



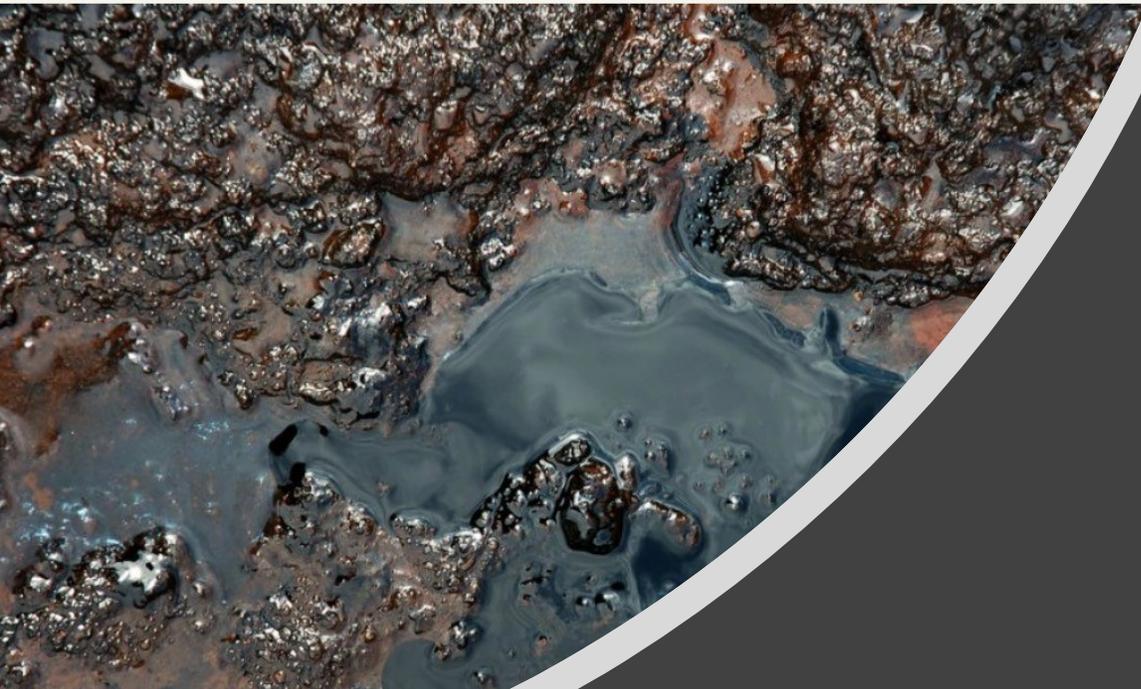
SUPERFUND EXPERT PANEL

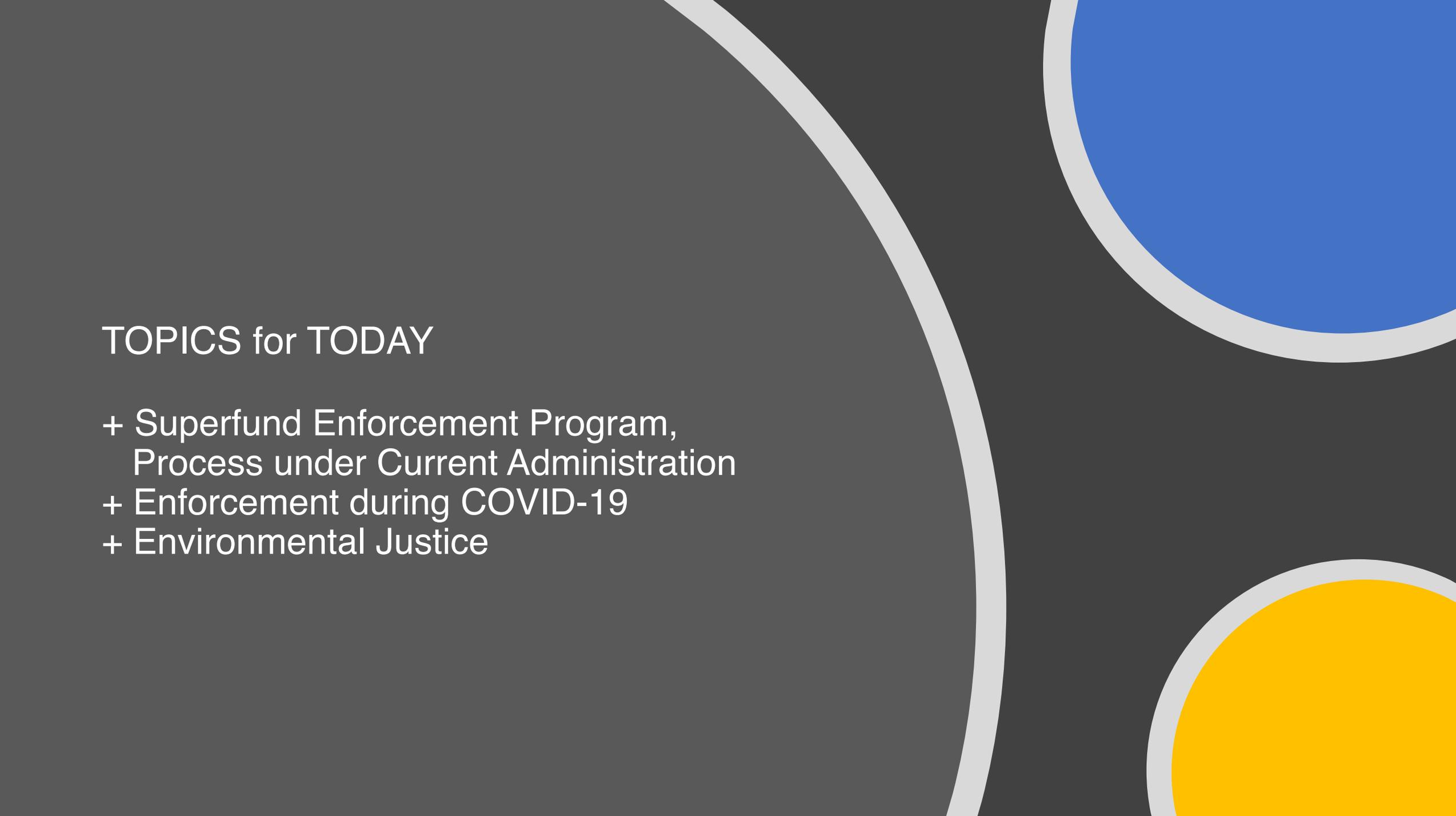
July 1st | 10:30am–12pm PDT

Cyndy Mackey: Director, Site Remediation Enforcement US EPA

Dennis McLerran: Cascadia Law Group

Allyn Stern: Beveridge & Diamond

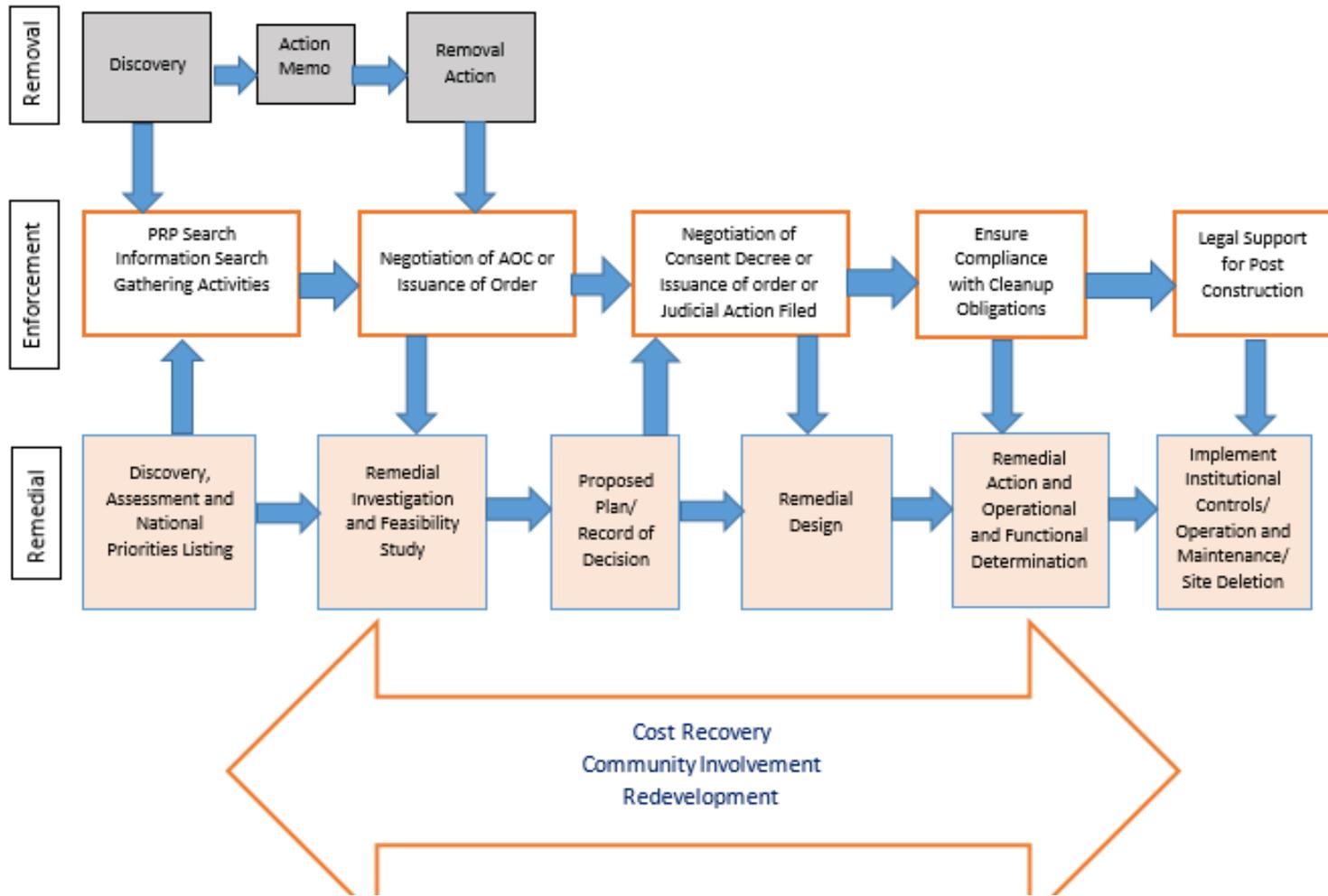




TOPICS for TODAY

- + Superfund Enforcement Program,
Process under Current Administration
- + Enforcement during COVID-19
- + Environmental Justice

Superfund Enforcement



Superfund Process

Overview of Superfund Enforcement

- The statute establishes that potentially responsible parties (PRPs) are responsible for performing and paying for cleanup of contaminated sites.
- PRPs are defined by CERCLA to include owners, operators, generators & transporters.
- There are 4 options to obtain PRP action:
 - Enter into settlement agreement
 - Issue order requiring performance of cleanup
 - Seek judicial order
 - Cost recover funds after EPA performs cleanup
- PRP engagement
 - Saves taxpayers money
 - Gets more sites cleaned up

Incentives to Bring Parties Together to Clean Up and Redevelop Sites

- Settlement that includes funds from EPA
 - Settlor receives funds to perform orphan share of cleanup
- Settlement that forgives of a portion of costs
 - Settlor is forgiven costs in recognition of cooperation and/or performance of orphan share of cleanup.
- Settlement that provides certainty and finality
 - Settlor receives covenant for CERCLA claims and receives protection from litigation from other parties at the site
- Prospective Purchaser Agreements (PPA) and Work Agreements with Non-Liable Parties
 - Settlor receives covenants for “existing contamination”
- Comfort/status letters & Ready For Reuse Determinations

Superfund Enforcement During COVID-19

Superfund COVID - 19 Guidance



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

April 10, 2020

MEMORANDUM

SUBJECT: Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19¹

FROM: Peter C. Wright
Assistant Administrator,
Office of Land and Emergency Management

PETER WRIGHT
Digitally signed by PETER WRIGHT
Date: 2020.04.10 08:34:12 -04'00'

Susan Parker Bodine
Assistant Administrator,
Office of Enforcement and Compliance Assurance

SUSAN BODINE
Digitally signed by SUSAN
BODINE
Date: 2020.04.10 08:41:43 -04'00'

TO: EPA Regional Administrators, Regions I-X

As all of us at the EPA and in other Federal Agencies, State and Local Governments, Tribes, Regulated Entities, Non-governmental Organizations, and Communities continue to adjust to the evolving COVID-19 situation, we at EPA are first and foremost mindful of the health, welfare, and safety of the public, as well as our employees and cleanup partners, as we all continue our work to protect human health and the environment.

COVID-19-Related Impacts to Remediation Sites

Managing Remediation Delays

Common Types of Delay or Disruption

- Safety of employees
- State or local restrictions or mandates
- Company COVID-19 practices
- Reduced company resources
- Supply chain (local/global)
- Personnel health or quarantine
- Contractor or laboratory availability/availability of disposal sites
- Travel restrictions
- Public meetings

Consequences of Delay

- Enforcement: Stipulated penalties or civil penalties
- Cascading deadlines
- Agency relationship impacts
- Community relationship and opportunity for public input
- Other PRP relationship impacts
- Cost increases and contractual impacts

Agreement/Order Terms to Evaluate

- Reporting requirements
- Modification requirements
- Force Majeure

Utilizing Agreement/Order Provisions

- Review relevant documents and identify upcoming deadlines – short term and long term
- Identify cascading deadlines
- Communicate with your employees and contractors, consultants, labs, to identify issues
- Determine whether it is a COVID-related delay – Don't overstate your case
- Identify whether there are any potential environment or human health impacts
- Document!

Force Majeure

Typically:

- “Beyond your control”
- “Best efforts to avoid”
- Responsible for contractors
- Cost alone is not a basis

- Report anticipated delay soon – trigger is event “might” cause a delay
 - (24-72 hours with some potential COVID-related flexibility)

Force Majeure Documentation

- Follow up in writing within 5-10 days
 - Describe reasons for delay
 - Anticipated duration of delay
 - All actions taken or to be taken to minimize delay
 - Schedule for implementation of mitigating measures
 - Rationale for attributing delay to a force majeure
- Include documentation supporting force majeure claim

Federal and State Guidance

- Vary by jurisdiction
- Availability of pandemic relief is narrowly construed
- Respond to imminent threats recognizing need for safety
- Site specific evaluation
- States that don't have guidance use general enforcement discretion
- Communication required – some specify notice in advance

Develop Support for COVID-Related Regulatory Relief

- Document –
 - Is the delay due to COVID-19? Why?
 - What circumstances lead to the delay?
 - Steps to prevent/mitigate?
 - Duration?
 - What is the proposed solution? Is it reasonable?

Planning Now To Avoid Delay

- Review agreements, orders, consent decrees for short term and long term deadlines
- Communicate with remediation managers, contractors, site personnel
- Identify challenges and potential solutions
- Know where documents are being maintained
- Stay up-to-date on current state restrictions and easing of restrictions
- Budget for potential delays
- Deliver consistent corporate messaging: safety and compliance; coronavirus exception are conditional and generally narrow

Planning For the Future

- Impacts from pandemic are evolving and probably won't end soon
- Can't rely on enforcement discretion
- Evaluate and update your plan
- Document thoroughly
- Build on successes – can tasks be done remotely? Can delays be offset by accelerating or altering other tasks
- Maintain strong relationships with agencies and communities

Environmental Justice

US EPA

Superfund Environmental Justice Points

- Superfund cleanups protect the country's most vulnerable populations
- EPA Superfund enforcement office works with Superfund program office and others to ensure environmental justice (EJ) opportunities are addressed
- EPA utilizes the community engagement provisions in CERCLA to advance EJ
 - CERCLA, NCP, and Agency guidance encourage early and frequent community engagement
 - EPA can facilitate meaningful community involvement by offering grants for or access to technical advisors

US EPA Superfund Environmental Justice Points (cont)

- There are several opportunities to address a community's EJ concerns throughout the Superfund process, including:
 - RI/FS: EPA uses site-specific factors to identify cleanup standards (like potential exposure by sensitive populations or the presence of multiple contaminants or exposure pathways)
 - Remedy selection: EPA uses nine criteria to evaluate potential remedies, including: protection of HH&E; long- and short-term effectiveness; reduction of the “principal threat waste” at the site; and community acceptance of the remedy

Environmental Justice

Current Opportunities and Impediments

Environmental Justice Basics

- The facts:
 - Communities of color bear a disproportionate share of health and environmental risks from pollution
 - This has resulted from historic patterns of discrimination and segregation
 - Access to decision makers and monetary power to influence decisions has been limited
 - Meaningful public participation and meaningful involvement in regulatory decisions is hard work and hard to achieve
- Fair treatment and just outcomes should be the objectives
- Superfund is a powerful tool to address existing EJ impacts

Environmental Justice Basics (continued)

- Executive Order 12898 put in place in 1994 by President Clinton
- Recognized that federal action was needed to address disproportionately high health and environmental risks experienced by low income communities of color
- Required each federal agency to develop a strategy for addressing EJ
- Established an Interagency Working Group on EJ chaired by the EPA Administrator comprised of the heads of 11 agencies and White House offices
- The record of success has been mixed at best, especially at present with regulatory rollbacks

October 2019 General Accounting Office Report

- Federal interagency efforts are falling short
- 24 recommendations with the bottom line being “federal efforts need better planning, coordination and methods to assess progress”
- Agencies are not living up to a 2011 EJ MOU under which they agreed to develop specific EJ plans, report progress annually and update plans regularly
- Decreased participation and reporting – in 2012 there were 14 annual progress reports filed but by 2017 there were only 4

EPA EJ Actions

- Plan EJ 2014 – integrate environmental justice into everything the EPA does through guidance, policies and tools -
 - Developed specific tools for use not only by EPA but by states and local governments like EJ Screen and T-FERST, a tribal focused environmental risk and sustainability tool to provide tribes with better access to the best available human health and ecological science
 - Developed approaches to advance EJ considerations in rulemaking, permitting and environmental reviews and enforcement
- 2020 EJ Action Agenda adopted in 2016 to build on EJ 2014
 - A key objective was to improve on-the-ground results for overburdened communities

National Environmental Justice Advisory Council (NEJAC) and the Superfund Taskforce

- EPA established NEJAC in September 1993
- NEJAC has long recognized that cleanup and redevelopment could lead to gentrification and displacement – 2006 report on Unintended Impacts of Redevelopment and Revitalization
- NEJAC now has a specific charge coming out of the Superfund Task Force
- Tasked with preparing a report of formal consensus advice and recommendations related to long term stewardship and risk communication to the Administrator

EJ at Superfund Sites in EPA Region 10

- Specific, focused engagement and actions related to EJ
- Extensive outreach to community organizations and tribes resulting in relationships and deeper listening – examples are many, but some significant ones were extensive use of translation services, coming to existing community events and deeper listening to community desires such as use of barges instead of trucks through neighborhoods and visiting tribal councils for consultation
- Funding of independent technical experts to assist communities on meaningful participation and technical input on site decisions through TAG grants
- Job training programs to create job opportunities in local communities for Superfund and Brownfield sites
- Capacity funding to tribes to participate actively on specific site decisions
- Extensive engagement in rule makings to set water quality standards



SUPERFUND EXPERT PANEL

July 1st | 10:30am–12pm PDT

Cyndy Mackey: Director, Site Remediation Enforcement US EPA

Dennis McLerran: Cascadia Law Group

Allyn Stern: Beveridge & Diamond

Q&A

