup plan based on an analysis of the RI / FS’s data.³² These cleanup procedures and processes are often slow,³³ inefficient,³⁴ arbitrary,³⁵ overly ambitious,³⁶ expensive,³⁷ and unevenly³⁸ – possibly even inequitably³⁹ – applied.

CERCLA also grants the EPA the authority to order private parties through unilateral administrative orders (“UAOs”) to take short-term or long-term cleanup action if there is an imminent, substantially dangerous release or threatened release of hazardous substances.⁴⁰ Such UAO’s, however, are not subject to pre-enforcement review, and parties who refused to comply with these UAO’s may incur treble damages for the costs incurred by the Superfund due to their noncompliance.⁴¹

After PRPs conduct a mandatory cleanup of a site, the PRPs can require the EPA to apportion liability to other PRPs through a

³⁰ 42 U.S.C. §9605(4)(d)(2012).

³¹ 42 U.S.C. §9604(a)(1).

³² *Id.*

³³ Robert W. McGee, *Superfund: It’s Time for Repeal After a Decade of Failure*, 12 *UCLA J. ENVTL. L. & POL’Y* 165, 168 (1993).

³⁴ See James T. Hamilton & W. Kip Viscusi, *How Costly Is “Clean”? An Analysis of the Benefits and Costs of Superfund Site Remediations*, 18 *J. POL’Y ANALYSIS & MGMT.*, 2, 22 (1999).

³⁵ See *Superfund: The Good, the Bad, and the Broken*, FREEDOM WORKS (Feb. 27, 1998), <https://www.freedomworks.org/content/issue-analysis-70-superfund-good-bad-and-broken>.

³⁶ See Richard L. Stroup, *Superfund: The Shortcut That Failed*, PERC POL’Y SERIES 1, 7 (May 1996), <https://www.perc.org/wp-content/uploads/2018/02/ps5.pdf>.

³⁷ McGee, *supra* note 33, at 170-71.

³⁸ Richard L. Stroup & Bradley Townsend, *EPA’s New Superfund Rule: Making the Problem Worse*, 3 *CATO REV. BUS. & GOV’T* 72, 73 (1993).

³⁹ See Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide In Environmental Law, A Special Investigation*, 15.3 *NAT’L L.J.*, 1, 2 (Sept. 21, 1992), <https://www.ejnet.org/ej/nlj.pdf>.

⁴⁰ 42 U.S.C. §9606(a)(2012).

⁴¹ 42 U.S.C. §9607(c)(3)(2012).

contribution suit.⁴² PRPs, however, are not subject to contribution suits for matters addressed in an EPA settlement.⁴³ Courts hearing contribution suits apply the rules of equity to determine whether to apportion the harm caused by the pollutants and by what degree to apportion it.⁴⁴ Courts often determine equitability using the Gore factors, which take into account (a) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of the hazardous substances can be distinguished, (b) the quantity of hazardous substances involved, (c) how toxic the hazardous substances are, (d) how involved the parties were in the release of the hazardous substances, (e) how careful the parties were with the hazardous substances in proportion to their toxicity, and (f) how cooperative the parties were with the federal, state, or local officials.⁴⁵ Courts hearing contribution suits have the discretion to look at a variety of other equitable factors besides the Gore factors.⁴⁶ Consequently, private parties who wish to pursue contribution suits have difficulty establishing the “correct” apportionment methodology, and as such, the results of such contribution suits are unpredictable.⁴⁷

PRPs may also conduct a voluntary site cleanup and sue other PRPs for costs if they conducted the cleanup in accordance with the national contingency plan.⁴⁸ In these cost recovery suits, PRPs can sue other PRPs jointly and severally unless a reasonable basis for apportioning liability can be established.⁴⁹ Moreover, PRPs are subject to cost recovery for matters already addressed in an EPA settlement.⁵⁰

⁴² 42 U.S.C. §9613(f)(1)(2012).

⁴³ 42 U.S.C. §9613(f)(2)(2012).

⁴⁴ 42 U.S.C. §9613(f)(1).

⁴⁵ Jeffrey M. Gaba, *The Private Causes of Action under CERCLA: Navigating the Intersection of Sections 107(a) and 113(f)*, 5 MICH. J. ENVTL. & ADMIN. L. 117, 128 n.50 (2015) (citing *United States v. Township of Brighton*, 153 F.3d 307, 318 (6th Cir. 1998); *United States v. Hardage*, 116 F.R.D. 460, 466 (W.D. Okla. 1987); Steven Ferrey, *Allocation and Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L.J. 36, 60 (1994)).

⁴⁶ Steven Ferrey, *Inverting the Law: Superfund Hazardous Substance Liability and Supreme Court Reversal of All Federal Circuits*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 633, 641 (2009).

⁴⁷ *See id.*

⁴⁸ 42 U.S.C. §9607(a)(4)(b)(2012).

⁴⁹ Ferrey, *supra* note 46, at 640-41.

⁵⁰ *Id.*

In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (“SARA”).⁵¹ SARA, among other things, requires that the EPA follow all applicable, relevant, and appropriate requirements (“ARARs”) when pursuing a cleanup or enforcement action.⁵² Specifically, SARA requires the EPA to take remedial action that protects human health and the environment, is cost-effective, and meets both federal and local environmental standards.⁵³ SARA also requires the EPA to disfavor remedies that entail the offsite transport and disposal of hazardous substances.⁵⁴ Sixteen years after Congress enacted SARA, it enacted the Small Business Liability Relief and Brownfields Revitalization Act (“SBLRBRA”), which, among other things, establishes a federal grants program for the development of contaminated or potentially contaminated property.⁵⁵ The SBLRBRA also provides incentives for local governments and private parties – who can clean up sites more quickly and efficiently than the EPA⁵⁶ – to revitalize such property.⁵⁷

CERCLA also imposes retroactive, strict, joint, and several liability on a broad range of PRPs.⁵⁸ Such PRPs include (1) current owners or operators of a facility, (2) past owners or operators of a facility at the time the hazardous substances were released, (3) arrangers who arranged for the disposal or treatment of the hazardous substances, and (4) transporters of the hazardous substances.⁵⁹ In practical terms, these PRPs can include buyers, sellers, lenders, corporate officers, employees, majority shareholders, lessors, lessees,

⁵¹ Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)).

⁵² 42 U.S.C. §9621(b)(1)(2012).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 42 U.S.C. §9628(a)(2012).

⁵⁶ See John Shanahan, *How To Rescue Superfund: Bringing Common Sense to the Process*, THE HERITAGE FOUND. 1, 6, 9 (July 31, 1995), http://thf_media.s3.amazonaws.com/1995/pdf/bg1047.pdf; Stroup, *supra* note 36, at 21.

⁵⁷ 42 U.S.C. §9628(a).

⁵⁸ 42 U.S.C. §9607(a)(2012).

⁵⁹ *Id.*

successor corporations, parent corporations, trustees, executors, and remediation firms.⁶⁰

A. *Owners*

Under CERCLA, current and past owners of a site can be held liable for the release of hazardous substances.⁶¹ Such parties can include buyers, sellers, lessors, successor corporations, trustees, executors, corporate officers, and majority shareholders.⁶² When the legislature originally enacted CERCLA, purchasers of polluted properties could be held liable for any hazardous substances released by prior owners.⁶³ Furthermore, purchasers could still be held liable even after they conducted their due diligence and were unaware of any released hazardous substances.⁶⁴ In fact, the only recognizable defense parties could claim was for *force majeure* acts, such as an act of God, war, or acts or omissions by third parties who did not have a contractual relationship with the defendant.⁶⁵

In response to the lack of an innocent purchaser defense, Congress enacted SARA.⁶⁶ SARA, among other things, creates a defense for land purchasers who comply with a number of challenging past and continuing obligations.⁶⁷ Specifically, SARA creates a defense for land purchasers who:

- (1) Had no constructive knowledge of any hazardous substances on the site at the time of purchase;
- (2) Conducted an “all appropriate inquiry” (“AAI”) by, among other things, hiring a qualified environmental professional;

⁶⁰ Moss, *supra* note 14, at 375-96.

⁶¹ 42 U.S.C. §9607(a)(1-2).

⁶² Moss, *supra* note 14, at 375-96.

⁶³ See Paul C. Quinn *The EPA Guidance on Landowner Liability and the Innocent Landowner Defense: The All Appropriate Inquiry Standard: Fact or Fiction*, 2 VA. ENVTL. L.J. 143, 149 (1991).

⁶⁴ See 42 U.S.C. §9607(b)(2012).

⁶⁵ *Id.*

⁶⁶ See Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)).

⁶⁷ 42 U.S.C. §9601(35)(2012).

- (3) Exercised appropriate due care with respect to the hazardous substances;
- (4) took precautions against foreseeable acts or omissions of third parties and their foreseeable consequences;
- (5) Fully cooperate with all parties authorize to conduct response actions related to the property;
- (6) Complies with any land-use restrictions established or relied on in connection with the response action;
- (7) Do not impede the effectiveness or integrity of any institutional control employed at the property in connection with the response action; and;
- (8) Take reasonable steps to stop or prevent any current or future releases and prevent or limit the exposure of any human, environmental, or natural resource to any released hazardous substance.⁶⁸

SARA also creates defenses for certain government entities and parties who acquired polluted properties by inheritance or bequest.⁶⁹

Sixteen years after Congress enacted SARA, it enacted the SBLRBRA, which, among other things, provides a defense for bona fide purchasers who knew about the hazardous substances but acted in good faith and fully cooperated with the EPA.⁷⁰ Specifically, the SBLRBRA creates a defense for bona fide land purchasers who:

- (1) Purchased the facility after January 11, 2002;
- (2) Established that all disposal of hazardous substances took place before the purchaser acquired the facility;
- (3) Conducted an AAI into the prior ownership and uses of the facility;
- (4) Provide/ed all legal required notices as to the release of any hazardous substances at the facility;
- (5) Were not/is not potentially liable or affiliated with any prior owner or operator who is potentially liable for response costs at the facility;
- (6) Took/take reasonable steps to stop or prevent any current or future releases;

⁶⁸ *Id.*

⁶⁹ 42 U.S.C. §9601(35)(A)(ii-iii).

⁷⁰ 42 U.S.C. §9601(40).

- (7) Prevent/ed or limit/ed the exposure of any human, environmental, or natural resource to any released hazardous substance;
- (1) Fully cooperate/ed with and assist/ed all parties authorized to conduct response actions or natural resource restoration at the facility;
- (2) Comply with any land use restrictions established or relied upon in connection with the response action;
- (3) Did/do not impede the effectiveness or integrity of any institutional control employed at the property in connection with the response action, and;
- (4) Comply/ed with all government subpoenas.⁷¹

The SBLRBRA also provides a defense for landowners who own properties at risk of becoming contaminated by a nearby polluted site.⁷² To qualify for the contiguous landowner defense, a party must have conducted an AAI into the prior ownership and uses of the facility, had no constructive knowledge of the nearby contaminated site, did not contribute or consent to the release or threatened release of the hazardous substances, and complied with a number of challenging past and continuing obligations that substantially parallel those for the bona fide purchaser defense.⁷³ The SBLRBRA also provides a *de micromis* exemption for transporters and arrangers that contributed less than a specified amount of hazardous substances at a site.⁷⁴

If a PRP qualifies for these or other defenses or exemptions under CERCLA, the EPA may issue that PRP a comfort/status letter stating that it meets the appropriate requirements.⁷⁵ Such comfort/status letters, however, are often non-binding; as such, they often do not always provide reasonable assurances to PRPs.⁷⁶ The EPA may also issue comfort/status letters to inform interested parties of site-specific legal and environmental information concerning the

⁷¹ *Id.*

⁷² 42 U.S.C. §9607(q)(1)(A)(2012).

⁷³ *Id.*

⁷⁴ 42 U.S.C. 9607(o)(2012).

⁷⁵ Frona M. Powel, *Amending CERCLA to Encouraging the Redevelopment of Brownfields: Issues, Concerns, and Recommendations*, 53 WASH. U.J. URB. & CONTEMP. L. 113, 126-27 (1998).

⁷⁶ *Id.*

reuse of impacted properties.⁷⁷ Such legal and environmental information can include past and present contamination, cleanup status, current or potential EPA involvement at the site, and any statutory protections or agency policies that may pertain to the interested party's situation.⁷⁸ The EPA may also administer comfort/status letters to suggest reasonable steps that the EPA believes a party should take at the property to protect human health and the environment.⁷⁹

B. Operators, Transporters, and Arrangers

Operators are also liable for the costs of cleaning up hazardous waste under CERCLA.⁸⁰ An operator is defined in the statute as a party that operates – but need not own – a polluting facility.⁸¹ Such parties can include lenders, corporate officers, employees, majority shareholders, lessees, parent corporations, trustees, executors, and remediation firms.⁸² As the legislature failed to define the term “operates,” the Supreme Court defined it as managing, directing, or conducting operations related to the leakage or disposal of hazardous substances or making decisions about compliance with environmental regulations.⁸³

By contrast, Congress clarified the participation standard as it relates to secured lenders.⁸⁴ Under CERCLA, secured lenders are exempt from liability for polluted sites if they have an ownership interest in a site primarily to protect a security interest and do not participate in the management of the site.⁸⁵ To further clarify when a secured lender is exempt from liability, Congress enacted the Asset

⁷⁷ *Id.*

⁷⁸ See Memorandum from Susan Parker Bodine, Assistant Administrator for Enforcement and Compliance Assurance, Env'tl. Protection Agency [EPA] 20 (July 29, 2019), <https://www.epa.gov/sites/production/files/2019-08/documents/common-elements-guide-mem-2019.pdf>.

⁷⁹ *Id.*

⁸⁰ 42 U.S.C. §9607(a)(1).

⁸¹ 42 U.S.C. §9601(20).

⁸² Moss, *supra* note 14, at 375-96.

⁸³ See *United States v. Bestfoods*, 524 U.S. 51, 66–67 (1998) (remanding the case for determination as to whether Bestfoods, the parent corporation, might be deemed an operator).

⁸⁴ See 42 U.S.C. §9601(20)(g).

⁸⁵ 42 U.S.C. §9601(20)(f-g).

Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (“ACLLDIPA”).⁸⁶ Under the ACLLDIPA, a secured lender is only held liable for polluted sites if it actually participates in its management or operational affairs, as defined extensively in the ACLLDIPA.⁸⁷ As a result of CERCLA’s liability scheme, parties such as lenders and parent corporations are perversely incentivized not to oversee or involve themselves in the cleanup of sites so as not to be held strictly, jointly, and severally liable as an operator. CERCLA also imposes liability on (a) transporters who delivered hazardous substances to disposal or treatment facilities if they participated in the selection of the facility⁸⁸ and (b) arrangers who arranged for the disposal or treatment of hazardous substances if that was the intent of their actions.⁸⁹

II. THE FLAWS OF CERCLA

CERCLA has many flaws. *First*, the petroleum exclusion is inequitable, as CERCLA’s overlap with Section 311 of the Clean Water Act and RCRA is imperfect and does not justify the petroleum exclusion.⁹⁰ Indeed, Section 311 of the Clean Water Act only covers hazardous spills on navigable waters, and RCRA contains several remedial gaps that require CERCLA for correction.⁹¹ For example, RCRA does not cover past spills that do not present an imminent and substantial endangerment to humans or the environment.⁹² Additionally, the petroleum exclusion decreases funds available for site cleanup and further complicates the statute, resulting in money being wasted on litigation costs.⁹³

Second, the Superfund is severely underfunded, with funding declining by nearly half from 1999 to 2013 due to the expiration of the

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 42 U.S.C. §9607(a)(4).

⁸⁹ 42 U.S.C. §9607(a)(3); *Burlington Northern and Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009) (finding that Shell did not intend for spills of hazardous waste to occur and therefore was not an arranger as defined by Section §9607(a)(3)).

⁹⁰ Armstrong, *supra* note 2, at 1190-91.

⁹¹ *Id.*

⁹² 42 U.S.C. § 6972(a)(1)(B).

⁹³ *Id.* at 1186-87.

special taxes.⁹⁴ As a result, the rate of site completion has slowed precipitously, with twenty-five sites completed in 1995, but only one site completed in 2016.⁹⁵ *Third*, CERCLA's retroactive, strict, joint, and several liability scheme encourages excessive litigation costs, as individual PRPs can be held liable for the entire cost related to a site and are thus incentivized to fight the EPA in court and sue all PRPs for contribution.⁹⁶ Although these contribution suits allow the EPA to shift the burden of suing PRPs onto other PRPs, the excessive litigation costs incurred by PRPs due to CERCLA amount to billions of dollars in costs.⁹⁷ Moreover, because CERCLA liability is potentially unlimited, insurance companies are reluctant to insure PRPs against CERCLA liability, and PRPs, in turn, are reluctant to involve themselves in the revitalization of polluted properties.⁹⁸

Fourth, CERCLA's retroactive, strict, joint, and several liability scheme results in an unfair allocation of financial responsibility, as parties who contributed a small amount of waste can be held liable for the entire cost related to a site.⁹⁹ Furthermore, these parties can be held entirely liable even if they unknowingly released waste at the site prior to CERCLA's enactment and did not independently cause any damage to humans or the environment.¹⁰⁰ Accordingly, PRPs who would have otherwise cleaned up polluted sites are hesitant to do so because they can be held liable for the entire cost related to a site through the slightest of mistakes.¹⁰¹

Moreover, as Professor Epstein argues, CERCLA's joint and several liability scheme creates collective action problems that perversely incentivize PRPs not to voluntarily clean up or reduce their waste.¹⁰² Indeed, because a PRP can be held entirely liable for voluntary cleanup costs and must recapture its expenses through cost recovery suits at the end of the site cleanup, it alone bears the initial

⁹⁴ Morrison, *supra* note 24.

⁹⁵ *Id.*

⁹⁶ See 42 U.S.C. §9607(a-c).

⁹⁷ See McGee, *supra* note 33, at 178.

⁹⁸ See *id.* at 174-75.

⁹⁹ See 42 U.S.C. §9607(a-c).

¹⁰⁰ See *id.*

¹⁰¹ See McGee, *supra* note 33, at 175.

¹⁰² See Richard A. Epstein, *Two Fallacies in the Law of Joint Torts*, 73 *GEO. L.J.* 1377, 1385-86 (1985).

costs of the site cleanup, while the initial savings are spread out thinly to all PRPs.¹⁰³ Additionally, because it may take decades to complete site cleanup and resolve cost recovery suits, it may take that long for PRPs to recapture their cleanup costs – some of which will inevitably be lost in litigation expenses.¹⁰⁴ Moreover, because many PRPs cannot reduce their waste to a legally permissible level, any reduction of waste by such PRPs is effectively rendered worthless due to CERCLA's joint and several liability scheme.¹⁰⁵ Instead, the optimal strategy for such PRPs is to reduce their precaution costs and save money, as the initial savings that a PRP may earn can be substantial while the initial losses that it creates will be borne by other PRPs.¹⁰⁶ Thus, CERCLA's joint and several liability scheme incentivizes PRPs to further pollute sites.¹⁰⁷

Fifth, parties such as lenders¹⁰⁸ and parent corporations¹⁰⁹ are perversely incentivized not to oversee or involve themselves in the cleanup of polluted sites so as not to be held strictly, jointly, and severally liable as an operator.¹¹⁰ As a result, sites are inadequately cleaned up, often resulting in the leakage of even more hazardous waste.¹¹¹ *Sixth*, CERCLA's innocent purchaser defense, bona fide purchaser defense, and contiguous landowner defense are inadequate,

¹⁰³ See *id.* (For example, if there are ten PRPs, each of whom contributes \$2,000 of pollution, for a total loss of \$20,000. If one PRP now spends \$1,000 to clean up its own waste, it reduces the total loss from \$20,000 to \$19,000, but reduces its own initial private loss from \$2,000 (its one in ten chance of being held liable for the entire loss) to \$1,900 (\$2,000 – (\$1,000 ÷ 10)) for an anticipated initial saving of only \$100. *Id.* Although Professor Epstein admits that this example “oversimplifies the current legal regime,” he argues that “no set of complications undoes the collective action problem that lies at the root of the issue.”); *Id.* at 1386.

¹⁰⁴ See Morrison, *supra* note 24.

¹⁰⁵ See Epstein, *supra* note 102, at 1386.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* (Although Professor Epstein admits that this argument “oversimplifies the current legal regime,” he argues that “no set of complications undoes the collective action problem that lies at the root of the issue.”); *Id.*

¹⁰⁸ See 42 U.S.C. §9601(20)(f-g).

¹⁰⁹ See *United States v. Bestfoods*, 524 U.S. 51, 66–67 (1998) (remanding the case for determination as to whether Bestfoods, the parent corporation, might be deemed an operator).

¹¹⁰ See 42 U.S.C. §9601(20)(f-g); *United States v. Bestfoods*, 524 U.S. 51, 66–67 (1998).

¹¹¹ See *id.*

as they are merely defenses that must be raised at trial and not exemptions; as such, they do not protect the economic and reputational interests of PRPs who must still pay legal fees and bear the brunt of negative publicity related to the case.¹¹² Moreover, PRPs must meet a number of challenging requirements to qualify for and keep these defenses and can lose them through the slightest of mistakes.¹¹³ As a result, parties are hesitant to involve themselves in the revitalization of polluted properties.¹¹⁴

Seventh, PRPs are denied due process under CERCLA, as they cannot obtain pre-enforcement review for UAOs, which require them to take short term or long term cleanup action in response to an imminent, substantially dangerous release or threatened release of hazardous substances.¹¹⁵ Furthermore, PRPs who refused to comply with such orders to remove or remediate hazardous substances may incur treble damages for the costs incurred by the Superfund due to their noncompliance.¹¹⁶ Moreover, although the PRPs can later sue the EPA or other PRPs for cleanup costs, by then the former PRPs are already in massive financial distress – sometimes even facing bankruptcy – due to high cleanup costs and excessive litigation expenses.¹¹⁷ As a result, parties are hesitant to involve themselves in the revitalization of polluted sites.¹¹⁸

Eighth, the EPA's investigation, cleanup, and reuse process is slow and inefficient.¹¹⁹ Furthermore, too much time and money are wasted on administrative and litigation expenses rather than on actual site cleanup.¹²⁰ Additionally, the EPA is highly conservative in its assessment of potential risks and overly ambitious and inflexible in its cleanup goals.¹²¹ For example, in a sample of 150 NPL sites, researchers found the median number of expected cancer cases at the

¹¹² See Kenneth A. Hodson & Charles H. Oldham, *Defenses to Liability Under CERCLA*, 46 ARIZ. ST. L.J. 459, 462-77 (2013).

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See 42 U.S.C. §9607(c)(3).

¹¹⁶ *Id.*

¹¹⁷ Stroup, *supra* note 36, at 9.

¹¹⁸ See *id.*

¹¹⁹ McGee, *supra* note 33, at 166, 168-71.

¹²⁰ *Id.* at 165, 170.

¹²¹ See Hamilton, *supra* note 34.

sites for a thirty-year period was less than 0.1%, and the cost per cancer case averted in most sites was over \$100 million.¹²² Likewise, the EPA often requires overly stringent groundwater standards at cleanup sites where water is not expected to be drunk.¹²³

Additionally, the EPA does not clean up the most hazardous sites first; instead, it gives preference to sites not on the NPL to avoid the bureaucracy involved in cleaning up NPL sites.¹²⁴ Furthermore, NPL status does not necessarily correlate with health risk, as the ranking system to qualify a site for a place on the NPL is arbitrary; some sites on the list may pose little risk to humans and the environment, while others not listed may pose more significant risks.¹²⁵ Moreover, the EPA often hires ineffectual contractors to clean up sites for inordinate amounts of money, sometimes even paying such contractors bonuses.¹²⁶

Tenth, the EPA's remedies are uneven from site to site, often driven by community lobbying.¹²⁷ Such lobbying creates perverse incentives for the EPA to impose overly stringent cleanup standards on sites to satisfy lobbying parties.¹²⁸ Conversely, some critics allege that unevenness of the EPA's remedies results in environmental injustice towards minority communities because such communities have less political clout and are less represented in the government and on the boards of polluting companies.¹²⁹ As a result, these critics allege that it takes the EPA longer to place sites on the NPL and clean them

¹²² *Id.*

¹²³ Stroup, *supra* note 36.

¹²⁴ McGee, *supra* note 33, at 169.

¹²⁵ FREEDOM WORKS, *supra* note 35.

¹²⁶ McGee, *supra* note 33, at 170-71.

¹²⁷ Stroup, *supra* note 38.

¹²⁸ *Id.*

¹²⁹ See Lavelle, *supra* note 39; but see John A. Hird, *Environmental Policy and Equity: The Case of Superfund*, 12 J. POL'Y ANALYSIS & MGMT., 323, 331-35 (1993) (finding the number of NPL sites in or around counties most heavily represented by the poor and nonwhites is *below* the national average and that the poorer a county is, the *less likely* it is to have a Superfund site); Martin Burda & Matthew Harding, *Environmental Justice: Evidence from Superfund Cleanup Durations*, 107 J. ECON. BEHAV. & ORG., 380-401 (2014) (finding that the degree of bias towards black, urban, and lower educated neighborhoods has decreased over time).

up in minority communities than in non-minority communities.¹³⁰ Moreover, these critics further allege that the EPA imposes lesser fines and chooses less permanent treatment solutions in minority-communities than in non-minority communities.¹³¹ Also subject to lax enforcement are nonprofit organizations, municipalities, and government agencies.¹³² In fact, the Department of Defense generates the most hazardous waste in the country yet is often not asked to pay for the costs related to such waste.¹³³

Eleventh, notwithstanding the EPA's Brownfields Program, the EPA needs to do more to involve local governments¹³⁴ and private actors¹³⁵ in the cleanup process, as these parties are more accountable for the costs, speed, and effectiveness of the site's cleanup and can clean up sites quicker and more efficiently than the EPA. *Finally*, as comfort/status letters are often non-binding, they do not generally provide reasonable assurances to PRPs.¹³⁶ Consequently, involved parties are hesitant to rely on such comfort/status letters to purchase, sell, lend, or clean up polluted sites, resulting in further economic inefficiencies and environmental damage.¹³⁷

In response to CERCLA's many flaws, The Superfund Task Force was commissioned to provide recommendations on how the EPA can improve its implementation of CERCLA.¹³⁸ Specifically, the Task Force was given five goals for improving CERCLA's implementation. These five goals are (1) to expedite cleanup and remediation, (2) to re-invigorate responsible party cleanup and reuse, (3) to encourage foreign investment, (4) to promote redevelopment and community revitalization, and (5) to engage with partners and stakeholders.¹³⁹ To effectuate these five goals, the Task Force outlined forty-two recommendations for the EPA to incorporate into its

¹³⁰ See Lavelle, *supra* note 39.

¹³¹ See *id.*

¹³² McGee, *supra* note 33, at 176.

¹³³ *Id.*

¹³⁴ See Shanahan, note 56, at 9.

¹³⁵ See Stroup, *supra* note 36, at 21.

¹³⁶ See Powel, *supra* note 75.

¹³⁷ See *id.*

¹³⁸ See *Task Force Recommendations*, *supra* note 9.

¹³⁹ *Id.* at iii.

implementation of CERCLA¹⁴⁰ These recommendations have already begun to be implemented by the EPA, and the Task Force has submitted its final report on the successful implementation of these recommendations in 2019.¹⁴¹

With the advent of these recommendations, several surface problems of CERCLA have been resolved. Nevertheless, the Task Force only provided recommendations for improving CERCLA's implementation – not its statutory scheme; as such, many of CERCLA's structural flaws remain intact and will require legislative changes to sufficiently resolve. Part III of this Note will analyze how the Task Force's recommendations solve many of CERCLA's problems. Where the Task Force's recommendations fail to sufficiently address such problems, Part III of this Note will provide its own solutions for improving CERCLA's structure and enforcement mechanisms. In contrast to the Task Force's recommendations, the solutions set forth in Part III of this Note will often require legislative changes to CERCLA's statutory scheme.

III. HOW THE TASK FORCE ADDRESSED MANY – BUT NOT ALL – OF CERCLA'S FLAWS

The Task Force's recommendations addressed many, but not all, of CERCLA's flaws. *First*, the Task Force did not address the petroleum exclusion, which inequitably exempts one industry from CERCLA liability.¹⁴² As a result of the petroleum exclusion, less funding is available for site cleanup.¹⁴³ Moreover, the petroleum exclusion further complicates the statute, resulting in money being wasted on litigation costs.¹⁴⁴ To create a more efficient, effective, and equitable CERCLA, the legislature must remove the petroleum exclusion from CERCLA's statutory scheme.

Second, the Task Force addressed CERCLA's lack of funding¹⁴⁵ by introducing ways for the EPA to spend money more efficiently. Specifically, the Task Force recommended, among other

¹⁴⁰ *Id.* at iv.

¹⁴¹ *See* Final Report, *supra* note 1.

¹⁴² *See* Armstrong, *supra* note 2, at 1190-91.

¹⁴³ *Id.* at 1186-87.

¹⁴⁴ *Id.* at 1187.

¹⁴⁵ *See* Morrison, *supra* note 24.

things, that the EPA (a) create an administrative review process for remedy decisions with an estimated cost of \$50 million;¹⁴⁶ (b) review third-party contracting procedures for large EPA-approved contractors and third-party contracts to ensure that contractors operate efficiently and are not overpaid;¹⁴⁷ (c) use third parties to evaluate optimal remediations for polluted sites, with a focus on optimizing remediation for complex sites or sites of significant public interest;¹⁴⁸ (d) and speed up the cleanup process.¹⁴⁹ While these recommendations seek to remedy CERCLA's lack of funding, they merely put a bandage on a fiscal wound. Indeed, CERCLA's lack of funding is largely due to competition for general tax revenue funds.¹⁵⁰ What is needed is not merely smarter spending by the EPA, but increased funding for the Superfund.

To obtain such increased funding, the legislature must reimpose the Superfund taxes on the chemical and petroleum industries and large firms. Moreover, the legislature should expand these special taxes to include consumer and commercial goods that are harmful to the environment when discharged, such as artificial detergents and gasoline. The benefits of expanding these special taxes are threefold: First, by imposing special taxes on various parties, the costs will be spread out thinly and no one party will be forced to bear them alone; second, such cost spreading is fair because all parties that directly or indirectly benefit from the pollution will be forced to pay for its remediation and prevention; and third, imposing these special taxes will result in higher prices for environmentally hazardous consumer and commercial goods, which will desensitize people from buying products and engaging in activities that are harmful to the environment.

Third, the Task Force addressed the EPA's slow, inefficient, and inflexible investigation, cleanup, and reuse process¹⁵¹ by recommending several changes to the EPA's standards and methodologies. Specifically, the Task Force recommended, among other things, that the EPA:

¹⁴⁶ *Task Force Recommendations*, *supra* note 9, at 4.

¹⁴⁷ *Id.* at 7.

¹⁴⁸ *Id.* at 6.

¹⁴⁹ *Id.* at 1-7.

¹⁵⁰ *See Morrison*, *supra* note 24.

¹⁵¹ *See McGee*, *supra* note 33, at 166, 168-71.

- (a) Focus resources on deleting or partially deleting NPL sites, especially those that require immediate and intense attention;¹⁵²
- (b) Use systematic planning, best management practices, remedy optimization,¹⁵³ and state-of-the-art technologies to expedite cleanup;¹⁵⁴
- (c) Use adaptive management at large or complex sites to make cleanup more efficient;¹⁵⁵
- (d) Designate one agency to be in charge of site cleanup to reduce overlap and duplication;¹⁵⁶
- (e) Include time limits, financial limits, and best practices for completing RI/FS,¹⁵⁷ and;
- (f) Make the groundwater policy less stringent for aquifers unlikely to be used for drinking water.¹⁵⁸

These recommendations will make the EPA's investigation, cleanup, and reuse process quicker, more efficient, and flexible. Absent from these recommendations, however, is any suggestion that the EPA improve its NPL-placement policy to better correlate with actual risks to humans or the environment. Accordingly, the EPA

¹⁵² *Task Force Recommendations, supra* note 9, at 1-2.

¹⁵³ *Id.* at 5-6 (Remedy optimization is the effort to identify and implement specific actions that could improve the effectiveness and cost-efficiency of any phase of the removal and remedial process. To identify such opportunities, regions may (a) use a systematic site review by a team of independent technical experts, (b) apply techniques or principles of Green Remediation or Triad (systematic project planning, dynamic work strategies, and use of real-time measurement technologies), or (c) apply other approaches to identify opportunities for greater efficiency and effectiveness.); *Id.* at n.1.

¹⁵⁴ *Id.* at 5-7.

¹⁵⁵ *Id.* at 2-3 (Adaptive Management is an approach that focuses resources on the development of a site strategy with measurable decision points and an understanding of site conditions and uncertainties. Based on these uncertainties, decisions are then made that allow the EPA to adapt accordingly if these uncertainties result in fundamental changes to site conditions. Under an Adaptive Management strategy, Regions are encouraged to consider greater use of early and interim actions to address immediate risks, prevent source migration, and return portions of sites to use pending more detailed evaluations on other parts of sites.); *Id.*

¹⁵⁶ *Id.* at 12.

¹⁵⁷ *Id.* at 4.

¹⁵⁸ *Id.*

should appoint an independent board of scientists to create a more objective NPL-placement policy that better correlates with actual risks to humans and the environment. By reforming the NPL-placement policy, the EPA will be able to focus its attention on cleaning up and remediating its most hazardous sites.

Nevertheless, site cleanup would probably be quicker and more efficient if CERCLA was defederalized, as states are more accountable than the EPA and are likely to work on local polluted sites more efficiently.¹⁵⁹ In a defederalized CERCLA, the federal government would provide states with the necessary funding; the states would have the authority to clean up NPL and non-NPL sites; and the EPA would retain emergency cleanup capacity.¹⁶⁰ Realistically, however, the defederalization of CERCLA will probably never happen, as the federal government – like any other entity – does not cede power easily. As such, the Task Force’s recommendations for making site cleanup quicker and more efficient are the best practical way to achieve these goals.

Fourth, the Task Force addressed the excessive litigation costs incurred by the EPA and PRPs under CERCLA¹⁶¹ by recommending, among other things, that the EPA encourage PRPs to reach early settlements with the EPA.¹⁶² To that end, the Task Force recommended that the EPA provide incentives in the form of reduced oversight to PRPs who perform timely, quality work under an agreement with the EPA.¹⁶³ Likewise, the Task Force recommended that the EPA use enforcement mechanisms such as UAOs as deterrents against recalcitrant parties to discourage protracted negotiations.¹⁶⁴

Even with these recommendations, CERCLA’s retroactive, strict, joint, and several liability scheme ensures that litigation costs for PRPs remain extremely high.¹⁶⁵ Indeed, as a result of CERCLA’s liability scheme, PRPs can be held unfairly liable for all costs related to a site even if they unknowingly released hazardous waste at the site

¹⁵⁹ See Shanahan, *supra* note 56, at 6; Stroup, *supra* note 36, at 21.

¹⁶⁰ See, e.g., Shanahan, *supra* note 56, at 6.

¹⁶¹ See 42 U.S.C. §9607(a-c); McGee, *supra* note 33, at 178.

¹⁶² *Task Force Recommendations*, *supra* note 9, at 10.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 11.

¹⁶⁵ See 42 U.S.C. §9607(a-c).

prior to CERCLA's enactment and did not independently cause any damage to humans or the environment.¹⁶⁶ Thus, PRPs are incentivized to fight the EPA in court and sue all parties involved in the pollution – however tangentially – for contribution.¹⁶⁷ As a result, litigation costs incurred by PRPs amount to billions of dollars in costs.¹⁶⁸

Furthermore, because CERCLA liability is potentially unlimited, insurance companies are reluctant to insure PRPs against CERCLA liability, and PRPs, in turn, are reluctant to involve themselves in the revitalization of polluted properties.¹⁶⁹ Additionally, PRPs who would have otherwise cleaned up polluted sites are hesitant to do so because they can be held liable for the entire cost related to a site through the slightest of mistakes.¹⁷⁰ Furthermore, PRPs are perversely incentivized not to clean up or reduce their waste because they alone bear the initial costs of such efforts, while the initial savings earned are spread out thinly to all PRPs.¹⁷¹ Moreover, because many PRPs cannot reduce their waste to a legally permissible level, the optimal strategy for such PRPs is to reduce precaution costs and save money, as the initial savings that a PRP may earn can be substantial while the initial losses that it creates will be borne by other PRPs.¹⁷²

Therefore, to lower litigation costs for PRPs and make CERCLA more equitable, efficient, and effective, the legislature needs to fundamentally change CERCLA's liability scheme. Specifically, the legislature must do away with CERCLA's retroactive, joint, and several liability for PRPs. Thus, PRPs will only be held liable for their portion of the pollution at the time when such pollution was illegal. Nonetheless, CERCLA liability should remain strict (and several), as it would be very difficult for the EPA to prove causation and intent and discharging parties are the least-cost avoiders.

Moreover, to determine a PRP's proportionate liability under CERCLA, the legislature should amend CERCLA to create an independent board that would determine a PRP's proportionate

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See McGee, supra* note 33, at 178.

¹⁶⁹ *See id.*

¹⁷⁰ *See id.* at 175.

¹⁷¹ Epstein, *supra* note 102.

¹⁷² *Id.*

liability by applying the Gore factors. Such determinations should be made within a short timeframe and only be reviewable after the cleanup is complete to prevent any delays and ensure that the EPA has the requisite funds needed for site cleanup. Additionally, PRPs should still be liable for treble damages due to non-compliance. Nonetheless, PRPs will have fewer due process concerns because CERCLA liability will be limited rather than potentially unlimited, and an independent board – not the EPA – will determine CERCLA liability. Accordingly, PRPs will be less hesitant to involve themselves in the revitalization of polluted properties.

Furthermore, contribution suits – though not cost recovery suits – will be rendered irrelevant, as PRPs will only be required to pay their fair share of the costs related to a site. As such, litigation costs for PRPs will be substantially lowered. Moreover, parties such as lenders and parent companies will be less hesitant to oversee or involve themselves in the cleanup of polluted sites, as they will only be held liable for their share of the pollution. Thus, site cleanup will be more effective and efficient.

Additionally, insurance companies will be less hesitant to insure private parties against CERCLA liability, who, in turn, will be less hesitant to involve themselves with polluted properties. Furthermore, PRPs will be less incentivized to fight the EPA in court because they will no longer be potentially liable for the entire cost related to a site. As a result, litigation costs for PRPs will be lowered. Additionally, PRPs will be incentivized to reduce their pollution and thereby reduce their proportional liability under CERCLA. Moreover, PRPs will no longer be incentivized to reduce their precaution costs and not conduct voluntary cleanups because of collective action dynamics.

Even with these positive changes, the EPA will likely have less money to spend on site cleanup because:

- (a) PRPs will no longer be held liable for pollution occurring prior to CERCLA's enactment;
- (b) the EPA will have to pay for the cleanup of orphan shares arising from insolvent parties;
- (c) the EPA will incur substantially more litigation costs because it will no longer be able to sue a single PRP and have it, in turn, sue other PRPs for contribution;

- (d) the EPA will no longer be able to sue PRPs who minimally contributed to the site pollution because the cost of such litigation would exceed the EPA's ultimate recovery; and;
- (e) PRPs will have less incentive to ensure that other parties do not discharge waste because they can no longer be held liable for a disproportionate amount of the costs.

Nevertheless, the legislature can counterbalance this loss of Superfund funding by removing the petroleum exclusion and imposing special taxes on the chemical and petroleum industries, large firms, and consumer and commercial goods that result in harm to the environment. Moreover, the EPA can further ensure that the Superfund has adequate funding by aggressively pursuing polluters and employing CERCLA more efficiently. Accordingly, to make CERCLA more equitable, efficient, and effective, the legislature should remove CERCLA's retroactive, joint, and several liability scheme.

Fifth, the Task Force addressed the EPA's uneven¹⁷³ – and possibly inequitable¹⁷⁴ – application of remedies from site to site by recommending that the EPA review all remedy review and approval authorities, especially for polluted sites exceeding \$50 million in costs, to promote consistent remedy standards across the nation.¹⁷⁵ By ensuring consistent national standards, the EPA will no longer be influenced to impose overly stringent cleanup standards on particular sites due to community lobbying, and there will be fewer racial justice concerns regarding the EPA's remedy selection from site to site.

In addition to this, allegations of racial injustice run deeper than what is solvable by the meager remedies selected by the EPA. In particular, the Task Force's recommendations do not address the allegations that the EPA takes longer to place sites on the NPL list in minority communities than in non-minority communities.¹⁷⁶ Nor do the Task Force's recommendations address the allegations that the EPA imposes lesser fines on polluters in minority communities than

¹⁷³ See Stroup, *supra* note 38.

¹⁷⁴ See Lavelle, *supra* note 39.

¹⁷⁵ *Task Force Recommendations*, *supra* note 9, at 4.

¹⁷⁶ See Lavelle, *supra* note 39.

in non-minority communities.¹⁷⁷ To address these allegations, the EPA must conduct a thorough review of its NPL-placement policy and its fines imposition policy to better promote consistent standards across the nation.

Sixth, the Task Force addressed the EPA's lack of CERCLA enforcement against municipalities and government agencies¹⁷⁸ by recommending that the EPA engage with local and federal agencies and authorities in various ways. Specifically, the Task Force recommended, among other things, that the EPA (a) work with federal agencies to create policy changes that promote early decision-making by federal agencies concerning settlement negotiations;¹⁷⁹ (b) use comfort/status letters to address liability concerns of local governments;¹⁸⁰ and (c) issue policy guidance clarifying the EPA's position on the liability of local governments that acquire contaminated property.¹⁸¹

While these recommendations encourage the EPA to engage with municipalities and government agencies rather than merely letting them off the hook, it does not address the EPA's lack of CERCLA enforcement against nonprofit organizations. Accordingly, the EPA must engage with nonprofit organizations in a similar way to how they did with municipalities and government agencies. In this way, the EPA can implement CERCLA against nonprofit organizations while at the same time working to engage with these organizations as much as possible.

Seventh, the Task Force recommended that the EPA further involve local governments and private actors in the cleanup process.¹⁸² Specifically, the Task Force recommended, among other things, that the EPA (a) designate tribal, state, or local entities as leads on sites;¹⁸³ (b) create and maintain an informational website to aid third-party

¹⁷⁷ *See id.*

¹⁷⁸ *See McGee, supra note 33*, at 176.

¹⁷⁹ *Task Force Recommendations, supra note 9*, at 10.

¹⁸⁰ *Id.* at 19.

¹⁸¹ *Id.*

¹⁸² *Id.* at iii.

¹⁸³ *Id.* at 12.

cleanup and reuse;¹⁸⁴ and (c) identify new tools and approaches to support third parties interested in cleaning up and reusing sites.¹⁸⁵

These recommendations will substantially help the EPA further involve local governments and private actors in the cleanup process. As a result, polluted sites will be cleaned up more cheaply, quickly, and efficiently. Moreover, because the defederalization of CERCLA is nearly impossible, these recommendations are the best practical way for the EPA to involve local governments and private actors in the cleanup process.

Finally, the Task Force addressed the inadequacies of the innocent purchaser defense, bona fide purchasers defense, and contiguous landowner defense¹⁸⁶ by recommending that the EPA provide further assurances to prospective purchasers using site-specific tools.¹⁸⁷ Specifically, the Task Force recommended that the EPA expand its use of comfort/status letters and binding prospective purchase agreements to provide reasonable assurances to prospective purchasers to limit their liability.¹⁸⁸ Moreover, to ensure that comfort/status letters provide reasonable assurances to prospective purchasers and PRPs, the Task Force recommended that the EPA revise its model comfort/status letters to provide for stronger statements addressing potential liability concerns.¹⁸⁹ As a result of these recommendations, prospective purchasers will no longer have to rely on defenses that do not adequately protect them and that are difficult to comply with. Moreover, prospective purchasers and PRPs will be more willing to rely on comfort/status letters and involve themselves in the revitalization of polluted properties, resulting in greater economic efficiency and environmental progress.

CONCLUSION

The Superfund Task Force was charged with providing recommendations and strategies for improving CERCLA's implementation. Specifically, the Task Force was charged with

¹⁸⁴ *Id.* at 15.

¹⁸⁵ *Id.* at 17.

¹⁸⁶ See Hodson, *supra* note 112.

¹⁸⁷ *Task Force Recommendations, supra* note 9, at 15.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 18.

providing recommendations for how the EPA could expedite cleanup and remediation, re-invigorate responsible party cleanup and reuse, encourage foreign investment, promote redevelopment and community revitalization, and engage partners and stakeholders.¹⁹⁰ As evidence by the Task Force's final report, these recommendations have improved CERCLA's implementation.¹⁹¹ Nonetheless, many structural and surface flaws remain. Indeed, CERCLA still has:

- (a) A severe shortage of funding;
- (b) An unfair liability scheme;
- (c) Perverse incentives;
- (d) Due process concerns;
- (e) Excessive litigation costs for PRPs, and;
- (f) Social justice concerns.

Accordingly, more reform is needed to make CERCLA more efficient, fair, and effective.

To create a more efficient, fair, and effective CERCLA, the EPA and the legislature should pursue legislative and administrative action to:

- (1) Remove the petroleum exclusion;
- (2) Reimpose and expand the Superfund taxes;
- (3) Remove CERCLA's retroactive, joint, and several liability scheme;
- (4) Create an independent board to evaluate CERCLA liability using the Gore factors;
- (5) Create an objective and racially just NPL-placement policy and fines imposition policy, and;
- (6) Engage with nonprofit organizations.

By making these legislative and administrative changes, the EPA and the legislature can create a more effective, efficient, and equitable CERCLA.

¹⁹⁰ *Id.* at iii.

¹⁹¹ *See* Final Report, *supra* note 1.

