

# ENVIRONMENTAL & ENERGY LITIGATION

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## Superfund Sites and Property Value Diminution

Orell C. Anderson and Alexander R. Wohl – May 25, 2017

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With the new administration's proposed cuts to the Environmental Protection Agency (EPA) budget, the issue of Superfund funding is back in the news. The recent proposed cuts would continue a long-term trend of decreasing federal funds to the EPA's Superfund, a program that channels money for cleaning up hazardous-substance contamination at sites. Annual appropriations to the Superfund program declined to \$1.1 billion from \$2 billion between 1999 and 2013.

According to a 2015 report from the Government Accountability Office, the EPA responded to the reduced allocations during the 2000s by prioritizing ongoing projects and therefore delaying the start of approximately one-third of the new remedial-action projects at National Priorities List (NPL) sites. Accordingly, though the present cuts may not necessarily affect the remediation of specific sites or even the total number of projects, they may affect timing.

As described below, timing can play an important role in property value diminution and damages analysis. But exactly how these cuts will affect property values or damage estimates is yet to be seen.

### Superfund Cases

Damages in Superfund cases are influenced by a complex interrelationship between risk, liability, funding, technology, and timelines. Further complicating the analysis is whether the property is a source of the contamination or only proximate to the contamination.

The government's new environmental focus will play out in the property market and go in one of two directions: either more permissive enforcement and cleanup standards or delays in spending and remediation. It is crucial now more than ever that

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the appraiser is up to date on these developments as the government is a major player in the stick-and-carrot enforcement of cleanup.

### **Invalid Appraisal Evidence**

Scientific-based models with reproducible results are the gold standard in the world of appraisals. Especially in single-family cases, though, appraisers can be tempted to become inventive, forgetting fundamentals of economics and analysis. Some go out on the limb of “junk science” looking for inspiration. Economics, however, is the measure of and quantification of social behavior.

Appraisers sometimes assume that because the contamination has been deemed severe, there is a corresponding severe decrease in property values. Similarly, appraisers sometimes assume that if a substance is deemed toxic, there is automatically damage. Or, if the substance is not toxic, then inevitably there is no damage. Regardless, there is no automatic correlation between toxicity studies and reactions of the market. Market participants have long mitigated real estate problems by changing behavior or perceptions. Chemicals may impact the waterways, but people and their purchasing decisions determine the markets.

Finally, there is the question of damages being only temporary. In other words, the appraiser may assume that “time will fix it.” An expectation of cleanup or confidence in agency follow-through may help explain observed market data, but damages cannot be assumed away because of an expected future remediation. For these reasons, appraisers are regularly warned about drifting into advocacy.

### **Perception, Perception, Perception**

Damages are determined from cost, use, and environmental risk. There are established methodologies rooted in the three traditional approaches to value. Furthermore, markets are made up of buyers and sellers—not toxicologists. Therefore, any impact on price is not due directly to health or environmental risks but rather to the perception and evaluation of those risks by buyers and sellers. This perception of risk, in turn, is largely founded on information disseminated by word of mouth, by the local and national media, by state and federal agencies, or by a combination of all three. The appraiser takes all this information, mixed with solid data and analysis, and applies it to the valuation question to be answered. In other words, a property should not be found guilty if it is innocent.

### **The Remediation Life Cycle**

The generally accepted appraisal framework for evaluating property value diminution separates any detrimental condition into three stages: the assessment stage, the remediation stage, and the ongoing stage. For each phase, the appraiser must carefully consider issues of cost, use, and risk.

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The Superfund cleanup process proceeds along a timeline that consists of about nine steps:

- preliminary assessment/site inspection (assessment)
- NPL listing
- remedial investigation/feasibility study (characterization)
- records of decision (RODs)
- remedial design / remedial action
- construction completion
- postconstruction completion
- NPL deletion
- site reuse and redevelopment

The steps leading up to the remedial action phase together make up the assessment stage, during which the site is assessed and characterized. During these initial stages, the uncertainty—and therefore risk—are highest. The steps from the announcement of construction completion onward collectively form the ongoing stage, where risk, if any remains, consists of a residual market resistance.

### **Considerations**

Two considerations illustrate the importance of a careful analysis of timing.

The first is the importance of formal NPL listing. This administrative event, which is determined by the site's Hazardous Ranking System score and the cutoff decided by the EPA, occurs between the site's initial assessment and its full characterization. The NPL listing carries importance as an announcement, possibly because of the suggestion that the federal government will step in and clean up the site if necessary. Anecdotal information even indicates that the initial NPL listing may result in an increase in prices in surrounding neighborhoods. Therefore, even within the assessment stage, it is important to consider information and the perception of risk, which may be positive or negative.

Another consideration is that, within the ongoing stage, there are two distinct and important events: the "construction complete" announcement and the formal deletion from the NPL. Some of the earliest research into the benefits of the Superfund program used deletion from the NPL as a cutoff point and found few benefits to local housing markets. However, several months can pass between construction completion and deletion from the NPL. The "construction complete" announcement, when considered independently, has been found to positively affect prices of nearby homes, probably because it signals the end of the remediation stage and the beginning of the ongoing stage.

Administrative status, physical status, and the dissemination of information by state and federal agencies must all be considered along this timeline. When valuing a home or set of homes near a Superfund site, the appraiser must closely consider the interplay of these different factors as of the date of appraisal. Assuming damages or a lack of damages, ignoring timelines, equating

chemical impacts with economic impacts, and underestimating the role of perceived risk can all lead to inaccurate valuations.

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