A Proposal to Increase Public Participation in CERCLA Actions through Notice

INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address hazardous substances releases from industrial operations.[1] Although the statute was meant to provide communities with a means of self-protection, CERCLA actions are often commenced by a government agency against a polluter or a group of potentially responsible parties (PRPs) without substantial input from the community threatened by the hazardous waste.[2] Recent court decisions have broadened the ability of polluters, who are not parties to the original settlement proceedings, to intervene in CERCLA settlement proceedings.[3] However, community groups seeking to have greater input on the remedial process are often barred from the process, either directly by courts or indirectly by procedural requirements.[4]

When directly barring community group intervention, courts often cite to the fact that the government is already representing the community interest, and additional intervention is therefore unnecessary.[5] Separate but related to this, community groups are sometimes barred from intervening based on their failure to adhere to a timeliness requirement—one that may be unrealistic for them to meet.[6]

Generally, courts cite the time parties first receive notice of a CERCLA action as the most appropriate time to file for intervention.[7] Notice provided through CERCLA section 117, which details the process for public participation,

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1. *See* 42 U.S.C. § 9602 (2012).
2. *See generally* United States v. Aerojet Gen. Corp., 606 F.3d 1142 (9th Cir. 2010); City of Emeryville v. Robinson, 621 F.3d 1251, 1255 (9th Cir. 2010).
3. Maya Waldron, *A Proposal to Balance Polluter and Community Intervention CERCLA Litigation*, 38 ECOLOGY L.Q. 401, 407–08 (2011).
4. *Id.* at 414.
5. *Id.*
6. *See* United States v. Atl. Richfield Co., No. 2:14-CV-312-PPS-PRC, 2017 WL 1682591, at *3 (N.D. Ind. May 2, 2017), *aff'd*, No. 2:14CV312-PPS/PRC, 2018 WL 798188 (N.D. Ind. Feb. 9, 2018).
7. *Id.*

is often used as the starting point for determining when such notice occurred.[8] This process, however, only requires constructive notice through a newspaper ad, which publicizes a public meeting about the site and an opportunity for public comment on the proposed plan for remedial actions.[9] Because of this obscure and outdated format, community members may not actually realize there is a serious contamination problem in their community upon this "notice."[10] In addition, even if community members do see the newspaper ad, the content of that ad may not fully alert communities about the extent of contamination until more details come out in a lawsuit.[11] By the time a lawsuit against the polluter has progressed to the point of actually notifying community members to the extent of damage, it may be well past the point in time where intervention and community participation are permissible.[12] The failure of community groups to meet the timeliness requirement in intervention proceedings is indicative of the need to amend CERCLA section 117's notice requirement in order to increase public participation.

This In Brief examines existing procedures surrounding CERCLA notice and timeliness requirements, overviews the impact of these requirements on community intervention in CERCLA actions, and proposes changes to CERCLA section 117's notice requirements to increase community involvement, by requiring that communities near high risk sites receive easily understandable information about the contamination through widely viewed media sources and mailings.

I. BACKGROUND

Congress enacted CERCLA in 1980 to clean up hazardous waste sites and mitigate the environmental and public health threats that stem from releases of toxic chemicals.[13] CERCLA establishes the basic federal program for addressing the problem of hazardous substances that have been released into the environment.[14] It authorizes the Environmental Protection Agency (EPA), or a state acting under a cooperative agreement with the EPA, to undertake response

8. 42 U.S.C. § 9617 (2012); *see, e.g.*, Utah v. Kennecott Corp., 232 F.R.D. 392, 396 (D. Utah 2005).

9. *See* § 9617; *Kennecott*, 232 F.R.D. at 396 (noting that the intervenor was originally given constructive notice through a newspaper ad).

10. *See Kennecott*, 232 F.R.D. at 396 (finding that the intervenor had constructive notice through a newspaper ad published nine years prior).

11. *See Atlantic Richfield*, 2017 WL 1682591, at *3–4 (noting that community members had received mailings four years prior but had not known about the impact to their properties until they filed the motion to intervene).

12. *Id.*

13. *See* SUSAN M. COOKE, 2 THE LAW OF HAZARDOUS WASTE § 12.02[1] (Matthew Bender ed., 2018).

14. *Id.*

activities, in order to mitigate actual or threatened hazardous substance releases.[15]

A. CERCLA and Intervention

A major part of CERCLA is its liability, enforcement, and settlement provisions, which seek to shift the cost of response actions from the federal Superfund,[16] to parties deemed responsible for the waste, site, or problem.[17] Cost recovery suits may be brought by federal or state governments, or by private parties, that have incurred response costs in accordance with the National Contingency Plan (NCP)—the procedures, criteria, and responsibilities for conducting response actions at Superfund sites.[18]

CERCLA has a provision specifying the procedures and permissible terms for settlements between the EPA, states, and PRPs before or after remedial actions have been decided depending on the situation.[19] Because of the incentives to forego trial,[20] PRPs generally settle with the government for the costs of the remedial action.[21] Non-settling polluters, however, may still be liable for any remaining remediation costs, but are prevented from seeking contribution from those PRPs that have settled.[22] Therefore, by intervening, non-settling polluters have the opportunity to dispute the portion of the remediation costs that a settling polluter will pay.[23]

In contrast, community groups typically intervene in settlement cases when a remedial action has been decided on, but they do not agree with the proposed remedy.[24] Remedial actions are difficult to change late in the process once

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15. *Id.*

16. The federal Superfund is a fund financed by taxes levied on the sale of hazardous materials, general taxes, and recoveries from remediation costs. The federal government uses this money to pay for the bulk of remedial or removal actions associated with contaminated sites. *Id.*

17. *See* COOKE, *supra* note 13, § 12.02[4].

18. *Id.*

19. Suits are typically filed prior to remedial action when private parties want to determine liability or by the government against a party that is refusing to acknowledge liability. Suits for settlement are filed after remedial action when the government is looking to split the cost of the remediation with the polluters. *See id.*; *see also* 42 U.S.C. § 9613(f) (2012).

20. Incentives for settlement include the discretionary nature of a settlement decision preventing judicial review and CERCLA's strict liability scheme, sweeping cost recovery authority, and huge litigation and transaction costs. *See* COOKE, 3 THE LAW OF HAZARDOUS WASTE, *supra* note 13, § 13.01[5][c][1].

21. *Id.*

22. *See* § 9613(f)(2).

23. *See Aerojet*, 606 F.3d at 1145–46 (describing how non-settling PRPs intervened in an action against settling PRPs so they would not be liable for the remaining remediation costs not paid by the settling PRPs).

24. *See* United States v. Atl. Richfield Co., No. 2:14-CV-312-PPS-PRC, 2017 WL 1682591, at *1 (N.D. Ind. May 2, 2017), *aff'd*, No. 2:14CV312-PPS/PRC, 2018 WL 798188 (N.D. Ind. Feb. 9, 2018) (noting that the decree was closed two years prior); Utah v. Kennecott Corp., 232 F.R.D. 392, 394 (D. Utah 2005) (finding that the remedial action had commenced a few months before the petitioner filed a motion to intervene).

significant time and effort have gone into conducting investigations and constructing remedial facilities.[25] Courts also note that late intervention can cause undue delay and poses a significant prejudice to the existing parties that paid for the remediation planning process.[26]

Intervening parties in CERCLA settlement suits base their claims on two statutes: CERCLA section 113(i) and the Federal Rules of Civil Procedure Rule 24.[27] Section 113(i) and Rule 24 allow for the intervention of any person who is not adequately represented in an action, and is in a position that may be harmed by the action.[28] Rule 24 and section 113(i) together establish a four-prong test for permissive intervention in CERCLA: "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter[,] by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation."[29] An element, which community groups are frequently scrutinized for, is the timeliness requirement.

While the timeliness requirement has no strict specified length of time in statute, the Seventh and Tenth Circuits have a four-prong test for deciding whether or not intervention is timely: (1) the length of time the applicants knew or should have known of their interest in the case;[30] (2) prejudice to the other parties caused by the delay; (3) prejudice to the applicants if the motion is denied; and (4) unusual circumstances.[31] Courts tend to allow intervention for parties that file a motion soon after they receive constructive notice that their interests may be harmed and are more reluctant to allow intervention from parties who have waited for a significant time from first notice.[32]

B. CERCLA and Constructive Notice

Courts consider intervenors to have received notice that their interests may be harmed, when the polluter follows the procedures outlined in CERCLA section 117, which are the guidelines for public notice in the CERCLA process

25. *Kennecott* discusses the prejudice to existing parties based on the amount of work that has already gone into determining the appropriate remedial action. *See* 232 F.R.D. at 397.

26. *Id.* at 396–97.

27. *See Aerojet*, 606 F.3d at 1148. In CERCLA cases, a judicially recognized settlement is necessary because it protects settling parties from contribution claims by other PRPs. *See* FRANK P. GRAD, 3 – 4 A TREATISE ON ENVIRONMENTAL LAW § 4A.02[1][g-1] (Matthew Bender ed., 2017).

28. FED. R. CIV. P. 24; 42 U.S.C. § 9613(i) (2012).

29. United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1181 (3d Cir. 1994) (quoting Harris v. Pernsley, 820 F.2d 592, 596 (3d Cir. 1987)).

30. This *In Brief* will refer to this prong as "constructive notice."

31. *Kennecott*, 232 F.R.D. at 396–97.

32. In *Aerojet*, the timeliness requirement was met because intervenors promptly filed a motion to intervene within four months of learning about the proposed consent decree. 606 F.3d 1148–49. In contrast, in *Atlantic Richfield*, the timeliness requirement was not met because the community group intervenors had notice that their interests were harmed four years prior to filing a motion for intervention. United States v. Atlantic Richfield Co., No. 2:14-CV-312-PPS-PRC, 2017 WL 1682591, at *4 (N.D. Ind. May 2, 2017), *aff'd*, No. 2:14CV312-PPS/PRC, 2018 WL 798188 (N.D. Ind. Feb. 9, 2018).

generally.[33] Under CERCLA section 117, public notice requires a brief analysis of the proposed remedial action plan and a reasonable opportunity for the public to submit comments about the plan.[34] Public notice is adequate when it is published in a "major local newspaper of general circulation" and a copy of the proposed plan is available near the site at issue.[35] The party leading the remediation efforts must also hold a public meeting about the proposed plan and make the transcript of the meeting available.[36] After a remedial action has been decided on, the final plan must be released to the public, along with responses to significant comments, and note changes from the proposed plan.[37] Courts typically find that community members have adequate constructive notice due to this process.[38]

The NCP also includes provisions to promote "meaningful public participation" in the CERCLA process.[39] The two main components of the public participation plan under the NCP are: (1) developing a remedial action plan with the input of community members and the creation of a formal community relations plan;[40] and (2) providing notice of the plan in the newspaper along with the opportunity to attend a public meeting and submit public comments.[41] This In Brief will focus on the second component.

II. CASES INVOLVING CERCLA INTERVENTION BY FINANCIALLY INTERESTED PARTIES AND COMMUNITY MEMBERS

Community members do not often intervene in CERCLA settlement cases, but when they do, courts may reject their request due to the lack of timeliness. Most CERCLA settlement cases, in which petitioners successfully intervene, involve non-settling PRPs as petitioners. This is likely due to recent court decisions allowing non-settling PRPs to intervene,[42] in order to prevent these individuals from being responsible for costs resulting from the settlement.[43] This section will summarize CERCLA settlement intervention cases involving non-settling PRPs, contaminated property owners, and community groups.

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33. 42 U.S.C. § 9617(a)(2) (2012); *see, e.g.*, *Kennecott*, 232 F.R.D. at 396 (discussing that the petitioner first had constructive notice when a notice about the site was published in a local newspaper).

34. 42 U.S.C. § 9617(b), (d).

35. *Id.*

36. *Id.* § 9617(a)(2).

37. *Id*. § 9617(b).

38. *See, e.g.*, *Kennecott*, 232 F.R.D. at 396.

39. *See* Orange Cty. Water Dist. v. Alcoa Glob. Fasteners, Inc., 12 Cal. App. 5th 252, 332 (2017).

40. This prong of the public participation provision was thoroughly discussed in Ellison Folk, *Public Participation in the Superfund Cleanup Process*, 18 ECOLOGY L.Q. 173 (1991).

41. *See id.* at 176, 198; *see also* 40 C.F.R. §§ 300.430(c), 300.430(f)(2).

42. *See generally Aerojet*, 606 F.3d at 1142; United States v. Albert Inv. Co., 585 F.3d 1386 (10th Cir. 2009); United States v. Union Elec. Co., 64 F.3d 1152 (8th Cir. 1995).

43. In *Aerojet*, a group of PRPs settled with the EPA for $3.4 million to help with the remediation efforts and entered into a consent decree, which barred other PRPs from filing contribution claims against them. *See* 606 F.3d at 1146–47. A group of non-settling PRPs intervened to become involved in the negotiations about contribution claims. *See id.*

A. Non-Settling Polluter Intervention

United States v. Aerojet Gen. Corp. set the most recent precedent for a broader intervention of polluters in CERCLA cases and overturned prior decisions, which stated that a non-settling polluter lacked a significantly protectable interest.[44] Before this decision, many district courts arrived at that conclusion by interpreting the phrase "any person may intervene as a matter of right" in section 113(i), as ambiguous and therefore requiring investigation into legislative intent.[45] However, in *Aerojet* the Ninth Circuit determined that "any person" was not ambiguous and that non-settling PRPs were allowed to intervene under the statue.[46] Courts seem to have accepted the holding that non-settling PRPs are entitled to intervene as a matter of right in CERCLA cases.[47]

B. Financially Interested Property Owner Intervention

In *City of Emeryville v. Robinson*, Sherwin-Williams filed a motion to enforce a court approved settlement for remediation costs associated with a CERCLA site, and the neighboring property owners filed a motion to intervene.[48] Prior to this, the neighboring property owners were named as defendants in a separate, but related, state action, which held them responsible for costs associated with Sherwin-Williams's contamination on their properties.[49] They were not included in the settlement negotiations, which released Sherman-Williams from all liability associated with remediation costs in the area.[50] The neighboring property owners intervened to protect their right to contribution from Sherwin-Williams to cover remediation costs associated with the contaminated properties.[51] The court granted the motion because the intervenors filed it soon after learning about Sherwin-Williams's motion to enforce the settlement, and their financial interests were considered to be "protectable" under *Aerojet*.[52]

C. Private Citizen and Community Group Intervention

Utah v. Kennecott Corp. and *United States v. Atlantic Richfield Co.* are two intervention cases where a private citizen and a community group were denied

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44. *Id.* at 1151; *see also* United States v. Acorn Eng'g Co., 221 F.R.D. 530, 537 (C.D. Cal. 2004).
45. *Acorn*, 221 F.R.D. at 534–35. Before *Aerojet*, courts were split on whether "any person" in section 113(i) was unambiguous and PRPs should be allowed to intervene or if it was ambiguous and should be interpreted as being limited to the affected communities and not PRPs. *Aerojet*, 606 F.3d at 1142.
46. *Id.* at 1151.
47. City of Emeryville v. Robinson, 621 F.3d 1251, 1259 (9th Cir. 2010).
48. *Id.* at 1255.
49. *Id.*
50. *Id.* at 1257.
51. *Id.* at 1259–60.
52. *Id.* at 1258–60.

the ability to intervene in CERCLA settlement proceedings.[53] Both involved parties that had been notified for public comment pursuant to CERCLA section 117 but had not decided to take action in the form of intervention until much later in the investigation.[54]

In *Kennecott*, a private citizen, who had been participating in the public comment process for a contaminated groundwater site, filed a motion to intervene in a case between the state and the polluter to set aside a consent decree.[55] He intervened on the basis that the public comment period was too short and that the remedial action was "woefully inadequate."[56] The private citizen had verifiable notice through his participation in the public comment process one and one-half years before he filed his initial complaint, but the court stated that he should have received notice nine years prior to his involvement through news publications.[57] The court denied the motion because of this untimeliness, and because he did not possess a sufficiently protectable interest to intervene in the action.[58]

In *Atlantic Richfield*, a community group filed a motion to intervene in a case involving a neighboring smelting plant after realizing the affect that the contamination had on their properties.[59] The petitioners received mailings stating that their property might be impacted, but they were not aware of the extent of the impact until four years after the first mailings were distributed.[60] In an unreported decision, the court denied the motion for intervention on the basis that the timeliness period started when the residents received the mailings.[61] The court focused exclusively on how long the residents knew or should have known that the litigation could impact their interests, rejecting as irrelevant whether or not petitioners knew about the precise impacts on their property before the time the motion was filed.[62]

III. ANALYSIS

The fact that community groups and individuals have failed to meet the timeliness requirement for intervention is indicative of the fact that CERCLA section 117 is inadequate to effectuate the public participation goals of CERCLA. To encourage meaningful public participation, CERCLA section 117,

53. *See* Utah v. Kennecott Corp., 232 F.R.D. 392, 393 (D. Utah 2005); United States v. Atlantic Richfield Co., No. 2:14-CV-312-PPS-PRC, 2017 WL 1682591, at *3–4 (N.D. Ind. May 2, 2017), *aff'd*, No. 2:14CV312-PPS/PRC, 2018 WL 798188 (N.D. Ind. Feb. 9, 2018).

54. *See Kennecott*, 232 F.R.D. at 396; *Atlantic Richfield*, 2017 WL 1682591, at *3–4.

55. *Kennecott*, 232 F.R.D. at 393.

56. *Id.* at 394.

57. *Id.* at 396.

58. *Id.* at 396–97.

59. *Atlantic Richfield*, 2017 WL 1682591, at *1.

60. *Id.* at *3–4.

61. *Id.* at *4.

62. *Id.* at *4–5.

rather than the timeliness requirement, should be amended to require a more in-depth public notice process. By receiving proper notice, community groups will not need to intervene late in the process in order to fully participate in the remediation process. Community participation is essential because the outcome of these cases can negatively impact a neighborhood's property values and result in intrusive remediation activities, which can range from the installation of monitoring points to the construction of remediation systems.[63] Early, substantial notice requirements will help ensure community members have a voice in the process.

A. Conclusions from Intervention Cases

Parties with a direct financial interest tend to more readily meet the timeliness requirement because they are directly notified that they may be responsible for paying part of the remediation costs or that their property has been contaminated.[64] This sufficient notice, tied to a large financial incentive, leads them to file timely motions to intervene.[65] In addition, neighboring property owners, who are directly impacted by contamination plumes, are notified during the remediation process by EPA agents seeking access to the contaminated areas.[66] This allows them to take action to ensure that they are able to provide input in the lawsuit.

On the other hand, community groups, who wish to play a greater role in the remediation process, may struggle to meet the timeliness requirement because they are unsure of the impacts of the contamination until much later in the settlement process.[67] Additionally, courts look to the newspaper ad—which advertises the public comment process on the proposed plan—as first notice,[68] even though it would not make sense for groups to intervene until long after the public comment process has ended. Intervention cases demonstrate the disparity

63. *See* City of Emeryville v. Robinson, 621 F.3d 1251, 1260 (9th Cir. 2010) (noting that one intervenor faced a substantial loss in property value during eminent domain proceedings caused by the contamination); *see also Technologies for Cleaning Up Contaminated Sites*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/remedytech (last visited April 10, 2018) (providing examples of remedial technologies).

64. Property owners impacted by neighboring contamination are typically notified during the remedial investigation process because they must grant inspectors permission to enter their land. COOKE, 3 THE LAW OF HAZARDOUS WASTE, *supra* note 13, § 13.01[4][d][iv]. Sometimes property owners find out the impact of contamination on property values during sale or eminent domain proceedings like in *Emeryville*. Interview with Robert Doty, Partner, Cox, Castle & Nicholson (March 7, 2018).

65. *See, e.g.*, *Emeryville*, 621 F.3d at 1257; *Aerojet*, 606 F.3d at 1149.

66. *See Emeryville*, 621 F.3d at 1254; COOKE, 3 THE LAW OF HAZARDOUS WASTE, *supra* note 13, § 13.01[4][d][iv] (stating that EPA is authorized to inspect all sites where substances may be present and that agents must request site access before inspection).

67. *See Atlantic Richfield*, 2017 WL 1682591, at *2–4 (noting that, after a consent decree was entered and the case was closed, residents were informed that "soil testing had revealed extremely high levels of contaminants").

68. *See Kennecott*, 232 F.R.D. at 396; *Atlantic Richfield*, 2017 WL 1682591, at *3–4.

between the extent of notice given to financially involved parties and to communities.

B. The Timeliness Requirement Should Be Kept

In order to address contaminated sites efficiently—another aim of CERCLA[69]—the timeliness requirement should remain unchanged, but the public participation provision of CERCLA should be reformed to give communities adequate notice of the CERCLA cleanup process. Although the timeliness requirement has been a primary reason for the dismissal of motions to intervene, it also helps communities because it leads to a timely cleanup.[70] In addition, courts are reluctant to allow late intervenors because doing so would prejudice existing parties and delay their remediation plans.[71]

The timeliness requirement also leads to a more efficient remedial process, which benefits communities.[72] Allowing too many groups to intervene in a CERCLA settlement action slows down the cost allocation process and leaves sites contaminated for longer.[73] In addition, a public comment period is also incorporated in every CERCLA case,[74] so allowing for two forums of public participation could lead to redundancy and inefficiency. Moreover, it is unlikely that intervention in settlement proceedings is the best option for providing input in remediation selection, since these proceedings often occur long after remedial actions have been decided on.[75] Overall, the benefits of the timeliness requirement outweigh its negative impact on community intervenors and should not be amended. Rather, CERCLA section 117 should be amended to help community groups learn about contamination in their community sooner and have a greater voice in the remediation selection process.

C. The Current Notice Requirements Are Inadequate and Should Be Amended

CERCLA section 117 is inadequate because the required notice does not reach the vast majority of people who rely on digital media for news and may fail to fully communicate the extent of harm to the community. The minimum constructive notice to an affected community is a legal notice about the proposed plan in a major local newspaper of general circulation.[76] The legal notice only needs to contain a brief analysis of the plan and information about where to view

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69. *See* COOKE, 3 THE LAW OF HAZARDOUS WASTE, *supra* note 13, § 13.01[4][e][iv][C].

70. *See Atlantic Richfield*, 2017 WL 1682591, at *4.

71. *See Kennecott*, 232 F.R.D. at 396–97.

72. *See Atlantic Richfield*, 2017 WL 1682591, at *4 (citing public health concerns caused by further delay of remediation as reason for not allowing intervention).

73. *Id.*

74. 42 U.S.C. § 9617 (2012).

75. *See Atlantic Richfield*, 2017 WL 1682591, at *1; *Kennecott*, 232 F.R.D. at 394. Remedial actions are typically selected after the public comment process closes on the proposed plan. COOKE, 2 THE LAW OF HAZARDOUS WASTE, *supra* note 13, § 12.02[4].

76. *See* § 9617(d) (2012).

the plan near the affected site.[77] Since only about 18 percent of Americans get their news from print newspapers,[78] it is highly unlikely that community members will see the request for public participation unless it is broadcast on television, shared widely on social media, or makes it to the front page of a news website. The government agency in charge of the project typically posts information about affected sites on their website,[79] which most people also do not check. Environmental watchdog groups tend to monitor local newspapers for CERCLA issues, but do not always cover rural areas with smaller publications.[80] Rural areas are disadvantaged by CERCLA section 117's requirements especially if there is no major newspaper of circulation or if the primary language in the community is not English.[81] Toxic waste producers have a history of targeting lower income, rural communities because they believe that there will be less resistance in these areas as well.[82]

Even when notice is sufficient, members of the public often do not completely comprehend the implications of the CERCLA actions in their community. In *Atlantic Richfield*, residents received mailed notices of the proposed remediation and a public meeting about the site but did not recognize that their interests were compromised until four years after the initial mailing.[83] The documents concerning remedial action, including the proposed plan, are supposed to be written in language understandable to the public,[84] but often do not properly alert community members about the specific impacts to their property.[85]

Because of the reasons discussed above, CERCLA section 117 should be amended to require mailings and news press releases to be featured online and on television as soon as the proposed plan is ready for high risk sites. In order to

77. *Id.* § 9617(a)(1).

78. Jeffrey Gottfried & Elisa Shearer, *Americans' Online News Use is Closing in on TV News Use*, PEW RESEARCH CTR. (Sept. 7, 2017), http://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/.

79. *See Search Superfund Documents*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/superfund/search-superfund-documents (last visited April 10, 2018).

80. *See, e.g.*, *Kennecott*, 232 F.R.D. at 396 (noting that Sierra Club submitted public comments on the initial proposed plan); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 2 (2001) (noting that neither Greenpeace nor local residents were aware of a chemical site being built in a rural area until a local sheriff notified the nonprofit).

81. *See* COLE & FOSTER, *supra* note 80, at 1–2 (explaining that Kettleman City was a rural area with a primarily Spanish speaking population next to a proposed toxic waste disposal site, and the residents did not see the notification in the local newspaper).

82. *See id.* at 3.

83. United States v. Atlantic Richfield Co., No. 2:14-CV-312-PPS-PRC, 2017 WL 1682591, at *3–4 (N.D. Ind. May 2, 2017), *aff'd*, No. 2:14CV312-PPS/PRC, 2018 WL 798188 (N.D. Ind. Feb. 9, 2018).

84. SUPERFUND COMMUNITY INVOLVEMENT HANDBOOK, U.S. ENVTL. PROT. AGENCY 40–41 (2016).

85. *See Atlantic Richfield*, 2017 WL 1682591, at *4 (finding that the EPA's notice of possible contamination was sufficient despite arguments by community members that residents disregarded the public mailings and that the EPA's other publications were too remote).

prevent undue worry, the press release and mailing requirements should be limited to sites where the baseline risk assessment prepared for the proposed plan indicates potentially dangerous levels of contamination for residents.[86] Since most Americans receive their news online or by television,[87] there is likely a better chance that concerned community members will receive the notice if it is distributed through these channels, especially in rural areas. The mailings should also be in the form of easily readable fact sheets that are sent out to elected officials, owners of potentially contaminated sites, and all people who reside within a two-mile radius of the projected contamination plume.

At a minimum, these notices should contain the following in both English and the primary language(s) of the impacted community: (1) easily understandable information about the risk level for contaminants at the site and its implications for adults and children, (2) clear maps of the areas that are potentially impacted, (3) warnings that pertain to the specific type of contamination, such as an advisory not to drink well water if the groundwater is contaminated, (4) basic information about remedial options along with the opportunity to request technical assistance,[88] (5) information about the proposed plan, and (6) information on how to participate in the public comment process. For more severely impacted sites, or sites in communities whose primary language is not English, a community outreach person should also be required.[89] A designated person would help educate the affected residents about the risk posed by contaminants and facilitate the discussion between the community and the entity conducting the remediation.

CONCLUSION

Communities should know about risks posed by hazardous waste to their community and be able to fully participate in the remedial process. The failure of groups to meet the timeliness factor when attempting to intervene is indicative of the weak public notice provisions in CERCLA. Therefore, CERCLA section 117 should be amended to require notice about the proposed plan through television, internet, and mail in order to fully inform community members about

86. The baseline risk assessment utilizes sampling data from the site to evaluate whether or not further action is necessary. *See Risk Assessment Guidance for Superfund (RAGS): Part A*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/risk/risk-assessment-guidance-superfund-rags-part (last visited April 10, 2018).

87. Gottfried & Shearer, *supra* note 78.

88. The technical assistance program helps communities understand the more detailed technical aspects of site contamination and the remediation process. *See* U.S. ENVTL. PROT. AGENCY, *supra* note 84, at 16.

89. Community outreach is currently recommended but not required for moderate to high risk sites. *Id.* at 38.

potential contamination and allow them to take action. This will not only inform people about the public comment process but allow citizens to provide substantial input as well. By increasing public awareness, this modification will help CERCLA fulfill its original purpose of protecting the health and interests of communities.

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