

Chapter 8

Public Participation and Public Confidence in the Superfund Program

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Public Participation and Public Confidence in the Superfund Program

SUMMARY

Public confidence in the Superfund program is vital to its success. The Superfund program, however, contains few formal opportunities for public participation in decisionmaking. In this chapter, the term “public” includes local residents, community groups, businesses, organizations such as environmental groups, and business and trade associations. “Public” also generally includes potentially responsible parties; however, discussion of their specific involvement in cleanups, negotiation of settlements, and liability issues is beyond the scope of this chapter.

Public participation does not necessarily slow the implementation of Superfund cleanups. While public participation adds steps to the process, which take time, it also adds public support. Public support can help a cleanup progress smoothly and effectively, while short-cutting public review in the hope of speeding cleanups can have unintended adverse effects. Public review of the adequacy of site assessments and other contractor work is a check on the quality of work and the effectiveness of remedial activities, and public scrutiny of agency performance can help management of the Superfund program.

The Environmental Protection Agency’s (EPA) information dissemination programs have received mixed reviews. Although some programs have drawn praise for keeping people informed, *information dissemination itself offers only a one-way communication that does not substitute for active participation in decisionmaking*. If cleanup strategies are developed behind closed doors, the public will feel disenfranchised and suspicious, eroding public confidence in the Superfund program.

The principal opportunity for public involvement in Superfund cleanups occurs late in the decisionmaking process after a proposed cleanup strategy has been identified. Even though the Remedial Investigation/Feasibility Study (RI/FS) process may have lasted for several years and remedial design and construction of an approved remedy may take several more years, the time allowed for review and comment may only be several weeks. Effective participation is frequently hindered because the public may lack the expertise needed to analyze complex environmental, public health, and technological issues. EPA, with rare exception, does not provide funds for citizens to hire technical advisers.

The limited opportunity for public involvement in decisionmaking to develop specific cleanup plans and the inability of public groups to obtain costly technical advice can affect the type of cleanups that are undertaken at Superfund sites. For example, local residents who do not understand complex remedial technologies or who are not involved in the development of cleanup plans can be less likely than their more technically oriented counterparts to: a) support more permanent cleanup strategies based on onsite treatment or decontamination of hazardous wastes, and b) understand if such permanent cleanups are not yet available. Lack of technical expertise can also result in some viable cleanup strategies that might be acceptable to the local population being prematurely rejected or not considered by EPA.

The pollution problems and community concerns at every Superfund site are substantial. Furthermore, the problems of assigning responsibility among large numbers of former

waste disposers are unparalleled. The complexity and variety of Superfund issues complicates attempts to modify the program to increase public participation, Opening the doors to public participation in negotiations and enforcement actions, granting new access to the courts for the public to seek redress of grievances, and even increasing public access to data collected in the course of Superfund activities are all confronted by some often equally compelling counterarguments,

That public participation in the Superfund program could be improved is clear. How to go about making the improvements is not nearly so obvious, and there currently is no clear consensus, even among groups in the public sector, on precisely how it should be accomplished.¹

¹See the "National Contingency Plan" section below for a description of how EPA's recent proposed changes to the NCP would address concerns about public participation.

INTRODUCTION

"The Superfund community relations program encourages two-way communication between communities affected by releases of hazardous substances and agencies responsible for cleanup actions . . . An effective community relations program must be an integral part of every Superfund action."² These words, amid other EPA policy statements, attest to the perceived importance of public participation in Superfund decisionmaking and establish an EPA objective to promote public involvement in the Superfund program,

This chapter compares that EPA objective with how public participation actually works in the Superfund program. It discusses the provisions for, and constraints on, public participation during the development of the national Superfund program and during the implementation of cleanup programs at individual Superfund sites. The chapter examines the public's efforts to become involved in Superfund decisionmaking, both through avenues provided by the program and through other pathways. It also assesses how participation has shaped overall public confidence in the Superfund program, confidence that has been shaken in recent years by the slow pace of program implementation at many sites and previously during the period when allegations of program mis-

management by top officials within EPA were being made. Finally, the chapter compares public participation in the Superfund program with other environmental programs, most notably with the hazardous waste permitting process of the Resource Conservation and Recovery Act (RCRA).

For the purpose of this chapter, the term "public" refers broadly to anyone who is not working as an employee or under contract to a government agency directly responsible for implementing the Superfund program. Thus, the public includes citizens living near Superfund sites, businesses, local governments, organizations such as environmental groups, professional and trade associations, and potentially responsible parties (PRPs). PRPs can be made to clean up sites or to reimburse the government for fund-financed cleanups. PRPs share with the public many of the same concerns about the availability of information and opportunities to participate in decisionmaking about remedial activities. PRPs, however, can be held liable for the costs of cleanup and in some cases for punitive damages. This liability exposure creates additional complications for PRP participation that do not apply to other groups. PRPs are or may soon be involved in adversarial proceedings with the EPA. Litigation strategies may influence the governments' willingness to share information with PRPs. Litigation considerations may also limit the PRP's willingness to work with other members of the public.

²U.S. Environmental Protection Agency, "Community Relations in Superfund: A Handbook," Interim Version (Washington, DC: September 1983), p.1 Introduction. Hereafter referred to as the Community Relations Handbook,

PUBLIC PARTICIPATION PROVISIONS UNDER CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) has, compared to other key environmental laws enacted since 1970, few requirements for, or references to, public participation in decisionmaking. The only guaranteed opportunities for public involvement occur as a result of Federal agency rulemaking proceedings mandated by CERCLA. The Act contains 11 rulemaking requirements.³ Under the Administrative Procedures Act, rulemaking would normally include a public comment period on the proposed regulations. CERCLA requires that the following be accomplished through rulemaking:

- Designating hazardous substances and establishing reportable quantities of hazardous substances (Section 102).
- Establishing information reporting requirements (Section 103).
- Defining emergency procurement powers (Section 104).
- Revising the National Contingency Plan (Section 105). (There are several requirements for rulemaking in this section.)
- Evaluating a program of optional private post-closure liability insurance for hazardous waste facilities (Section 107).
- Determining financial responsibility for vehicles (Section 108),
- Assigning money-spending powers to government officials (Section 111).
- Giving notice to potential injured parties (Section 111).
- Establishing procedures for filing claims (Section 112)

Section 113 of CERCLA discusses access to the courts by parties that disagree with EPA actions. Subsection (a) permits the public to seek judicial review of any Federal regulation promulgated under the Act in the U.S. Circuit Court of Appeals in Washington, D.C. Additionally, subsection (b) provides that “. . . the

³Fred Anderson, *Negotiation and Informal Agency Action. The Case of Superfund*, Report to the Administrative Conference of the U.S., May 25, 1984.

United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act . . . ,” but it is silent on who has standing to bring suit regarding what types of controversies. These are the only statements in CERCLA concerning the rights of the public to initiate or participate in legal actions related to Superfund activities.

Absent from CERCLA are provisions allowing “citizen suits” to be brought against the government or a private party, such as a potentially responsible party, thought to be acting in violation of the law. Citizen suits are explicitly permitted under most other major environmental protection laws including the Clean Air Act (Section 304), the Clean Water Act (Section 505), the Endangered Species Act (Section 11g), and the Toxic Substances Control Act (Section 20).⁴ Moreover, CERCLA does not define procedures by which the public may petition EPA to promulgate new regulations under the Act. Citizen petition provisions are contained in the Toxic Substances Control Act (Section 21) and the Resource Conservation and Recovery Act (Section 7004).⁵ Finally, CERCLA does not guarantee that the public may intervene in Superfund negotiation or enforcement actions involving potentially responsible parties,⁶ and several courts have ruled that community groups may not join Superfund lawsuits as intervening parties.⁷ These limitations in CERCLA may have resulted from concerns about delays in the cleanup process and about problems associated with getting PRPs to fund cleanups if the public were more directly involved.

CERCLA contains instructions to guide the EPA as it develops the Superfund program,

⁴Jeri Bidinger, “Hazardous Waste Cleanup in Wyoming: Legal Tools Available to the Private (citizen),” *Land and Water Law Review*, 1984.

⁵Natural Resources Defense Council, Memorandum from Jane Bloom to the Superfund Reauthorization Coalition, Jan 3, 1983, pp. 9-11.

⁶*Ibid.*, p. 1

⁷Randy Mott, letter to Karen I. Larsen, “Office” of Technology Assessment, Nov. 30, 1984. Hereafter referred to as the Mott letter.

but, with one exception, these instructions make no reference to public involvement. For example, CERCLA requires that the Attorney General be consulted prior to the issuance of “guidelines for using the imminent hazard, enforcement, and emergency response authorities” (Section 106(c)), but does not require public review of those guidelines. Similarly, Section 105(8)(B) requires that “each State shall establish . . . priorities for remedial action,” but it does not order the States to allow public involvement during that process, nor does it insist on public participation during EPA reviews of State nominations.

The one exception, Section **105(4)**, requires that the revised National Contingency Plan examine the “appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and *nongovernmental entities* in effectuating the plan” (emphasis added). While the public is not mentioned specifically, it could arguably be considered a subset of nongovernmental entities. No guidance is offered about how the “appropriate roles” might be determined.

CERCLA was drafted during an era when for the first time many abandoned hazardous waste sites were discovered to be leaking sub-

stances that could endanger public health. News of “toxic timebombs” such as Love Canal, New York, appeared in the press routinely. These announcements, coupled with the apparent inability of the government or private parties to take quick action to protect the health of people living near the sites, heightened public fears and created an emotionally charged atmosphere. In that environment, Congress enacted a law to facilitate a rapid response by the Federal Government to what many thought was a national emergency.

The law seems to reflect a belief that this is a problem best handed to the experts. The extent of pollution and the public health threats it causes at many uncontrolled hazardous waste sites is poorly understood. The selection of appropriate cleanup technologies often requires sophisticated engineering and scientific judgments. The assignment of liability to parties that caused environmental problems involves difficult legal issues. The two themes of promoting quick action and domination of decisionmaking by EPA and technical experts acting on behalf of a frightened public are reflected in CERCLA and guide the development and implementation of the Superfund program.

THE NATIONAL CONTINGENCY PLAN

CERCLA ordered the EPA to develop a framework for the Superfund program in the form of Federal regulations incorporated into the National Contingency Plan (NCP), first developed under the Clean Water Act,

Public participation during the NCP revision process took two forms—litigation and formal public comments on proposed regulations. Litigation resulted because the EPA missed the June 9, 1981 statutory deadline for promulgating revisions to the NCP. The Environmental Defense Fund (EDF) then sued in the U.S. Circuit Court of Appeals in Washington, D. C., seeking a court order forcing EPA to propose

NCP revisions.⁸ The suit was later combined with a similar action by the State of New Jersey.⁹ On February 12, 1982, the court ruled in favor of the plaintiffs and ordered the EPA to complete NCP revisions by May 13, 1982.¹⁰ The deadline was extended for 15 days by the court on March 18, 1982, to provide additional time for public comment on the proposed rules

⁸U.S. Court of Appeals, District of Columbia Circuit, (Civil Action #81-2083,

⁹U.S. Court of Appeals, District of Columbia Circuit, (Civil Action #81-2269.

¹⁰Decision published in the *Environmental Law Reporter* at 12 E.L.R. 20376-20378, April 1982.

(which was *expanded* from 30 to 45 days).¹¹ The final regulations were promulgated on July 16, 1982.¹²

During the 45-day comment period, EPA received 146 written statements from the public, government agencies, and industry that included over 1,000 pages of text.¹³ The preamble to the final regulations notes that the regulations were modified in response to comments. However, with one exception, EPA rejected every recommendation to expand public participation procedures outlined in the draft NCP. The preamble noted four major themes contained in comments related to public participation:¹⁴

- there should be stronger advocacy of public participation in the NCP;
- the draft NCP placed too much authority in the hands of the lead agency and the National Response Team;
- some procedure should be established to help the public understand what cleanup actions were being taken; and
- the NCP should include specific public participation requirements.

Consequently, EPA added a provision requiring that government personnel “be sensitive to local community concerns (in accordance with applicable guidance)” when assessing the need for, planning, or undertaking Superfund-financed actions.¹⁵ However, EPA did not include the guidance as part of the regulations, nor did it define any specific public participation requirements,

With regard to other comments related to public involvement in the Superfund program, EPA rejected a request that the Hazard Ranking System (HRS) be expanded to include consideration of nontechnical factors—including community interests—when used to assess the severity of a site’s environmental problems. EPA reasoned that the appropriate place to consider community interests was during the development of cleanup strategies, well after

the site ranking.¹⁶ However, sites not receiving a high hazard ranking are not considered for remedial cleanup actions.

Also relevant to the “community interest” issue is that the HRS scoring criteria does consider population density near sites. That criterion can create a bias in favor of adding NPL sites in populated regions in comparison to equally hazardous sites in sparsely populated regions. To the extent that densely populated regions are likely to have high levels of community interest compared to rural areas, adding a specific “community” interest criterion to the HRS could exacerbate that bias.

EPA also rejected a recommendation that meetings of the National Response Team be open to the public by saying that “such a provision is not appropriate in this Plan, since some meetings may be public and others may require executive session.”¹⁷ Finally, recommendations that private parties be allowed to suggest to EPA that particular On-Scene Coordinators (OSCs) of Superfund actions be replaced were also denied. EPA continued to limit such suggestions to the Regional Response Teams—which contain no members from the public—reasoning that “it is inappropriate to encourage such requests in the Plan, especially since the OSC will often be involved in situations where private parties have failed to clean up properly.”¹⁸

The final NCP is similar to CERCLA itself in its lack of specificity with regard to required public involvement in Superfund activities. It is perhaps notable that the word “public” does not appear anywhere in the introductory Section 300.3 which defines the scope of the entire NCP.

In addition to the requirements, cited above, for “sensitivity to local community concerns” when studying cleanup options and for public comments on proposed additions to the NPL, the following NCP sections address public participation issues:

- “Federal agencies should coordinate planning and response action with affected

¹¹Modification published in the *Environmental Law Reporter* at 12 ELR 20401, May 1982.

¹²47 Federal Register 31180-31220.

¹³47 Federal Register 31180.

¹⁴47 Federal Register 31198.

¹⁵40 CFR 300.61(c)(3).

¹⁶47 Federal Register 31181.

¹⁷47 Federal Register 31197.

¹⁸47 Federal Register 31197.

State and local government and private citizens” (40 CFR 300.22(b)).

- “Industry groups, academic organizations, and others are encouraged to commit resources for response operations” (40 CFR 300.25(a)).
- “It is particularly important to use valuable technical and scientific information generated by the nongovernment local community along with those from Federal and State government to assist the OSC in devising strategies where effective standard techniques are unavailable” (40 CFR 300.25(b)).
- “Federal local contingency plans should establish procedures to allow for well-organized, worthwhile, and safe use of volunteers” (40 CFR 300.25(c)),
- “The USCG (U.S. Coast Guard) Public Information Assist Team (PIAT) and the EPA Public Affairs Assist Team (PAAT) may help the OSCs and regional or district offices meet the demands for public information and participation during major responses. Requests for these teams may be made through the (National Response Center)” (40 CFR 300.34(f)).

The promulgation of the final revised NCP precipitated a second legal challenge by EDF and the State of New Jersey.¹⁹ The plaintiffs argued that the NCP did not contain the necessary information in sufficient detail to comply with CERCLA,²⁰ Negotiations between EPA and the plaintiffs resulted in a consent decree signed on January 16, 1984.²¹ In the agreement, EPA promised to propose further revisions to the NCP to address six major issues, one of which was public participation. Specifically EPA agreed to the following:

EPA will propose amendments to the NCP to (a) require development of Community Relations Plans for all Funded-financed response measures, (b) require public review of the Feasibility Studies for all Fund-financed response measures, and (c) provide comparable public

participation for private-party response measures undertaken pursuant to enforcement actions.²²

EPA released a second draft version of possible regulatory language to the plaintiffs in September 1984. The draft requires community relations plans at every Superfund site and orders a 21-day public comment period on all feasibility studies.²³ These actions have to date been EPA policy, but they have not been regulatory requirements. Also, the draft contains language that would permit public participation in enforcement actions, but only when EPA determines that public participation will be “useful to further the cause of settlement.” EDF has taken issue with that condition by responding to EPA as follows:

This requirement ignores the fact that the central purpose of public participation is not to facilitate settlements but rather to deal effectively with the concerns of the surrounding community . . . If public representatives are willing to comply with the other conditions, including small numbers, technical and legal expertise, and a pledge of confidentiality, they should be permitted to participate in the negotiations.²⁴

It is important to note that many people disagree, at least in part, with EDF’s position on public involvement in all stages of enforcement actions. One lawyer believes, for example, that “public participation in enforcement cases is a potential necessity, but public access to settlement discussions would have a potentially disastrous effect on voluntary cleanup. We have generally conducted all our negotiations in the open, but this is the exception, not the rule and, even then, on some issues privacy is critical.”²⁵ A paper on Superfund negotiations written for the Administrative Conference of the United States cites discussions involving the allocation of cleanup costs among private parties or involving analysis of the amount, tox-

¹⁹U.S. Court of Appeals, District of Columbia (Circuit, Civil Actions #82-2234 and #82-2238.

²⁰Bob Percival, Environmental Defense Fund (EDF), personal communication, Oct. 9, 1984.

²¹Copy of the Settlement Agreement obtained from EDF.

²²Ibid., p. 2.

²³“Comments of the Environmental Defense Fund on the Sept. 10, 1984, Draft Revisions to the National Contingency Plan,” Oct. 1, 1984, p. 8. Mailed from EDF’s Washington, DC, office to EPA.

²⁴Ibid., p. 8.

²⁵Mott letter, op. Cit.

icity, longevity, and condition of the wastes deposited by individual parties as examples of issues that might require privacy.²⁶

EPA Proposed Changes to NCP

On January 28, 1985, EPA announced its proposed changes to the NCP.²⁷ A number of important changes have been proposed concerning public participation. However, the proposal undergoes public comment for 60 days and it is not now possible for OTA to know how the proposal may be changed in response to public comments or how the new NCP will be implemented. Nevertheless, the proposed changes significantly address concerns about public participation.

A new section to Subpart C on Organization entitled Public Information is proposed. This sets up the mechanism to “address public information at a response.” The purpose is to ensure “that all appropriate public and private interests are kept informed and their concerns considered throughout a response.”

A new section to Subpart F on Hazardous Substance Response entitled Community Relations is proposed. The Preamble notes that: “The purpose of the community relations program is to provide communities with accurate information about problems posed by releases of hazardous substances, and give local officials and citizens the opportunity to comment on the technical solutions to the site problems.” A formal community relations plan is required for all removal actions and all remedial actions, including enforcement actions, but not for “short term or urgent removal actions or ur-

gent enforcement actions.” Moreover, the formal plan is to be “based on discussions with citizens in the community” and “should be reviewed by the public.” The plan “should be developed and implementation begun prior to field activities” for remedial actions, including enforcement actions. A “responsible party may develop and implement specific parts of the community relations plan with lead agency oversight.” Furthermore:

... the minimum public comment period allowed for review of feasibility studies for remedial actions at NPL releases shall be 21 calendar days. The comment period is to be held prior to final selection of the reined} and allows for effective community and responsible party input into the decision making process. The public may also have the opportunity to comment during the development of the feasibility study. This will provide the public with advanced warning as to possible remedial alternatives.

Records of decision would be required to have a responsiveness summary “addressing the major issues raised by the community.”

Lastly, with regard to the interactions between the lead agency and PRPs, there could be meetings with “a limited number of representatives of the public, where these representatives have adequate legal and technical capability and can provide appropriate assurances concerning any confidential information that may arise during the discussions, if in the judgment of the lead Agency such meetings may facilitate resolution of issues involving the appropriate remedy at the site.”

Note that the remainder of this chapter examines and discusses the current Superfund program, even though some of the above changes might address the issues and concerns that now exist.

²⁶Anderson, op. cit., p. 97.

²⁷Therevisions are published at 50 Federal Register 5861, Feb. 12, 1985

THE EPA COMMUNITY RELATIONS PROGRAM

The Community Relations Program defines public participation procedures that agency staff should follow as a matter of policy, rather

than law or regulation. The document that currently explains the program is a September 1983 report entitled “Community Relations in

Superfund: A Handbook,” It describes in detail public participation activities that EPA staff should conduct during the development and implementation of cleanup efforts at Superfund sites. (The specifics of how the program is operated are discussed later in this chapter.)

Despite the length of the handbook—over 100 pages—and its degree of detail, there are some notable limitations to the program it defines. First, the document is an “interim version” and is incomplete. For example, an entire chapter concerning public participation in enforcement actions is missing. EPA has drafted several versions of the chapter, but none have been adopted.²⁸ Secondly, the program applies only to cleanup activities at NPL sites. It does not include procedures to promote public participation during the review of proposed regulations or policy or during the hazard ranking or site selection processes. Thirdly, the program focuses on public participation activities by EPA employees, it does not establish legally enforceable minimal requirements for public involvement at Superfund sites. As explained above, EPA has agreed to promulgate new reg-

²⁸Margaret Randall, Deputy Director of the Office of Public Affairs EPA Region II and Lillian Johnson, Superfund Community Relations Coordinator EPA Region II, personal communications, Oct. 24, 1984. Hereafter referred to as the EPA Region II interview.

ulations requiring Community Relations Plans, but implementing the program is currently discretionary.

Finally, the handbook is designed to help EPA officials develop community relations programs, not to help the public participate in them. Indeed, the handbook specifically cautions that it:

... does not serve as a public participation manual. In the past, several public participation manuals have been prepared for EPA, particularly in the water program. Readers that need detailed guidance on public participation techniques . . . should consult these manuals.²⁹

The Superfund program differs considerably from other EPA programs. The task of explaining public participation procedures to the public has fallen to citizen groups involved in Superfund issues. For example, the Environmental Defense Fund has published a public participation manual entitled *Dumpsite Cleanups: A Citizen Guide to the Superfund Program*.³⁰

²⁹Community Relations Handbook, op.cit., p.1-4.

³⁰Environmental Defense Fund, *Dumpsite Cleanups: A Citizen's Guide to the Superfund Program*, Washington, D.C., 1983. Hereafter referred to as *Dumpsite Cleanups*.

THE SUPERFUND PROGRAM IN ACTION

The actual implementation of the Superfund program can be divided into two phases. The first involves identifying potential sites for Superfund cleanup and ranking those sites according to the severity of the environmental and human health risks they present. The sec-

ond phase involves selecting and conducting cleanup programs at uncontrolled sites, including emergency and remedial cleanup actions. EPA provides opportunities for public participation in each of these phases, as discussed later.

The National Priorities List

With the exception of some short-term emergency actions, cleanup of a hazardous waste site as part of the Superfund program is not undertaken unless the site is on the National Priorities List (NPL), which is revised periodically. A site cannot become part of the NPL unless it has been identified as a potential NPL candidate and the severity of its pollution problems have been evaluated.

While EPA states the purpose of the NPL merely “as an informational tool for use by EPA in identifying sites that appear to present a significant risk to public health or the environment,”³¹ appearance of a site on the NPL has other implications. For example, listing can provide State leverage to pressure EPA for cleanup funds or offer citizens groups information with which to pressure EPA, States, and responsible parties to take actions. Also, publication of the list and the press coverage that accompanies it provide a way for the public to learn about the Nation’s hazardous waste problems and track the progress of the Superfund program. On the other hand, NPL listing can have some potential adverse consequences. For example, appearance of a site on the NPL can heighten community fears beyond what is warranted by the health risks posed by the site, and it can cause negative economic consequences such as reducing local property values. Thus, for a number of reasons many citizen groups are keenly interested in the selection process and are anxious to participate in it.

About 19,000 uncontrolled sites have been identified in the United States and EPA estimates that the list might ultimately reach 22,000.³² Many sites were identified by their

present or past operators as required under Section 103 of CERCLA. Site identification is an ongoing process, however, and there are two official pathways by which the public can bring potential Superfund candidates to EPA’s attention. First, CERCLA and the NCP require the National Response Center in Washington, D. C., to record site identifications phoned in by the public and to report this information to the On Scene Coordinator for Superfund activities in the appropriate region. In addition, EPA headquarters and each EPA Region maintain Superfund “hot-line” numbers that people can use to identify hazardous waste sites.³³

Once a site has been identified, its pollution problems are evaluated. The first two steps in this process involve the collection of information during a preliminary assessment and a site inspection (see chapter 5). While there are no formal opportunities for public comment during these procedures, the EPA Community Relations Handbook suggests that EPA “establish contact by phone with State and local officials and with key citizens” during the preliminary assessments.* Furthermore, “community relations activities during a site inspection should focus on informing the community of site inspection activities and the likely schedule of future events.”³⁵

The public now has no formal way to influence which sites are selected for preliminary assessments and site inspections or when those evaluations are conducted. In the words of Margaret Randall, Deputy Director of the Office of Public Affairs at EPA Region 11, “EPA decides when the (evaluation process) kicks in.”³⁸ One community group in Greenup, Illinois, has gone as far as holding public demonstrations at a potential Superfund site to

³¹49 Federal Register 40320, Oct. 15, 1984.

³²Dennis Melamed, “Superfund: From Site Selection to Cleanup,” *Environmental and Energy Study Conference Guide* (Washington, DC: July 11, 1984), p. 1. Hereafter referred to as EESC Guide.

³³EPA Region II Interview, op. cit.,

³⁴Community Relations Handbook, op. cit., p. 3-2.

³⁵Ibid., p. 3-2.

³⁶EPA Region 10 Interview, op. cit.

pressure EPA into beginning a preliminary assessment. 37

If the site inspection uncovers potential or actual discharges of hazardous substances, the HRS is used to evaluate and "score" its pollution problems. The development of the HRS itself included some public participation. Public comment was solicited on an HRS model proposed by EPA in a Federal Register notice along with the draft NCP on March 12, 1982.³⁸ EPA received extensive comments on the HRS and modified it in several ways prior to adopting a final version on July 16, 1982.³⁹

The development of the HRS also involved an unusual effort by the Senate Appropriations Subcommittee on HUD—Independent Agencies to sponsor a workshop on the topic attended by representatives from industry, government, and one environmental organization. The 2-day workshop, convened on March 19 and 20, 1982, in the midst of the public comment period on the draft NCP and HRS, was moderated by a professional mediator, and a written record of portions of the proceedings was later published.⁴⁰ While the information and opinions discussed at the workshop were not entered into the public comment record for the draft HRS, EPA officials were present and the meetings provided an avenue for public participation in the HRS decisionmaking process.

There are no opportunities for public participation during the application of the HRS to sites after the site inspection. Moreover, there are no public participation provisions during the reviews performed subsequently by the States and the EPA. HRS scores and the worksheets produced during the evaluations are not made public either by States or the EPA unless

³⁷Robert Ginsburg, Citizens for a Better Environment, personal communication, Oct. 8, 1984.

³⁸47 Federal Register 10975, Mar. 12, 1982.

³⁹47 Federal Register 31186-31191, July 16, 1982.

⁴⁰Sam Eisman, Senior Associate of the Conservation Foundation, personal communication, Oct. 5, 1984. The written record of the workshop appears as *Workshop on Selection of Hazardous Waste Sites for Superfund Fundings. Sponsored by the Subcommittee of Department of Housing and Urban Development-Independent Agencies of the Committee on Appropriations, U.S. Senate*, Mar. 19-20, 1982 (Washington DC: U.S. Government Printing Office, 1982). Hereafter referred to as the Workshop Record.

and until the EPA publishes a list of sites proposed for inclusion on the NPL. EPA treats information on sites that are not added to the NPL as privileged and it is not available to the public.

Once proposed additions to the NPL have been published in the Federal Register, a 30-day public comment begins. At the beginning of the comment period, EPA releases ranking worksheets and other background information, but only for sites named for the NPL. Comments were received on about 50 percent of the sites named to the first proposed NPL list. About 90 percent of the comments came from potentially responsible parties and changes were made in the rankings for about 2 percent of the sites based on information provided in the public comments.⁴¹ During the most recent proposed NPL listing, completed in September 1984, EPA received 128 comments. Fifty of the 133 proposed sites were the focus of 112 comments. Only 16 comments addressed sites not included on the proposed list.⁴²

In short, the public is completely excluded from the draft NPL selection process itself, and then is provided information only about proposed NPL candidates to assist them in preparing comments. Although many people are concerned that sites with severe toxic pollution problems might be omitted from the NPL (see chapter 5), *the current decisionmaking process does not offer them an opportunity to examine why sites were rejected.*

Thus, the current process does not generate public confidence that sites not named to the NPL list have been justifiably omitted. As a result, some experts believe that "every site picked is bad, but not every bad site is picked."⁴³ Others, such as PRPs, believe that the NPL selection process overscores as many sites as it underscores.⁴⁴

Several groups have attempted to obtain information about sites not proposed to the NPL,

⁴¹ESC Guide, op. cit., p. 4.

⁴²"Background Information: National Priorities List Update #1, September 1984," obtained from EPA Region II.

⁴³Linda Greer, Environmental Defense Fund, personal communication, Oct. 8, 1984.

⁴⁴Moore letter, op. cit.

or to influence which sites are placed on the list. For example, prior to the publication of the first NPL candidate list, a law firm filed a Freedom of Information Act request seeking data about the sites submitted by the States. The request was refused. The firm had better luck at the State level. According to an attorney at the firm, "we had input into the 115 list solely because we went to States and found the candidates they were submitting and (somehow) managed to whip in data and information in the process."⁴⁵

The staff of a public interest organization in Ohio had a completely different experience. They attempted to obtain information from the State environmental agency about a site that had been evaluated, but their request was denied. The information was obtained from EPA, however, not as part of EPA policy, but unofficially from a sympathetic agency employee.⁴⁶

Bonnie Exner, representing the Colorado Citizen Action Network, was involved in a review of a ranking process at the Lowry Landfill site near Denver that resulted in a reevaluated score 20 points higher than originally calculated. Several years ago during a controversy over the permitting of an operating hazardous waste facility at Lowry, the Governor formed the Lowry Landfill Monitoring Committee, an advisory group that included local citizens and representatives of EPA, the State health department, local government, and a waste disposal company. After a 300-acre "area within the much larger landfill site was evaluated as part of the Superfund program, the local citizens decided to perform their own HRS scoring. When the citizens' score turned out to be much higher than the official evaluation, they "forced the issue," in Exner's words, and the higher score was ultimately submitted by the State to EPA as part of its NPL nomination.⁴⁷

As a final example, a citizens group in California, Concerned Neighbors in Action, used

lobbying and a threatened press conference to expose conditions at the Stringfellow Acid Pits to influence the State selection process. The Stringfellow site did not receive the highest ranking of all sites evaluated in the State during the initial site selection process. But, as one analyst has summarized, the citizens group:

... was very active in lobbying for the passage of the State's Superfund law. Prior to announcing passage of the law, the State was leaning toward selecting the McColl dumpsite in Fullerton as the highest priority site. The citizens prevailed, claiming that if McColl was selected and money was not allocated for Stringfellow, a press conference would be held...⁴⁸

The State ultimately chose Stringfellow as the highest priority site; McColl was not placed on the Interim Priority List, but was placed on the 1982 NPL. However, a new California ranking process has changed the entire situation.

Fund-Financed Removals and Remedial Responses

Removal Actions

Removal programs are categorized according to the length of time involved in the cleanup. Varying levels of community relations activities accompany the different types of removal programs. For removals estimated to last fewer than 5 days, the Community Relations Handbook instructs EPA staff to be ready to respond to requests for information from the media, to provide information to government officials to help them to answer questions from their constituents, and to explain the removal program directly to the public.⁴⁹

If a removal is expected to last between 5 and 45 days, regional EPA staff must prepare a Community Relations Profile that must be approved by EPA headquarters prior to the undertaking of the removal program. The profile should explain the public participation pro-

⁴⁵ Workshop record, *op. cit.*, p. 81.

⁴⁶ Steven Lester, Citizen's Clearinghouse for Hazardous Wastes, Inc., personal communication, Oct. 11, 1984.

⁴⁷ Bonnie Exner, Colorado Citizen Action Network, personal communication, Oct. 18, 1984.

⁴⁸ George J. Trezek, "Engineering Case Study of the Stringfellow Superfund Site," contractor report prepared for the Office of Technology Assessment, August 1984, p. 50.

⁴⁹ Community Relations Handbook, *op. cit.*, p. 2-1.

visions EPA expects to conduct during the removal. Recommended activities include designating a single EPA contact person, publicizing the phone number of the contact, providing information to government officials, holding a press conference if there is sufficient interest, establishing a repository for documents explaining the removal, and meeting periodically with small groups of local officials and interested citizens. so

For removals lasting between 45 days and 6 months, regional EPA staff must prepare a Community Relations Plan as part of the Action Memorandum or Draft Cooperative Agreement that must be approved by EPA headquarters. Recommended public participation activities during these lengthier removal actions include briefings and periodic progress reports for officials and interested citizens, public meetings and workshops, site tours, and news releases describing developments at the site. After completing the removal, regional EPA staff must submit a "responsiveness summary" to EPA headquarters describing what community relations activities were actually conducted.⁵¹

All community relations efforts at removals have a common focus on providing information. No activities permit the public to participate in decisionmaking about what type of removal program should be implemented or how it should be implemented. Indeed, none of the 18 suggested "community relations techniques" described in the Community Relations Handbook for use during Superfund site activity involve public participation at the points when cleanup decisions are actually made.⁵² All the techniques involve information dissemination, tours, or citizen group meetings where no cleanup decisions are made,

Moreover, the Community Relations Handbook instructs EPA staff to fit their activities to respond to the degree of public interest or concern. The higher the level of interest, the more extensive the community relations pro-

gram. There is a certain logic to this guideline, but it places citizens groups in an awkward position, as described by Lois Gibbs, Director of the Citizens Clearinghouse for Hazardous Wastes:

The message this policy sends out is "organize and raise hell and you'll have input—sit back, behave yourselves and you'll be ignored." The very nature of this policy is to force people into an adversarial role. Once a relationship begins poorly, it is difficult, if not impossible, to build trust.⁵³

Because rural or low-income areas often have fewer resources and organizations compared to more densely populated or middle-class areas, this could produce a bias against providing extensive community relations programs for some areas.

Remedial Actions

All remedial actions must include at least one formal opportunity for public participation. Remedial responses must be undertaken whenever cleanup of a Superfund site cannot be accomplished within the 6-month time limit set in CERCLA. The key steps in remedial actions include an in-depth investigation of the site (the remedial investigation), the development of several cleanup plans and the selection of a preferred alternative (called the feasibility study), the final approval of a cleanup program, and the execution of the cleanup.

The Community Relations Handbook explains public participation activities that may or must occur during remedial actions.⁵⁴ Those activities must be explained in an approved Community Relations Plan prepared by regional EPA staff after meetings with local officials and citizens to assess community concerns and the technical complexity of the site's pollution problems. During the remedial investigation and the drafting of the feasibility study, the objectives of community relations activities are to distribute information and to elicit citizen

⁵⁰Ibid., pp. 2-3.

⁵¹Ibid., pp. 2-7.

⁵²Ibid., pp. 4-1 through 4-33.

⁵³Lois Gibbs, "Why Government and Industry Have Failed at Public Participation at Superfund Sites," undated reprint, p. 192.

⁵⁴Community Relations Handbook, op. cit., pp. 3-1 through 3-13.

views. The recommended techniques again focus on small or informal meetings, news releases, tours, briefings, and progress reports.

It is only *after* the publication of the feasibility study and the delineation of a preferred cleanup strategy that the public is given a formal opportunity to comment to decisionmakers on the development of a remedial action. EPA requires that a public comment period of at least 3 weeks must follow the release of a feasibility study; EPA may extend the comment period upon request, and it frequently does so.

After selecting a final remedial design and while the remedial action is occurring, EPA continues the same sorts of information dissemination activities that characterize the earlier phases of the program. In addition, EPA community relations staff is instructed during the cleanup implementation phase to “make sure local residents understand that cleanup of the site may not resolve all problems . . . Meetings with small groups of citizens and officials . . . may again be the most effective communications technique during this stage of the response action.”⁵⁵ When a remedial action is completed, regional EPA staff must submit a report to headquarters describing and evaluating the overall community relations effort.

Two general criticisms of the public participation program for Fund-financed cleanups are frequently stated by citizens groups active at Superfund sites. The first is that the public is not given the opportunity to influence decisionmaking early in the process while cleanup strategies are being selected. The second criticism is that the program does not address the lack of technical expertise on the part of citizens groups that hampers constructive public participation. The second issue seems to be the most difficult one to resolve, as it involves funding needs.

On the issue of opportunities to participate in decision making, for example, the EDF Dumpsites *Cleanup* citizen guide concludes that: “Unfortunately, EPA has not supported

the notion of active citizen involvement in the dumpsite cleanup program.”⁵⁶ Steven Lester of the Citizen’s Clearing House for Hazardous Wastes, Inc., is another critic. He terms the community relations program “public relations, not community relations.” He complains that the EPA generally does only what it is required to do by law and as a result the community relations program is “almost nonexistent for us as far as public involve merit.” Finally, he adds that he knows of “one hundred groups dealing with the process. They are all frustrated,”⁵⁷

Bonnie Exner summarizes her 5-year experience at the Lowry Landfill site as follows: “All your questions (about public participation) have one answer. Citizens don’t have much of a chance.”⁵⁸

For more than 4 years, Exner has been researching innovative technologies that might be used successfully to treat the hazardous wastes at the Lowry site, including gas collection, venting and burning, and carbon filtration. She has personally met with representatives from 17 companies and has tried repeatedly, without success, to interest the EPA, which is preparing the feasibility study, in several cleanup options. So far, she says, the EPA regional Superfund manager supervising the Lowry site has “fought the idea of bringing in outside technologies. He calls them magic black boxes.” EPA counters by asserting that the new technologies will not work or that they would take too long to be licensed for use at Lowry.⁵⁹

The adequacy of EPA community relations plans in achieving their primary purpose of providing information has also drawn criticism from community groups. Exner, for example, terms EPA’s information dissemination program helpful, but complains that “90 percent of the time EPA will not volunteer information EPA doesn’t want citizens to understand. They

⁵⁵Ibid., pp. 3-11.

⁵⁶Dumpsite Cleanups, op. cit., p. 53.

⁵⁷Steven Lester, Citizens Clearinghouse for Hazardous Wastes, Inc., personal communication, Nov. 7, 1984.

⁵⁸Exner, op. cit.

⁵⁹Ibid.

stymie them with technical terms. "Citizens then shy away from becoming involved because they "are afraid to look stupid." Lois Gibbs points out that "public meetings have often proved to be unproductive, uninformative, and, at times, completely out of control . . . Too often, information is presented to communities in either technical jargon or so simplified as to be insulting."⁶⁰

The history of public participation at the Seymour, Indiana, Superfund site provides some evidence to support such criticisms. Only one public meeting was held prior to initiation of cleanup activities, during which public input was not sought. The EPA promised to provide the public with periodic progress reports, but none were published. The local Chamber of Commerce was frequently briefed, but those meetings were closed to the public. Overall, the Mayor of Seymour concluded that the EPA's public participation program was of little value.⁶¹ Are these examples solely representative of a few "alarmed citizens"? There seems to be rather widespread agreement with these early experiences of the Superfund program by PRPs and government.

Turning to the second criticism, many citizens groups do not employ and cannot afford to hire people knowledgeable about the technical and scientific issues related to Superfund cleanup proposals. Steven Lester, who has worked with dozens of community groups at Superfund sites, believes "the biggest problem in the Superfund process is that local people don't have the expertise to make comments that will help EPA."⁶² Lois Gibbs writes that: "One of the most significant gaps in the past and present public participation is the lack of funds to provide a way for citizens to hire their own experts to review a proposed plan . . . Without these professionals, a real public participation program will never exist."⁶³

EPA, with rare exception, does not provide money to community groups to hire technical experts. One citizen group that has received EPA funds is the Concerned Neighbors in Action located near the Stringfellow site in southern California.⁶⁴ Indeed, it is not clear whether CERCLA or current EPA policy authorizes the funding of citizens groups. Officials at EPA Region II believe that such actions are not permitted by EPA policy. "There is no mechanism for that," says the region's Deputy Director of the Office of Public Affairs.⁶⁵

The Superfund Community Relations Coordinator at Region II, Lillian Johnson, argues, however, that EPA community relations activities bring technical experts and concerned citizens together throughout the development of cleanup programs. Moreover, in addition to public meetings and briefings, Region II frequently convenes 2-day "availability meetings" at Superfund sites where technical experts, such as Superfund project managers, contractors on feasibility studies, and attorneys are available to talk with the public on an informal and pro bono basis.⁶⁶

In fact, despite the shortcomings in Superfund's public participation program cited by citizens groups, many local groups have successfully involved themselves in cleanup decisionmaking processes, particularly while reviewing feasibility studies. For example, one group in New Jersey hired an economist who demonstrated that a cleanup option that included removal of drums of toxic pollutants was more cost effective than the "preferred" alternative of monitoring for groundwater contamination; EPA subsequently selected this as the removal option.⁶⁷

At a harbor Superfund site in New Bedford, Massachusetts, a citizens group called LIFE developed a remedial program that was not considered among the five alternatives in the feasibility study. Four of the five alternatives involve dredging PCB-contaminated sediments

⁶⁰ m. Gibbs, *op. cit.*, p. 193.

⁶¹ ERM-Midwest, Inc., "Case Study: Seymour Recycling Corp., Seymour, Indiana," contractor report prepared for the Office of Technology Assessment, Mar. 5, 1984, pp. 4-12 to 4-13.

⁶² Lester, Oct. 11, 1984, *op. cit.*

⁶³ Gibbs, *op. cit.*

⁶⁴ Lester, Oct. 11, 1984, *op. cit.*

⁶⁵ EPA Region II interview, *op. cit.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

and disposing the sediments in various locations. LIFE's plan, coined the "pineapple upside down cake" alternative, involves covering layers of contaminated sediments with clean sediments now lying beneath the harbor; no dredging is involved. EPA is now studying this plan.⁶⁸

At a site in Bruin Lagoon, Pennsylvania, technical comments submitted by EDF and the Citizens Clearinghouse for Hazardous Waste provided leverage for a community group called PURE-West to argue for changes in the preferred alternative. EPA made two additions to the alternative based on those comments. The first provided passive groundwater control to divert groundwater away from the lagoon by building a barrier upgradient from it. This would lower the water table and lessen the migration of toxic substances through the groundwater. The second change added monitoring procedures to test the structural integrity of a dike built to hold back contaminated sludges.⁶⁹

Lowell Fair Share, a community group in Massachusetts, has also used technical comments as a leveraging tool. At the Silresim site, the group successfully pressured the State to investigate the possible seepage of contaminated groundwater into the basements of nearby homes. The group feared that this seepage occurred and that the liquids, once in the basements, evaporated to produce air pollution in the homes. In-house air pollution in the home has been confirmed as a result of the investigations.⁷⁰

Although few citizen groups have the money to hire experts, many groups have been able to obtain some low-cost or pro bono professional assistance. For example, the Colorado Citizens Against Lowry Landfill and the Ecumenical Task Force in Niagara Falls, New York, have been represented by lawyers in legal actions related to Superfund cleanups.⁷¹ Also, national environmental organizations with in-

house technical expertise such as Citizens for a Better Environment have commented on feasibility studies on behalf of local citizen groups.⁷²

In some cases, money to hire experts has been obtained from sources outside the community, despite EPA's policy not to fund citizen group activities. For example, The New York State Love Canal Task Force once hired a technical adviser for the Love Canal Home-Owner's Association.⁷³ In Baltimore, the State of Maryland once hired an expert selected by a local community group to comment on cleanup programs at the Monument St. Landfill.⁷⁴ Similarly, the Virginia Environmental Endowment has made grants to several community groups to bolster their expertise on technical issues at Superfund sites.⁷⁵

Enforcement and Other Legal Action

In addition to Fund-financed cleanups, the Superfund program also encompasses cleanups paid for and executed by the parties responsible for generating or managing hazardous materials found at uncontrolled sites. These cleanups are the result of enforcement actions that involve negotiations or legal actions between EPA and potentially responsible parties. The specifics of the cleanup programs that result are contained in voluntary agreements, administrative orders, consent decrees, or court orders.

In fiscal year 1981, 13 settlements were reached between EPA and responsible parties. The number jumped to 28 in the next year, to 36 in fiscal year 1983, and to 46 during the first 8 months of fiscal year 1984.⁷⁶ Ultimately, more Superfund cleanups may result from settlements and enforcement actions than from Fund-financed programs. In fact, to date EPA has negotiated more cleanup plans with private parties than it has undertaken on its own or forced on private parties through court or-

⁶⁸Lester, Nov 7, 1984, op.cit.

⁶⁹Ibid.

⁷⁰Ibid.

⁷¹Forner, op.cit. Also Bill Butler, Eco-funding, 101' E' +) al (om-
munication, Oct 24, 1984.

⁷²Shurg, op.cit.

⁷³Lester, op. cit.

⁷⁴Lester, Oct 11, 1984, op. cit.

⁷⁵Butler, op. cit.

⁷⁶EESC Guide, op.cit.

ders.⁷⁷ Still other cleanups are performed without public or government awareness or scrutiny. Thus, public participation in cleanups not financed by Superfund is also an issue of major concern to citizen groups.

Neither CERCLA, the NCP, nor the Community Relations Handbook currently provide for public participation during negotiations or enforcement actions. Several citizens groups—including the Ecumenical Task Force that worked at several Superfund sites near Niagara Falls⁷⁸—have attempted without success to convince a court to grant them status to intervene in legal actions involving Superfund sites. Other groups, including one working at a Superfund site in St. Louis, Michigan,⁷⁹ and another working in Kingston, New Hampshire,⁸⁰ have tried to gain a seat at the negotiating table, also without success.

The current EPA policy is to exclude the public from all negotiation sessions, but to provide periodic information about the progress of negotiations.⁸¹ In addition to the periodic updates, at least one EPA office, Region II, arranges meetings between the public and parties in the negotiations and publishes notices of when negotiating sessions will take place and what issues are on the agenda.⁸² EPA policy could change as a result of regulations adopted in accordance with the consent decree, described earlier in this chapter, between EDF and EPA or when the agency publishes an enforcement chapter to be added to the Community Relations Handbook.

Successful negotiations result in “requisite remedial technology agreements,” while legal actions incorporate cleanup strategies in administrative or court orders. As Department of Justice regulations provide that court orders may be published in the Federal Register for public comment. Comments are submitted to the Department of Justice.⁸⁴ As a matter of pol-

icy EPA also publishes administrative orders and voluntary agreements and provides a 30-day comment period.⁸⁵

In whatever form they appear, cleanup strategies resulting from negotiations or legal actions are the equivalent of the preferred strategy contained in the feasibility studies for Fund-financed projects. A key difference for negotiation or enforcement actions, however, is that alternative cleanup strategies are not examined and presented for public comment.

What happens when citizens are faced with a cleanup strategy not to their liking or when they are upset at not being part of decisionmaking? Citizens are prevented from using several of the most common legal strategies employed in environmental law because CERCLA does not have a “citizen suit” provision granting legal standing in enforcement actions and the right to petition EPA for redress of grievances. Despite the limitations on opportunities for legal actions by the public under CERCLA, other laws implicitly provide some legal options for the public to challenge Superfund decisions,

For example, citizen suit provisions in RCRA or the Clean Water Act can, in some instances, be invoked at Superfund sites, but there are restrictions on their use. The citizen suit provision in the original version of RCRA was limited to operating hazardous waste sites. EPA has in the past used “the imminent hazard provision” of RCRA to support legal action at an abandoned site, but only EPA can use this provision.⁸⁶ Congress reauthorized RCRA in 1984 and the new version broadens the scope of citizen suits. Even so, citizen suits still cannot be initiated at Superfund sites if the EPA is actively engaged in a cleanup action or is preparing a feasibility study, if a court ordered cleanup program exists, or if the EPA is diligently prosecuting potentially responsible parties.⁸⁷

⁷⁷Anderson, *op. cit.*, p. 2.

⁷⁸Butler, *op. cit.*

⁷⁹Anderson, *op. cit.*, p. 97.

⁸⁰Lester, Nov. 7, 1984, *op. cit.*

⁸¹Anderson, *op. cit.*, p. 2.

⁸²EPA Region III interview, *op. cit.*

⁸³*Ibid.*

⁸⁴Dumpsite Cleanups, *op. cit.*, p. 100.

⁸⁵Anderson, *op. cit.*, p. 98; and Dumpsite Cleanups, *op. cit.*, p. 101.

⁸⁶Bidinger, *op. cit.*, p. 400.

⁸⁷Linda Greer, letter to Karen Larsen, Office of Technology Assessment, Nov. 30, 1984.

Similarly, legal actions under the Clean Water Act are restricted to instances of surface water pollution. Also, while the citizen suit provisions of other environmental laws apply to "any person," the Clean Water Act applies to "any citizen." The law defines citizen as "a person or persons having an interest which is or may be adversely affected." This means that plaintiffs under the Clean Water Act must show how they are personally affected by events at Superfund sites.⁸⁸

The National Environmental Policy Act (NEPA) also potentially offers the public a legal means to challenge Superfund programs. For example, Section 102(c) of NEPA requires, among other things, that environmental impact statements be prepared for "all major actions significantly affecting the quality of the human environment." This requirement exists unless Congress has specifically exempted a Federal action from NEPA or if the government follows procedures or prepares a document that serve as a "functional equivalent" of an impact statement. CERCLA does not contain a NEPA exemption, but the EPA asserts that feasibility studies and the like are, in fact, functional equivalents of NEPA statements.⁸⁹ This assertion, however, is subject to other legal interpretations. To date, no organization has successfully challenged a Superfund cleanup program on the basis of insufficient compliance with NEPA.⁹⁰

Another possible strategy, available to some potentially responsible parties and affected citizens, is to challenge some Superfund decisions on constitutional grounds. Such chal-

lenges would allege a denial of the plaintiffs constitutional "due process" right to be heard before adverse actions are taken affecting them. Due process is addressed in many laws, including the Administrative Procedures Act which allows the public to challenge Federal agency actions that allegedly: exceed the scope of the agency's powers; are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or were completed without adhering to necessary procedural requirements.⁹¹ A potentially responsible party could, for example, invoke the Administrative Procedures Act to challenge a Fund-financed cleanup plan, the cost of which it might ultimately be forced to pay. Alternatively, a dissatisfied citizens group could claim that a cleanup program was so bad as to be inconsistent with the NCP. Case law for denial of due process in the Superfund program appears absent.

Finally, citizens can attempt to sue in State court if State hazardous waste laws contain citizen suit provisions. Few States have enacted Superfund laws on their own, however. Citizens can also sue under common law. Tort actions based on State strict liability, nuisance, negligence, or trespass claims could apply to pollution issues at Superfund sites.⁹² Federal common law actions are preempted by environmental legislation, however. Plaintiffs in State tort actions face difficult burden of proof obligations. Also, most tort actions have a short statute of limitations period during which suits must be filed.⁹³

⁸⁸Plaintiffs' Memorandum in Support of Mot 101 for Preliminary Injunction, *Long Pine Steering Committee et al. v. EPA*, U.S. District Court, N.J., Civil Action 484-A-513-D, p.36.

⁸⁹*Ibid.*, p. 103.

⁹⁰Bidinger, *op cit*, pp. 413-417.

⁸⁸*Ibid.*, p. 398.

⁸⁹Anderson, 01 (*cit.* p.22

⁹⁰*Ibid.* *id.*, p.40.

PUBLIC PARTICIPATION UNDER CERCLA VERSUS RCRA

Comparing Superfund's public participation provisions with those provided by CERCLA's legislative cousin, RCRA, can give insight into the extent and adequacy of the public participation opportunities.

RCRA specifically requires or permits public involvement in Federal or State hazardous waste management programs that are denied to the public or not mentioned in CERCLA. As mentioned, for example, RCRA contains a cit-

izen suit provision (Section 7002) not contained in CERCLA. RCRA also permits “any person” to petition the EPA to request the promulgation of new hazardous waste regulations (Section 7004(a)). No petition powers are enumerated in CERCLA.

Perhaps most importantly, RCRA contains in Section 7004(b)” specific instruction for public participation. The law reads:

Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish guidelines for public participation in such processes,

Other RCRA provisions require a public comment period and public hearings to review operating permits issued under the Act (Section 7004(2)). State programs must include public participation provisions if the States are to receive EPA authorization to implement their hazard waste management programs.

Rulemaking under RCRA, as under CERCLA, requires public notice and comment periods. There is a difference, however, because RCRA

requires more extensive rulemakings of greater complexity than does CERCLA. Like CERCLA, RCRA permits the public to seek judicial review of regulations and, in addition, it offers judicial review of petitions.

In short, the hazardous waste management program defined in RCRA requires and permits far more public participation than does CERCLA. Specific public participation objectives and requirements lacking in CERCLA are given in RCRA. The public has more opportunity to become involved in the shaping of the RCRA program because of its detailed rulemaking requirements. Public participation at hearings must be allowed during the permitting process—which is the backbone of the implementation phase of RCRA. And the public, with some limitations, is guaranteed access to the courts for judicial review of the RCRA program or its implementation. The applicability of RCRA public participation requirements to Superfund remedial actions (that might otherwise require a RCRA permit) is not clear. EPA has said at various times that Superfund actions will adhere to substantive RCRA requirements. If EPA considers public participation and review to be procedural rather than substantive, public involvement rights under RCRA may be curtailed at Superfund sites.