

# SUPERFUND SETTLEMENTS PROJECT

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## **VIA ELECTRONIC MAIL**

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**Re: National Priorities List; Proposed Rule No. 48**  
**Docket ID Nos. EPA-HQ-SFUND-2008-0081 to -0086**

To Whom It May Concern:

On behalf of the Superfund Settlements Project (“SSP”)<sup>1</sup> I am pleased to submit these comments on the Proposed Rule Number 48 to add six new sites to the National Priorities List (“NPL”). Our comments focus not on these six proposed sites, but rather on the addition of the “Need for NPL Listing” section to the narrative summaries available as part of the docket for each site.

### Overview

We view the new “Need for NPL Listing” as a positive step towards greater transparency for the rationale behind listing particular sites. This new section provides useful information about why EPA decided to propose a site for listing on the NPL. Thus, the section is definitely a worthwhile effort to help achieve a “genuine interchange” between the agency and interested stakeholders.

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<sup>1</sup> The SSP is a non-partisan group of major companies dedicated to improving the Superfund program. Organized in 1986, the SSP seeks to expedite Superfund cleanups, increase fairness in the enforcement process, encourage settlements, and reduce transaction costs associated with Superfund litigation. The SSP’s member companies represent various sectors of American industry.

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Having said that, we also believe that even with this new information, EPA's proposed NPL listings still fall well short of (1) meeting the legal requirements of the Administrative Procedure Act for notice-and-comment rulemaking and (2) allowing the public to assess EPA's continued commitment to the fundamental policy decision that NPL listing is "the tool of last resort."<sup>2</sup>

Section 553 of the Administrative Procedure Act ("APA") requires EPA to present its rationale for proposing each site for the NPL, in order to allow stakeholders to engage in a meaningful dialogue about whether the site should or should not be listed. Moreover, when EPA publishes a final rule listing a site on the NPL, the APA also requires EPA to include a statement of the purpose behind its listing.

The information provided in the new "Need for NPL Listing" section does not satisfy these requirements. It does not include any discussion of EPA's reasons for listing a site, beyond a simple assertion that the site scored above 28.5 on the Hazard Ranking System ("HRS"). Nor does it explain what alternatives to listing were considered, or why they were found to be inadequate or inappropriate for the particular site at issue. Nor, finally, does it explain EPA's purpose in listing a site on the NPL. We address each of these points below in greater detail.

## **Notice-and-Comment Rulemaking is a Dialogue**

The APA requires that EPA give stakeholders a reasonable opportunity to participate in the rulemaking process through notice and comment.<sup>3</sup> To create this opportunity, the notice must "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."<sup>4</sup> It is not enough for the agency simply to state its conclusions. The notice must "provide an accurate picture of the reasoning that has led the agency to the proposed rule."<sup>5</sup>

The notice and comment process "mandates a dialogue" between the agency and stakeholders.<sup>6</sup> The process is designed to be "a genuine interchange" with commenting

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<sup>2</sup> See Superfund: Times to Complete the Assessment and Cleanup of Hazardous Waste Sites, U.S. General Accounting Office, at 41 (March 1997) (EPA's Detailed Comments on the Draft Report).

<sup>3</sup> 5 U.S.C. 553(c).

<sup>4</sup> *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988).

<sup>5</sup> *Conn. Light and Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982).

<sup>6</sup> J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375, 381 (1974).

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parties, rather than “mere bureaucratic sport.”<sup>7</sup> As the D.C. Circuit observed: “Only when the public is adequately informed can there be any exchange of views and any real dialogue as to the final decision. And without such dialogue any notion of real public participation is necessarily an illusion.”<sup>8</sup>

## **Requirements for NPL Listing**

Historically, EPA has been reluctant to engage in a genuine dialogue regarding its rationale for listing sites. The fact is that EPA does not list a site based on HRS score alone. Rather, EPA considers many other factors, such as whether alternative programs are available. As EPA explained in its most recent Superfund Annual Report:

Some of the factors influencing the prioritization of sites for [NPL] listing include the degree of risk to human health and to sensitive environments; the need for a response; the level of support for listing from states, tribes, and communities; and program management considerations affecting the types and numbers of sites selected for proposal. EPA also seeks alternative cleanup programs before sites are listed on the NPL.

FY 2007 Superfund Annual Report at 5.

Those “alternative cleanup programs” may include “a state voluntary or enforcement program, the Resource Conservation and Recovery Act (RCRA) corrective action program, the Superfund removal program, or the Superfund remedial program.” *Id.* at iv.

Because NPL listing decisions are based on all of these considerations, and not simply on HRS scores, the APA requires that EPA present its reasoning at the proposal stage, solicit public comment on those reasons, and only then reach a final decision on whether or not to list the site. When EPA fails to articulate which alternative approaches were considered and rejected for a site, and its rationale for rejecting them, then stakeholders cannot comment meaningfully on why a particular alternative might actually be preferable to listing the site on the NPL. The result is a failure of the dialogue mandated by the APA, and a rulemaking that does not comply with the law.

Including a more thorough and candid discussion of EPA's rationale will benefit EPA as well as the stakeholders. Notice and comment allows the agency to receive new information, consider alternative views, and ensure that it is achieving its goals by taking

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<sup>7</sup> *Conn. Light and Power*, 673 F.2d at 530.

<sup>8</sup> *U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 540 (D.C. Cir. 1978).

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a particular action. As EPA has affirmed on several occasions, NPL listing is the “tool of last resort” for handling toxic waste sites. EPA’s stated goal is to no longer list sites on the NPL – even with an HRS score of 28.5 – if those sites can be addressed in other ways, such as through removal actions, the RCRA corrective action program, state cleanup programs, or voluntary cleanups by PRPs, to name just a few. By engaging in a dialogue with stakeholders over the most appropriate program for cleaning a particular site, EPA will benefit by thoroughly considering alternatives before listing a site. This way, EPA will conserve scarce federal funds for sites that otherwise would not be addressed because there are no PRPs willing to perform the cleanup under another program.

## **“Need for NPL Listing” Section**

The addition of the “Need for NPL Listing” section as part of the narrative summaries is a definite step forward. This section provides an important overview of why EPA decided to propose a site for listing on the NPL. It is readily available online and generally accessible to the public. The section is a worthwhile effort to encourage a “genuine interchange” between the agency and stakeholders.

However, the new section falls short in two regards. First, most of the descriptions are broad and conclusory, providing little opportunity for meaningful dialogue. Second, the descriptions are not included in the Federal Register, and so do not give interested parties adequate notice of the agency’s rationale for listing a site. We address these points in turn.

First, the descriptions in these new sections are unfortunately very brief and often not very illuminating. Some of them contain conclusory statements that “Superfund is the only viable option to address this particular source of contamination” or that “no other viable options were available.”<sup>9</sup> Such statements simply do not allow for meaningful comment, because they do not articulate which other options were considered or why those other options were rejected.

Other summaries state that the governor or local government supported listing, but fail to explain why they supported the listing, which again does not provide a basis for a

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<sup>9</sup> EPA, Nelson Tunnel/ Commodore Waste Rock, EPA-HQ-SFUND-2008-0085-0003 (Mar. 2008), *available at* <http://www.epa.gov/superfund/sites/npl/nar1778.htm>; EPA, Attebury Grain Storage Facility, EPA-HQ-SFUND-2008-0083-0003 (Mar. 2008), *available at* <http://www.epa.gov/superfund/sites/npl/nar1776.htm>; EPA, Old Esco Manufacturing EPA-HQ-SFUND-2008-0084-0003 (Mar. 2008), *available at* <http://www.epa.gov/superfund/sites/npl/nar1777.htm>.

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response from an interested party.<sup>10</sup> Instead, these sections should explain what alternatives were considered and why they were determined to be inadequate in enough detail that interested parties can submit responses that would assist EPA.

Two of the narrative summaries contain better analyses that, while still brief, come closer to promoting the necessary dialogue. In one summary, EPA stated that listing is the only viable alternative because the PRP “is no longer a viable company and the state does not have the resources to cleanup the source of the TCE contamination at the [site] and in the ground water.”<sup>11</sup> In another, EPA explains why the site was not eligible for the state's dry-cleaner remediation program.<sup>12</sup> We strongly encourage this type of fuller description. We also urge an even fuller analysis in subsequent NPL updates, in order to provide the public and all stakeholders with an “accurate picture of the reasoning” behind EPA’s decision to list a site.<sup>13</sup>

Second, EPA also falls short by not including any analysis of its listing decisions in the Federal Register itself. In proposing to list these six sites, EPA simply states: “All of the sites in this proposed rulemaking are being proposed based on HRS scores of 28.50 or above.”<sup>14</sup> Additional information, such as the “Need for NPL Listing” sections, can be found only in the electronic docket. This does not give stakeholders an opportunity for meaningful comment on the rationale behind a site’s selection for NPL listing. SSP urges the EPA, in line with its requirements under the APA, to insert a full description of its reasoning for listing a site directly into the Federal Register notices.

Alternatively, if this approach is deemed impracticable, EPA should at a minimum direct readers to the new information it is making available in the docket. A casual reader of the Federal Register notices might not be aware of where to find this new information. It would be most unfortunate if stakeholders overlooked the new section. SSP recommends that EPA consider adding a clarifying sentence to the Federal Register boilerplate for future listing proposals and final listings, such as: “A brief explanation of each listing can be found in the narrative summaries in the EPA docket, under the heading ‘Need for NPL Listing.’”

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<sup>10</sup> EPA, Iron King Mine – Humboldt Smelter, EPA-HQ-SFUND-2008-0086-0002 (Mar. 2008), available at <http://www.epa.gov/superfund/sites/npl/nar1779.htm>.

<sup>11</sup> EPA, Aberdeen Contaminated Groundwater, EPA-HQ-SFUND-2008-0082-0003 (Mar. 2008), available at <http://www.epa.gov/superfund/sites/npl/nar1774.htm>.

<sup>12</sup> EPA, Flash Cleaners, EPA-HQ-SFUND-2008-0081-0003 (Mar. 2008), available at <http://www.epa.gov/superfund/sites/npl/nar1775.htm>.

<sup>13</sup> *Conn. Light and Power*, 673 F.2d at 530.

<sup>14</sup> 73 Fed. Reg. 14742, 14746 (Mar. 19, 2008).

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## Statement of Basis and Purpose

Once EPA makes a final NPL listing decision, the APA also requires that EPA include a “concise general statement of [its] basis and purpose” in the final rule.<sup>15</sup> To meet this requirement, the statement must be “sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted.”<sup>16</sup> For example, the statement should include a discussion of the alternatives that the agency considered.<sup>17</sup> In addition, the statement “must not be in conclusory terms, but must be in sufficient detail to permit [judicial] review.”<sup>18</sup> As one respected judge noted, “the agency must show that it truly has given serious consideration to possible alternative rulings.”<sup>19</sup>

EPA uniformly fails to meet this legal requirement in its typical boilerplate listing of NPL sites. EPA generally announces its decision to list a site without ever saying why it is doing so. Nowhere in the Federal Register notice, or the HRS Scoresheet, or the supporting docket materials does EPA ever explain the purpose of listing a particular site on the NPL. Thus, in the most recent final rule adding 12 new sites to the NPL, EPA said nothing in its Federal Register notice about the purpose behind listing each site.<sup>20</sup> This approach plainly fails to satisfy the APA’s requirement of a general statement of the basis and purpose of each final rule.

As noted earlier, the recent addition of the “Need for NPL Listing” section to the narrative summaries for each site is definitely an improvement. The statements provided for some sites begin to explain the purpose behind those listing decisions. But many of these sections lack sufficient detail to permit meaningful judicial review, and thus fail the standard for a statement of basis and purpose.

For 9 of the 12 sites newly added to the NPL, the most recent final rule stated simply that there were no other viable options available. This conclusory statement gave no indication of which alternatives were considered, or why they were deemed unavailable.<sup>21</sup> Although 3 of these 12 listings gave at least some explanation as to why

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<sup>15</sup> 5 U.S.C. 553(c).

<sup>16</sup> *Nat’l Welfare Rights Org. v. Mathews*, 533 F.2d 637 (D.C. Cir. 1976) (emphasis added).

<sup>17</sup> *Natural Res. Def. Council, Inc. v. Sec. and Exch. Comm’n*, 389 F.Supp. 689, 701 (D. D.C. 1974).

<sup>18</sup> *Id.*

<sup>19</sup> Wright, *supra* note 6, at 381.

<sup>20</sup> 73 Fed. Reg. 14719 (Mar. 19, 2008).

<sup>21</sup> EPA, Plating, Inc., EPA-HQ-SFUND-2007-0686-0003 (Mar. 2008); EPA, Washington Cty. Lead District – Old Mines, EPA-HQ-SFUND-2007-0687-0008 (Mar. 2008); EPA, (continued).

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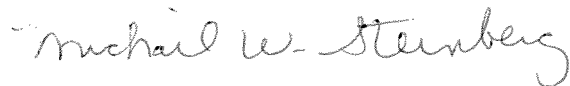
other options were not selected, even these explanations are minimal and do not provide "sufficient detail" to permit meaningful judicial review.<sup>22</sup>

## Conclusion

The SSP views the new section on "Need for NPL Listing" as an important upgrade to EPA's listing protocol. We applaud EPA for taking this step. However, the actual content of those statements often fall short of the standard required for either a proposed or a final rule. We encourage EPA to live up to the requirements of the APA, and to honor the policy of transparency, by articulating the rationale behind each proposed listing, including the reason(s) why particular alternatives were not selected.

Thank you for your consideration of our comments. We remain ready and willing to work with your staff in any way that would be helpful.

Sincerely yours,



Michael W. Steinberg

Counsel to the Superfund Settlements Project

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Washington Cty. Lead District – Potosi, EPA-HQ-SFUND-2007-0688-0007 (Mar. 2008); EPA, Washington Cty. Lead District – Richwoods, EPA-HQ-SFUND-2007-0689-0007 (Mar. 2008); EPA, Sherwin-Williams/ Hilliards Creek, EPA-HQ-SFUND-2006-0242-0004 (Mar. 2008); EPA, San German Groundwater Contamination, EPA-HQ-SFUND-2007-0692-0003 (Mar. 2008); EPA, Donna Reservoir and Canal System, EPA-HQ-SFUND-2007-0693-0003 (Mar. 2008); EPA, Midessa Ground Water Plume, EPA-HQ-SFUND-2007-0694-0003 (Mar. 2008); EPA, San Jacinto River Waste Pits, EPA-HQ-SFUND-2007-0695-0003 (Mar. 2008).

<sup>22</sup> EPA, Lusher Street Groundwater Contamination, EPA-HQ-SFUND-2007-0685-0003 (Mar. 2008); EPA, Chem-Fab, EPA-HQ-SFUND-2007-0691-0005 (Mar. 2008); EPA, Hidden Lane Landfill, EPA-HQ-SFUND-2007-0696-0003 (Mar. 2008).