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# STIMULATING THE FUTURE OF SUPERFUND:

## WHY THE AMERICAN RECOVERY AND REINVESTMENT ACT CALLS FOR A REINSTATEMENT OF THE SUPERFUND TAX TO POLLUTED SITES IN URBAN ENVIRONMENTS

by *Braunson Virjee\**

The “polluter pays” principle is a cornerstone of environmental policy and rationalizes Superfund cleanup efforts.<sup>1</sup> However, the expiration of Superfund taxes has undermined these efforts in urban environments.<sup>2</sup> The American Recovery and Reinvestment Act of 2009 (“ARRA”) has provided stimulus funds to create jobs and reinvigorate cleanups.<sup>3</sup> These temporary funds have demonstrated that, given sufficient financial resources, Superfund remains a viable solution to urban pollution.<sup>4</sup> Superfund taxes should be reinstated long-term to ensure the vitality of the nation’s urban areas.

In response to the Love Canal disaster and corresponding support of the polluter pays principle, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”). CERCLA and its subsequent amendments created polluter liability and established the Superfund trust to finance the cleanup of “orphan sites” where responsible parties were unknown, insolvent, or disbanded.<sup>5</sup> Taxes generated from the chemical and petroleum industries that benefit from contaminating products<sup>6</sup> supplied the trust with approximately \$1.5 billion annually.<sup>7</sup>

In 1995, however, Congress allowed the Superfund tax to expire, and the trust balance fell from \$3.8 billion in 1996 to zero in 2003.<sup>8</sup> Instead of polluters paying, the U.S. Treasury has since subsidized cleanups, and financial allocation to Superfund has dramatically fallen.<sup>9</sup> A plunge in the pace of Superfund cleanups<sup>10</sup> has followed reduced funding,<sup>11</sup> resulting in few initiated cleanups, as well as a slower rate of completion. For example, the EPA completed eighty-nine cleanups in 1999, but a mere nineteen in 2009.<sup>12</sup>

This slowing has dramatically affected the nation’s urban areas. One in four Americans lives within one mile of a Superfund site,<sup>13</sup> and this rate increases with the inclusion of contaminated sites that, due to shrunken budgets, are not even given Superfund designation.<sup>14</sup> The result is that urban-dwelling Americans are exposed to polluted sites, compromising their health, economic livelihoods, and well-being. Of distinctive concern is the health of children. Lower-cost housing that surrounds orphan sites attracts younger families and single parents.<sup>15</sup> Today, over ten million children live within four miles of Superfund sites.<sup>16</sup> This statistic is especially alarming because children are most vulnerable to arsenic, DDT, and brain-damaging toxins found in the soil and water around these sites.<sup>17</sup>

Lingering pollution sites also cause lasting economic and social impacts on urban communities. Many inner-city sites are remnants of prosperous manufacturing activity that has since departed, leaving a disadvantaged population behind.<sup>18</sup> Reinvestment in these sites fails due to cleanup uncertainty; lenders and investors refuse to back projects,<sup>19</sup> leaving ideal inner city sites with pre-existing industrial zoning vacant


and polluted.<sup>20</sup> Instead, developers move outside the cities, compromising pristine land in rural and suburban areas<sup>21</sup> and leaving behind lower property values, lower tax revenues, unemployment, visual blight, and health concerns for urban dwellers.<sup>22</sup> In turn, these declines lead to poorly funded schools, fewer services, low quality housing, and higher crime rates.<sup>23</sup> As unfunded orphan sites remain, urban neighborhoods suffer.

Last year, however, ARRA gave much needed relief, allocating Superfund \$600 million “to protect and promote green jobs and a healthier environment by furthering cleanup activities.”<sup>24</sup> The immediate impact has been substantial. The EPA was able to begin construction at twenty-six new Superfund sites and increase operations at another twenty-five ongoing cleanups.<sup>25</sup> Since the ARRA’s passage in February 2009, the EPA has also completed projects at over twenty sites.<sup>26</sup>

Stimulus funding has also produced success stories in urban environments. Superfund is removing arsenic from five hundred homes in Minneapolis,<sup>27</sup> stripping pesticides, heavy metals, polychlorinated biphenyls (“PCBs”), and volatile organic compound (“VOCs”) from waterways in Brooklyn and Queens,<sup>28</sup> and dredging the Sacramento River for mining byproduct that, when removed, will provide California cities with 200,000 additional megawatt hours of clean electricity each year.<sup>29</sup> So too has stimulus money targeted social and economic concerns, creating as many as three hundred jobs at the aforementioned California site alone.<sup>30</sup> Stimulus funds, however, offer only temporary relief.

The measurable effect of ARRA funding demonstrates that Superfund can make a significant difference in blighted urban environments when adequate funding is made available. Reinstating the Superfund tax would permanently provide these resources, holding those who benefit from pollution responsible for damage to urban victims.

The conditions are ripe for reinstatement. The BP Deepwater Horizon spill, akin to Love Canal, has drawn recent attention to the polluter pays principle,<sup>31</sup> and Congress has already introduced two bills that would reinstate CERCLA taxes through 2019.<sup>32</sup> Additionally, both the Obama Administration and EPA have advocated congressional reinstatement.<sup>33</sup>

With these procedural pieces in place, the time to act is now. The ARRA stimulus and subsequent cleanup demonstrate that Superfund can produce tangible results if allocated sufficient resources. ARRA’s success warrants reinstatement of the Superfund tax to ensure that polluter-generated revenues finally grant relief to urban areas struggling amid neglected Superfund sites. 

**Endnotes:** Stimulating the Future of Superfund on page 65

\* Braunson Virjee is a J.D. candidate, May 2012, at American University Washington College of Law.

- <sup>1</sup> Mark Haggerty & Stephanie A. Welcomer, *Superfund: The Ascendance of Enabling Myths*, 37 J. ECON. ISSUES 451, 451 (2003).
- <sup>2</sup> See generally Anthony Quincy Vale, *Reform and Renewal: A Look at the Link Between Superfund and Urban Blight*, 2 ALB. L. ENVTL. OUTLOOK 57 (1995) (describing problems associated with unfunded urban superfund site cleanups).
- <sup>3</sup> American Reinvestment and Recovery Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.
- <sup>4</sup> See *Superfund National Accomplishments Summary Fiscal Year 2009*, EPA, <http://www.epa.gov/superfund/accomp/numbers09.html> (last updated Oct. 1, 2010) (reporting increased cleanup activity following ARRA stimulus passage).
- <sup>5</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9631-9633 (2006).
- <sup>6</sup> JONATHAN L. RAMSEUR & MARK REISCH, CONG. RESEARCH SERV., RL33426, SUPERFUND: OVERVIEW AND SELECTED ISSUES 12 (2006).
- <sup>7</sup> *Id.* at 2; Meline MacCurdy, *Reinstatement of Superfund Tax Proposed in Congress, Presumed in President Obama's Budget*, MARTEN LAW (Apr. 22, 2009), <http://www.martenlaw.com/newsletter/20090422-superfund-tax-reinstated#>.
- <sup>8</sup> *Superfund*, EARL BLUMENAUER: REPRESENTING OREGON'S 3RD DISTRICT, [http://blumenauer.house.gov/index.php?option=com\\_content&view=article&id=1664&catid=50](http://blumenauer.house.gov/index.php?option=com_content&view=article&id=1664&catid=50) (last visited Nov. 4, 2010).
- <sup>9</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-746R, HAZARDOUS WASTE PROGRAMS: INFORMATION ON APPROPRIATIONS AND EXPENDITURES FOR SUPERFUND, BROWNFIELDS, AND RELATED PROGRAMS (2005) (showing a steady decline of funding from between 1993 and 2005); Major Garrett, *White House Won't Tax Corporations For Superfund Cleanup*, CNN (Feb. 24, 2002), [http://articles.cnn.com/2002-02-24/politics/bush.superfund\\_1\\_toxic-waste-cleanups-superfund-program-superfund-taxes?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2002-02-24/politics/bush.superfund_1_toxic-waste-cleanups-superfund-program-superfund-taxes?_s=PM:ALLPOLITICS); Jennifer 8. Lee, *Drop in Budget Slows Superfund Program*, N.Y. TIMES, Mar. 9, 2004, <http://www.nytimes.com/2004/03/09/us/drop-in-budget-slows-superfund-program.html>.
- <sup>10</sup> Lee, *supra* note 9.
- <sup>11</sup> *Oversight of the Environmental Protection Agency's Superfund Program Before the Subcomm. On Superfund, Toxics and Env't. Health of the Sen. Comm. on Env't. & Pub. Works*, 109th Cong. (2010) (statement of Sen. Frank Lautenberg).
- <sup>12</sup> Juliet Eliperin, *Obama, EPA to Push for Restoration of Superfund Tax on Oil, Chemical Companies*, WASH. POST, June 21, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/20/AR2010062001789.html>.
- <sup>13</sup> Jessica Reaves, *Superfund Gets the Super Shaft*, TIME (Feb. 25, 2002), <http://www.time.com/time/nation/article/0,8599,213010,00.html>.
- <sup>14</sup> *Federal Register Notices for NPL Updates*, EPA, <http://www.epa.gov/superfund/sites/npl/frlist.htm> (last updated October 21, 2010) (demonstrating a

decreasing trend in annual number of sites listed to the National Priorities List each year from 1982 until the present).

- <sup>15</sup> TRUDY ANN CAMERON & GRAHAM D. CRAWFORD, SUPERFUND TAIN AND NEIGHBORHOOD CHANGE: ETHNICITY, AGE DISTRIBUTIONS, AND HOUSEHOLD STRUCTURE 23 (2003).
- <sup>16</sup> Lois J. Schiffer & Timothy J. Dowling, *Reflection on the Role of the Courts in Environmental Law*, 27 ENVTL. L. 151, 163 (1997).
- <sup>17</sup> Philip J. Landrigan et al., *Chemical Wastes, Children's Health, and the Superfund Basic Research Program*, 107 ENVTL. HEALTH PERSP. 423, 423 (1999).
- <sup>18</sup> James T. O'Reilly, *Environmental Racism, Site Cleanup and Inner City Jobs: Indiana's Urban In-Fill Incentives*, 11 YALE J. ON REG. 43, 45 (1994).
- <sup>19</sup> *Id.* at 54.
- <sup>20</sup> Vale, *supra* note 2, at 62.
- <sup>21</sup> Julia A. Solo, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285, 297, 304 (1995).
- <sup>22</sup> Vale, *supra* note 2, at 60.
- <sup>23</sup> Solo, *supra* note 21, at 287.
- <sup>24</sup> ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL PROTECTION AGENCY RECOVERY ACT PROGRAM PLAN: SUPERFUND REMEDIAL PROGRAM (2009), <http://www.epa.gov/recovery/plans/superfund.pdf>.
- <sup>25</sup> *EPA Calls Superfund Cleanup Progress 'Significant'*, ENVIRONMENTAL PROTECTION: THE SOLUTION RESOURCE FOR MANAGING AIR, WATER, ENERGY AND WASTE ISSUES (Mar. 10, 2010), <http://www.eponline.com/Articles/2010/03/10/EPA-Calls-Superfund-Cleanup-Progress-Significant.aspx>.
- <sup>26</sup> *Superfund National Accomplishments Summary Fiscal Year 2009*, *supra* note 4.
- <sup>27</sup> Bob Van Sternberg, *Minneapolis Superfund Site Gets More Cleanup Money*, STAR TRIB., (Apr. 15, 2009, 1:31 PM), <http://www.startribune.com/local/43041332.html>.
- <sup>28</sup> Mireya Navarro, *U.S. Cleanup Is Set for Newtown Creek, Long Polluted by Industry*, N.Y. TIMES, Sept. 27, 2010, available at <http://www.nytimes.com/2010/09/28/science/earth/28newtown.html>.
- <sup>29</sup> Dylan Darling, *First Economic Stimulus Grant for Superfund Clean-Up Goes to Iron Mountain Mine*, REDDING.COM, (Apr. 14, 2009, 12:00 AM), <http://www.redding.com/news/2009/apr/14/first-economic-stimulus-grant-for-superfund-clean>.
- <sup>30</sup> *Id.*
- <sup>31</sup> Ben Geman, *EPA Pushes Congress to Revive Superfund Tax on Oil, Chemical Companies*, THEHILL.COM, (June 21, 2010, 3:07 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/104507-epa-pushes-congress-to-revive-superfund-tax-on-oil-chemical-companies>.
- <sup>32</sup> H.R. 546, 111th Cong. (2009); H.R. 832, 111th Cong. (2009).
- <sup>33</sup> *EPA Asks Congress to Revive Superfund Tax*, UNITED PRESS INT'L., (June 21, 2010, 5:22 PM), [http://www.upi.com/Top\\_News/US/2010/06/21/EPA-asks-congress-to-revive-Superfund-tax/UPI-58331277136057](http://www.upi.com/Top_News/US/2010/06/21/EPA-asks-congress-to-revive-Superfund-tax/UPI-58331277136057); MacCurdy, *supra* note 7.