

Chapter 61

The Superfund end game

The federal Superfund program was established following a growing concern over hazardous materials dumped by the nation's chemical and petroleum industries getting into groundwater and surface water and impacting human health. Congress passed the Resource Conservation and Recovery Act in response to public outcry about "midnight dumping" of toxic wastes in 1976. That same year, Congress passed the Toxic Substances Control Act, which provided the Environmental Protection Agency with the authority to protect public health and the environment with controls over toxic chemicals. National attention was drawn to the issue following several dramatic incidents. In 1977, a chemical waste treatment plant in Bridgeport, N.J., was ignited by a welder's spark, and the resulting fire blanketed the city with black toxic smoke. President Jimmy Carter proclaimed a state of emergency at Love Canal, N.Y., in 1978 after it was discovered that a residential community had been established on top of a toxic chemical waste dump. In 1979, House and Senate committees held extensive hearings on the dangers posed by toxic chemical waste dumps. The next year, a toxic chemical waste storage facility in Elizabeth, N.J., burst into flames and burned for 10 hours, covering a 15-mile area with black smoke.¹

Superfund legislation

On Nov. 24, 1980, the U.S. Senate approved legislation that would create a \$1.6 billion fund that would be used to clean up toxic waste sites around the U.S. The 78-9 vote indicated the support the final bill expected to see in Congress. Concessions had been made to the chemical industry. The EPA estimated there were about 2,000 dump sites with hazardous chemicals posing human health threats around the U.S. The average cost to clean up such a site was about \$3.6 million. A companion House bill also included funding for oil spills.² Congress passed the legislation "in response to the dangers of uncontrolled releases or threatened releases of hazardous substances, and releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to public health or welfare."³ President Carter signed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) into law on Dec. 11, 1980. Under the law, the EPA could identify parties responsible for hazardous substances released to the environment and either compel the parties to clean up the sites or allow for the government to clean up the site using money from a trust fund called the Superfund, along with any money obtained from polluters through the Justice Department. Polluters could not be

compelled by unilateral administrative order to clean up pollutants or contaminants if they were not hazardous.⁴ The Superfund process was used to respond to the notorious Valley Of The Drums chemical waste site in Kentucky in 1981.⁵

To implement CERCLA, the EPA promulgated the revised National Oil and Hazardous Substances Pollution Contingency Plan on July 16, 1981. The plan set guidelines and procedures for responding to releases and threatened releases of hazardous substances and other pollution concerns. The national plan was revised again on March 8, 1990.⁶ The Hazard Ranking System was established in 1982 as the federal government's principal mechanism for evaluating environmental hazards at a site. That same year, the EPA reached its first major CERCLA multi-generator settlement, in which the parties implemented a cleanup at the South Carolina Recycling and Disposal Inc. site. The EPA created the first National Priority List in 1983, using the Hazard Ranking System to classify 406 sites across the U.S. Only sites on the list could qualify for long-term remedial action financed by the Superfund.⁷ The National Priorities List was included in the National Contingency Plan as Appendix B and defined a list of releases and the highest priority facilities. The list was required to be revised at least annually and was considered a guide for the EPA to help determine which sites warranted further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances. The list did not assign liability to any party or to the owner of any specific property, and placing a site on the list did not mean that any remedial or removal action necessarily need be taken.⁸ In 1986, the Friedman property in New Jersey became the first site to be removed from the National Priority List.⁹

The Superfund act was amended on Oct. 17, 1986, by the Superfund Amendments and Reauthorization Act, and the Hazard Ranking System was revised to comply with these amendments on Dec. 14, 1990. The ranking system evaluated four pathways for releases – groundwater, surface water, soil exposure and air. A facility could be placed on the National Priorities List three ways: 1) by scoring highly on the Hazard Ranking System; 2) if a state government designated a site as high priority; and 3) if a facility or release was designated a significant threat to public health. The National Priorities List did not describe releases in precise geographical terms – the extent of a release was typically not known at the time of listing, and often a release migrated beyond the boundaries of a facility that was the source of the release. The EPA could remove a site from the National Priorities List when no further response was appropriate under the Superfund act, when responsible parties or other persons had implemented all appropriate response actions, when all appropriate Superfund-financed responses had been implemented, and when the remedial investigation had shown the release posed no significant threat to public health or the environment. The National Priorities List

rules were amended on March 2, 1993, to provide for a Construction Completion List to help categorize sites and to better communicate the successful completion of a cleanup, but the Construction Completion List had no legal significance. The National Priorities List rules were amended again on Nov. 1, 1995, so portions of a Superfund site could be removed from the list and be put back into productive use. The Love Canal Superfund site was removed from the National Priority List in 2004.¹⁰

Until the mid-1990s, most of the Superfund money came from a tax on the petroleum and chemical industries. But with little support in Washington, D.C., about \$4 billion was owed to the Superfund by 1995 and never collected by Congress. By 2003, the Superfund was empty. From 2000 to 2015, Congress allocated about \$1.26 billion of general revenue to the Superfund program each year. As a result, less than half of the sites on the National Priority List were cleaned up from 2001 to 2009. With little money in the Superfund to work with, the EPA typically negotiated consent orders with potentially responsible parties to study sites and develop cleanup alternatives, subject to EPA oversight. The cleanup itself would be implemented under consent decrees or under unilateral orders if consent could not be reached. Once the EPA was notified about a potentially hazardous site, the agency would conduct a preliminary assessment and site inspection. Information from that report would be used to develop a Hazard Ranking System score. Sites that ranked high enough would proceed to a remedial investigation and feasibility study to define the nature of the site contamination and to evaluate various remediation alternatives. The preferred alternative would be presented in a proposed plan and released to the public for comment before a record of decision would be issued. A remedial design phase would be conducted, followed by a remedial action phase. Long-term monitoring and five-year reviews could follow the actual cleanup.¹¹

By Oct. 5, 2015, a total of 1,323 sites were on the National Priority List, 391 had been removed from the list, and 53 new sites had been proposed. About 70% of Superfund cleanup activities had been paid for by potentially responsible parties. The only time cleanup costs were not borne by those parties was if they could not be located or if they were unable to pay for the cleanup.¹² Congress passed the Pollution Prevention Act in 1990 as national policy to encourage industry and universities to research technologies and processes that could avoid the production or use of hazardous substances.¹³ The Brownfield Amendments added to the federal Superfund law in 2002 “dramatically changed the Superfund liability landscape for landowners,” according to the EPA. Under the amendments, persons could acquire a Superfund site if they took ownership after Jan. 11, 2002, did not impede the performance of a response action or natural resource restoration, complied with land-use restrictions, took reasonable steps with respect to hazardous substances affecting the property, provided cooperation, assistance and

access, complied with information requests and administrative subpoenas, and provided legally required notices.¹⁴

By April 2017, environmentalists, government officials and media were discussing the potential impacts of significant budget cuts to the EPA's Superfund cleanup program. President Donald Trump's administration had proposed cutting the program's \$1.1 billion budget by about 31 percent and transferring the burden of some of the EPA's functions to states. While the proposal would significantly help reduce the federal deficit, scientists, environmentalists and some state and federal officials claimed the proposed reductions would further weaken the effectiveness of an underfunded program charged with remediating more than 1,300 sites across the country. "It's already been cut by 50 percent," said Kenneth Kimmell, president of the Union of Concerned Scientists and the former commissioner of the Massachusetts Department of Environmental Protection. "Far fewer sites are getting cleaned up as a result of that." According to Kimmell, the Superfund program's annual budget was set at \$2 billion and then was cut down over the following decade. The Congress eliminated a nine-year-old tax on the petroleum and chemical industries in 1995 that had funded the federal cleanup program, and the EPA turned to responsible parties to pay for cleanup projects. "The idea of it originally was that if you give the EPA the tools to make private parties who were responsible for the sites to clean them up," Kimmell said. "But as is often the case, sometimes the sites got contaminated 20, 30, 60 years ago and so there's no one left to hold responsible and so they still need to get cleaned up." The funding cuts also affected the EPA's ability to effectively handle environmental enforcement. As the former head of a state environmental department, Kimmell said the idea that states could take more control over cleaning up contaminated sites would only go so far, given the size and complexity of some Superfund projects. "More sites would sit there longer, more people including the most vulnerable people would continue to be subjected to the risks of living near these sites," Kimmell said. "More property would be taken out of economic commission. That's what the impact of cutting the Superfund beyond what it's already been cut will be."¹⁵

On Oct. 17, 2017, Montana Trout Unlimited and the nonprofit Montana Environment Research and Policy Center released a report called "Rough Waters Ahead" warning that the Trump administration's proposed 31% cut to the EPA could cost the state of Montana more than \$3 million and harm ongoing efforts to clean up and protect Montana's waterways. The report warned that the budget cuts could hamper scientific research, slow efforts to prevent pollution in local rivers, hold fewer polluters accountable, and stall work to clean up contaminated sites on the Superfund's National Priorities List. According to David Brooks, the executive director of Montana Trout Unlimited and a Superfund historian who contributed to the report, the Trump budget

cuts could impact Montana's 17 active Superfund sites, which could lose \$1,049,297 in the next fiscal year. The state's Superfund sites received \$3,497,656 in fiscal year 2017, the report said. Of the potentially affected grant funding, about one-third of the cuts would be to Superfund-related cleanup grants. Republican Montana Sen. Steve Daines wrote to EPA Administrator Scott Pruitt urging him to prioritize the Superfund program over other programs so as not to slow down cleanup efforts. Democratic Montana Sen. Jon Tester told Pruitt during a Senate hearing in June that the budget cuts would fail Montana communities. "You told me that you are going to punish bad actors," Tester said. "It is your job to hold these bad actors accountable and make sure they come to the table with a wallet that has money in it, and the EPA must oversee the cleanup." ¹⁶

State Superfund sites

Montana established its own Superfund program starting in 1985, when the Montana Legislature passed the Environmental Quality Protection Fund Act. The Act created a legal mechanism for the Montana Department of Health and Environmental Sciences, which later became the Montana Department of Environmental Quality (DEQ), to investigate and clean up, or to require liable persons to investigate and clean up, hazardous or deleterious substance facilities in the state. The act also established the Environmental Quality Protection Fund, a revolving fund where all penalties and costs recovered under the act were deposited. In 1987, the legislature created a delayed funding mechanism for the Environmental Quality Protection Fund that used 4% of the interest accrued by the Resource Indemnity Trust, a fund mandated by the state constitution for reclamation purposes which was funded up to \$100 million by taxes on the extraction of natural resources. The amount that went to the Environmental Quality Protection Fund was increased to 6% in 1995 and to 9% in 1999. The DEQ began addressing Superfund facilities in 1987. Temporary grant funding was used between 1987 and 1989 to clean up two facilities and to rank 250 others. The Montana Legislature amended the Environmental Quality Protection Fund Act in 1989 – the name was changed to the Comprehensive Environmental Cleanup and Responsibility Act (CECRA) and DEQ was provided with similar authorities provided by the federal Superfund program. In 1995, CECRA was revised to include the Voluntary Cleanup and Redevelopment Act, a pilot program that led in 1997 to the Controlled Allocation of Liability Act, legislation that provided a voluntary process to apportion liability and an "orphan share fund" for sites with bankrupt or defunct owners. ¹⁷

Most of Montana's Superfund sites were related to mining, smelting, wood treating, railroad fueling and maintenance, petroleum refining, landfills, and chemical manufacturing or storage. Historic waste disposal activities at these sites caused contamination of air, surface water, groundwater, sediments, and/or soils with

hazardous substances. The contamination caused or threatened to cause public health impacts such as contaminated drinking water and ecological impacts such as harm to fisheries. Typically, state and federal Superfund laws were not applied to permitted facilities if releases of hazardous substances were within the scope of a permit or a corrective action under a permit. By 2006, a total of 293 sites in Montana had been placed under CECRA, 83 had been delisted, six were considered maximum priority sites, 50 were high priority, 76 were medium priority, 54 were low priority and 15 were on the federal Superfund's National Priority List.¹⁸

Typically, a site did not go into the CECRA program until it had gone through the federal Superfund process and was found to be ineligible for placement on the National Priority List. CECRA sites were prioritized by the state under five categories, from "maximum" to "operational and maintenance." A Superfund investigation was not only complex – it also needed to be legally defensible if the parties held responsible decided to challenge the DEQ's findings. A three-step investigation included a remedial investigation to determine the nature and extent of the contamination, a risk assessment to evaluate threats to humans or the environment, and a feasibility study to look at cleanup options. State funds could be used to pay for cleanup of CECRA sites only if no responsible parties were willing to fund investigation and cleanup. In practice, however, the state did not have enough money for that.¹⁹

In 2005, the Montana Legislature directed the Montana Environmental Quality Council under House Joint Resolution 34 to study how effective and timely the state's Superfund process was working. The Council's September 2006 report found a dozen elements that had contributed to a successful cleanup process: 1) lack of DEQ project manager turnover; 2) active citizen groups or local government participation; 3) cooperative potentially responsible parties; 4) continuity among all stakeholders from start to finish; 5) adequate funding and resources; 6) EPA-provided Technical Assistance Grants for citizen groups; 7) clearly delineated scope of cleanup work; 8) clear communication and cooperation between the DEQ and stakeholders; 9) no litigation; 10) voluntary action; 11) prompt interim remedial actions; and 12) clear cleanup guidelines. The report also came up with 14 impediments to site cleanup: 1) lack of adequate resources at the DEQ; 2) high DEQ project manager turnover; 3) micro-management concerns with DEQ staff and projects, and insufficient decision-making authority for project managers; 4) "moving-target syndrome" caused by changing technology, standards and regulations; 5) "paralysis by analysis"; 6) a "jungle of red tape," with too many regulations and procedures; 7) litigation; 8) uncooperative potentially responsible parties; 9) complex site contamination; 10) multiple potentially responsible parties; 11) lack of money; 12) rapid change at the site over time, such as development; 13) inactive citizens; and 14) lack of clear cleanup standards.²⁰

The largest Superfund site in Montana was also the largest and oldest in the U.S. – mining and smelting wastes accumulated over 150 years that extended from mile-high Butte near the Continental Divide to the former smelting town of Anaconda about 20 miles west, and about 120 miles downstream to Missoula where contamination in the Clark Fork River was mostly blocked by the Milltown Dam. The Anaconda Company, which built the aluminum plant in Columbia Falls in the early 1950s, held title to the mines in Butte and operated a giant metals processing and smelter plant in Anaconda and a metals refinery in Great Falls. Working under CERCLA authority from 1988 to 2005, the EPA cleaned up areas in Butte and Anaconda around former smelter sites, mine-waste dumps, railroad beds, stream banks and channels, and residential yards to address immediate human health and environmental risks. Contamination was removed from stream sides and channels, and local area groundwater was treated. According to the EPA, the long-term remedy included long-term environmental monitoring; removal of contaminated soil, sediment and tailings; placement of contaminated materials in repositories; treatment of wastes left in place; institutional controls; treatment of contaminated surface water; excavation and treatment of arsenic-contaminated soil; and construction of an expanded capacity water supply system for the community. The Atlantic Richfield Co., which completed a merger with the Anaconda Company in 1981, was the responsible party for the Butte-Anaconda Superfund site.²¹

Litigation in the Butte-Anaconda Superfund site continued even after a \$260 million cleanup settlement was reached between the state and ARCO in 1999 to pay for cleanup in the Butte, Silver Bow and Anaconda areas. On May 13, 2003, U.S. District Judge Sam Haddon ruled against the state in *Montana v. ARCO* regarding lands allegedly damaged by fumes from the Anaconda smelter. The state was seeking about \$47.5 million for damages to 11,000 acres on Mount Haggin, the old Smelter Hill and Stucky Ridge, north of the town of Anaconda. Haddon ruled that the damages occurred prior to December 1980, and Superfund law stated that natural resource damages could not be recovered for impacts that “wholly occurs” before that date. The federal Superfund law was enacted in December 1980, and Montana’s Superfund law was enacted in 1985. The state’s argument that damages do not occur until “a trustee incurs expenses to restore the resource or restoration costs are quantified by the court is unpersuasive,” Haddon wrote. “If the term ‘occurred’ was construed as argued by Montana, the ‘wholly before’ limitation in the statute would be rendered meaningless.” The state had also argued that damage to natural resources still continued. Haddon’s decision did not affect the 1999 settlement.²²

ARCO also was the responsible party for the 442-acre site in Great Falls where the 506-foot high chimney at Anaconda’s metals refinery on Smelter Hill at Black Eagle “belched” smoke beginning in June 1909. Smelter Hill had been classified as a medium-priority

state Superfund site since the 1980s. According to the EPA's July 2004 report on contamination levels at the site, no emissions testing had ever been conducted by Montana on the smoke from the chimney until 1972, when the state enacted air pollution regulations and created the Montana Air Quality Bureau. The DEQ also said very little pollution testing had been conducted at the site since 1982. ARCO officials said the company had spent about \$20 million cleaning up the site, and the city of Great Falls joined Cascade County in drafting a land-use plan for Smelter Hill in 1997. ARCO said it would deed the property to the city and county, and ARCO submitted its final cleanup plan for the site in June 2000. The DEQ, however, raised concerns about soil and groundwater contamination and requested the EPA complete additional testing, which held up the deed transfer from ARCO to the city and county.²³

The EPA's July 2004 report showed lead levels near the Great Falls zinc plant at 7,070 ppm, more than double the 2,300 ppm level considered a health risk for land used for recreation. Testing was also conducted near the former waste pile at the zinc plant dumps, near the former electric copper refinery, near the former aluminum rolling mills, and in landfills and the east and west ditch dumps. In addition, heavy metals were thought to be migrating from the site into the Missouri River. About 950,000 tons of slag and tailings were released into the Missouri River in 1907, and tests showed traces of contaminants that released in the floodplain. ARCO said embankments were in place to prevent further pollution of the river, but the EPA report described "metal-rich groundwater" seeping from a bluff into the river. Arsenic, cadmium, calcium, cobalt, copper, iron, lead, manganese, mercury, nickel, silver, sodium and zinc were all detected at concentrations about three times the levels found in upstream samples. Some testing was also conducted in residential areas around Black Eagle. Mildly elevated levels of heavy metals were found in three backyards in Black Eagle, but arsenic and lead levels were below the EPA's residential cleanup levels. Historical reports described use of material from slag piles at Smelter Hill for sanding streets in Black Eagle in winter. Government officials were considering whether to have the site classified as a Superfund site and placed on the National Priority List with 1,400 of the nation's worst environmental sites.²⁴

ARCO also was linked to a 2,140-acre Superfund site in East Helena where a lead and zinc smelter operated for more than 100 years. Operations there released lead, arsenic, copper, zinc, cadmium and other heavy metals into the air, soil, surface water and groundwater of the Helena Valley, contaminating more than a 100-square-mile area. The Anaconda Company operated the East Helena plant for 45 years before the American Smelting and Refining Co. (ASARCO) bought it in 1972. The EPA placed the smelter site and surrounding residential areas on the Superfund's National Priority List in 1984 and identified both ARCO and ASARCO as potentially responsible parties.

²⁵ ASARCO shut the plant down on April 4, 2001, and filed for bankruptcy in 2005. ASARCO settled environmental claims in 2009 and paid more than \$138 million for cleanup at the site. On Jan. 25, 2015, it was reported that ASARCO had filed a civil lawsuit against ARCO claiming ARCO failed to tell ASARCO or the EPA about pollution problems at the East Helena smelter before ASARCO bought the plant from ARCO in 1972. According to ASARCO's lawsuit, ARCO agreed to compensate ASARCO for some cleanup costs during the 1972 sale but failed to provide critical documents that showed hazardous substances had been discharged into the groundwater. An EPA project manager said ASARCO's lawsuit was not expected to have an impact on the cleanup at the East Helena plant because of federal laws governing cleanup obligations. ²⁶

The Columbia Falls smelter

The path to Superfund listing for the aluminum smelter in Columbia Falls could be traced back to 1980 when the state of Montana designated the Anaconda Aluminum Co. plant as a "large quantity hazardous waste generator"—five years before the state's CECRA Superfund program was enacted. The Montana Department of Health and Environmental Sciences conducted a preliminary site assessment of the aluminum plant in 1984 and found that hazardous wastes and solid wastes were generated at the site. Following acquisition by Brack Duker and Jerome Broussard and operation by the Columbia Falls Aluminum Co., the site was evaluated under CECRA in 1989. The Montana Department of Health and Environmental Sciences required a groundwater investigation in 1993 to determine sources of cyanide found seeping into the Flathead River, and the DEQ's Permitting and Compliance Division in 1998 required removal of spent potliner material in surface soil. ²⁷ The path to Superfund status picked up in December 2012 when state Senator-elect Dee Brown went to the Flathead County Commissioners and asked that the CFAC property be investigated as a potential Superfund site for cleanup. The site had been shut down since fall 2009. ²⁸ The DEQ began to negotiate an administrative order on consent with Glencore, the aluminum plant's owner, as a contract to direct a cleanup project for the site, but Glencore or its subsidiary CFAC broke off talks with the state in December 2014. ²⁹ That left the EPA to oversee how Glencore cleaned up the aluminum plant property.

Shortly after Glencore broke off negotiations with the DEQ in December 2014, CFAC Spokesman Haley Beaudry announced that CFAC had hired Roux Associates to develop a site assessment plan for the cleanup at the smelter site. Founded in New York in 1981 as a groundwater contamination investigation firm, the employee-owned company had grown to include 250 environmental professionals working for some of the largest and most sophisticated companies in the world, including ExxonMobil, Amtrak, Sunoco, BASF, Konica Minolta, BP, Eastman, Honeywell, GAF, Pfizer and Novartis. ³⁰ In April 2015,

CFAC announced that it had entered into a contract with Calbag Resources LLC, a privately owned salvage and repurposing firm, for the decommissioning and removal of buildings, tanks, silos, machinery, equipment and waste materials at the CFAC plant. The company had demolition experience at other Pacific Northwest aluminum plants and numerous large industrial plants.³¹ Although the demolition involved handling hazardous wastes, Calbag's work did not include the landfills and waste ponds that were believed to be the source of contamination to groundwater beneath the CFAC property.

On June 5, 2015, CFAC announced that Roux had completed a Draft Remedial Investigation and Feasibility Study (RI/FS) Work Plan to thoroughly understand conditions at the site and to explore potential remediation alternatives to address the conditions. The draft work plan "complies with applicable federal and state requirements," CFAC's press release said. "It presents a road map and schedule for performing a comprehensive assessment of existing site conditions and an evaluation of alternatives to address those conditions." Under the draft plan, Roux would conduct field investigations in 2016 and produce a summary report by the first part of 2017. The entire remedial investigation and feasibility study evaluation was expected to take about 4 1/2 years. After receiving public and regulatory input, CFAC would finalize and implement the work plan. CFAC said it had approached the EPA in December 2014 to discuss entering into an administrative order on consent to conduct the investigation. "Such AOCs provide for regulatory oversight of RI/FS Work Plan development and execution, including opportunities for agency review and comment on various interim steps," the press release said. If CFAC and the EPA entered into an order on consent, CFAC and Roux would modify the draft work plan to include appropriate regulatory supervision, the press release said. "This is a comprehensive plan for assessing the environmental conditions at CFAC and developing the data we need to evaluate potential remedial solutions," CFAC Environmental Manager Steve Wright said. "I am looking forward to receiving input from the public and regulators on the draft RI/FS Work Plan so we can finalize it and move forward. We will work diligently to implement the RI/FS Work Plan and coordinate closely with Calbag to demolish certain site buildings and properly dispose of wastes."³²

The purpose of the work plan was to identify chemicals of potential concern at the site and their sources; determine the nature and extent of the site-related chemicals in soil, groundwater, surface water and sediment; understand the fate and transport of the chemicals at the site; identify any exposure pathways, considering both current and potential future land use; evaluate current and potential future human health and ecological risks posed by the chemicals present at the site; and conduct an evaluation of remedial alternatives for the site, including treatability studies where necessary. Roux said the draft work plan's methodology was in accordance with EPA guidance, but at the

time of the June 5 announcement, CFAC had not yet entered into an agreed-upon order on consent, and CFAC was not subject to an order to assess site conditions. Therefore the draft plan did not include provisions for regulatory oversight or steps for a regulatory authority to approve plans and data. It was CFAC's intention to discuss entering into an order on consent with the EPA, Roux said. Once that was done, appropriate changes would be made to the work plan. The remedial investigation and feasibility study would be conducted in phases over several years. Phase 1 site characterization would begin with site reconnaissance followed by geophysics and soil gas-screening methods to optimize sampling locations. In the fourth quarter of 2016, about 126 soil borings would be conducted; collection and analysis of samples from 51 surface and 51 shallow soil samples would be conducted on a grid across the site; 43 monitoring wells would be installed; and collection and analysis of surface water and sediment samples from about nine locations in the Flathead River, three locations in Cedar Creek and four locations in the Cedar Creek Reservoir Overflow Ditch. The results of this sampling and analysis would be presented in a summary report in the first quarter 2017.³³

According to the draft RI/FS Work Plan, interim steps to accelerate the remedial process, if necessary, could be taken during the Phase 1 site characterization period. A Baseline Risk-Assessment Work Plan would be prepared based on the results of the Phase 1 site characterization work, and the assessment would be presented in a remedial investigation summary report in the third quarter of 2018. A feasibility study to evaluate remedial options would follow, and a feasibility study work plan would be completed by the first quarter 2019. The feasibility study work plan would prepare remedial action objectives. A feasibility study report would be completed in the fourth quarter of 2019 with a detailed evaluation of alternatives to apply to the first seven of nine evaluation criteria. Those criteria included: 1) overall protection of human health and the environment; 2) compliance with the EPA's applicable or relevant and appropriate requirements; 3) long-term effectiveness and permanence; 4) reduction of toxicity, mobility or volume; 5) short-term effectiveness; 6) implementability; 7) cost; 8) state or support agency acceptance; and 9) community acceptance. Criteria eight and nine would be addressed by the appropriate regulatory authority after the feasibility study report and the proposed plan were released to the general public for approval. "CFAC is prepared to commit the resources required to complete the RI/FS according to the preliminary schedule," Roux said. "However, several factors not within CFAC's control will influence the project schedule, including the regulatory review and approval process, the availability of specialized contractors for certain aspects of the work, and the need to modify the scope of work based upon the investigation findings."³⁴

The EPA announced on Nov. 30, 2015, that a final agreement had been reached with CFAC for an administrative order on consent to investigate contamination at the aluminum plant site. Under the agreement, CFAC would conduct a comprehensive investigation of soils, river sediments, and ground and surface water to determine the nature and extent of contamination at the site, and CFAC would reimburse the EPA for its future costs in overseeing the investigation. "This agreement will help us fully identify the nature and extent of contamination and begin to address threats to human health and the environment at the Columbia Falls Aluminum Plant site," EPA Regional Administrator Shaun McGrath said in the press release. "We are encouraged that the company has committed to an aggressive investigation of the contamination in a legally binding agreement." The EPA said it had worked closely with the DEQ to negotiate the scope and details of the investigation.³⁵

The agreement came after significant political pressure was exerted by Sen. Jon Tester and Gov. Steve Bullock. "I'm pleased Glencore has finally realized it has an obligation to the people of Columbia Falls," Tester said in a press release, referring to the plant's owner. "As this process moves forward, I will continue to hold the company and the EPA responsible for ensuring this site is cleaned up and revitalized so we can continue to strengthen the economy in the Flathead." Bullock also supported the agreement. "I welcome the news that Glencore has recognized its obligations to clean the site and make it ready to once again become a driver of the Flathead economy," Bullock said. "The plant was a critical part of the economy of Columbia Falls and the site has been idle for too long. It has tremendous potential for redevelopment and will be an important anchor in the future of the region."³⁶

EPA Project Manager Mike Cirian told local media that the November 2015 administrative order on consent acted as a "blueprint" for how CFAC would assess the extent of contamination at the 960-acre site. "It's a binding agreement for a work plan to carry out the site assessment and feasibility study," he said. Initial steps would include drilling at least 43 wells to determine the extent of the groundwater pollution, gathering more than 130 soil samples from the site and analyzing contaminants in surface water and river sediments. Following completion of the feasibility study around 2020, an environmental assessment with public comments would be drafted to determine the best course of action for the site, he said. The agreement obligated CFAC to post \$4 million for the site investigation, remediation plan and government oversight costs. "It's kind of like a bond," Cirian said. "They get a bank to say if they walk away, we'll have \$4 million to finish the work."³⁷

If CFAC met the objectives of the agreement to the EPA's satisfaction, it could qualify for a Superfund Alternate Approach designation, Cirian told the Daily Inter Lake, which

would essentially hold CFAC to the same standards as a Superfund site without the stigma of being officially designated a Superfund site. “They’re almost the same thing,” he said. “The Superfund Alternative gives us the same oversight capacities, and it gives the community the same availability to Superfund options – for instance, community advisory groups and technical assistance groups – without actually listing it as a Superfund.” The EPA Region 8 office had only used the Superfund Alternate Approach designation once. Cirian said he expected the designation would come no sooner than fall 2016 and he expressed optimism about the process. “With a lot of Superfund sites, it goes to court cases, and there are companies that don’t want to take care of it.” In this case, Cirian said, negotiations went quickly, starting in July and reaching an agreement by the end of November. “To have this signed by November, it’s a pretty monumental site to get done that quickly,” he said.³⁸

The order on consent was issued under CERCLA authority and specified payment by CFAC or its parent company Glencore for any future response costs incurred by the EPA in connection with the investigation and study. Both sides agreed that the settlement was negotiated in good faith and did not constitute an admission of any liability. CFAC agreed to comply with and be bound by the terms of the agreement and that it would not contest the basis or validity of the agreement and its terms. The purpose of the agreement was “to determine the nature and extent of contamination and any threat to the public health, welfare or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants at or from the site.” All work conducted under the agreement was subject to approval by the EPA with the goal of evaluating remedy alternatives consistent with CERCLA and the National Contingency Plan.³⁹

According to the findings of fact for the order on consent, the EPA had sampled waste sources, soil, sediment, groundwater and surface water at or near the 953-acre smelter site in September and October 2013 and issued a report on the sampling in April 2014. The EPA had found releases or threats of releases of hazardous substances caused by industrial activities at the site, including arsenic, cadmium, chromium, lead, manganese, nickel, selenium, zinc, cyanide, fluoride, volatile organic compounds, semi-volatile organic compounds, polycyclic aromatic hydrocarbons, polychlorinated biphenyl compounds and pesticides. Samples from groundwater monitoring wells contained concentrations of arsenic, chromium, lead, selenium, cyanide and fluoride greater than the maximum contaminant level, and of zinc greater than the secondary maximum contaminant level. The April 2014 report also stated that these contaminants had a potential to migrate, which could impact drinking water. The April 2014 report also stated that cyanide, manganese and other contaminants had been detected in surface water and sediment in the Flathead River, which provided habitat for bull trout, a

federally designated threatened species, and westslope cutthroat trout, a federally designated sensitive species. The closed plant property included wetlands on both sides of the river.⁴⁰

According to the order on consent, CFAC designated the company's environmental engineer, Steve Wright, as the project coordinator. The EPA designated Mike Cirian as the remedial project manager, and the DEQ designated Lisa DeWitt as its state project officer. Cirian had the authority to halt any work required under the settlement agreement and take any necessary response actions if he determined conditions at the site presented an immediate threat to public health or welfare or to the environment. Under the settlement agreement, CFAC was allowed to ship waste material from the site to an out-of-state waste management facility if Cirian and an appropriate state environmental official in the receiving state approved the action. In the course of investigating and developing a feasibility plan, CFAC was required to provide the EPA and DEQ upon request with copies of records, reports, documents and other information. CFAC could assert business confidentiality claims and assert attorney-client privilege or other privileges recognized by federal law. However, "No claim of confidentiality shall be made with respect to any data, including but not limited to all sampling, analytical, monitoring, hydrogeological, scientific, chemical or engineering data, or any other records evidencing conditions at or around the site," the agreement stated.⁴¹

Stipulated penalties for failure to provide 12 different draft and final assessments, reports and work plans or financial assurance were \$1,000 per day for the first 14 days of noncompliance, \$4,000 per day for the 15th through 30th day of noncompliance and \$10,000 per day for any violation beyond 30 days. If the EPA took over any portion of the work, CFAC could be fined \$50,000. Nothing in the settlement was to be construed as prohibiting the EPA from seeking other remedies or sanctions if CFAC violated the terms of the agreement. The EPA also agreed to a covenant not to sue CFAC if the company abided by the conditions of the settlement agreement by completing the investigation and feasibility plan and met all its obligations to pay future response costs. CFAC could seek judicial review of a final rule placing the site on the Superfund's National Priorities List unless it was based on a claim that the remedial investigation itself changed site conditions. CFAC provided an irrevocable letter of credit as financial assurance that its obligations under the settlement agreement would be carried out.⁴²

Cirian said the investigation could take four years to complete, by which time many of the buildings would have been demolished and removed.⁴³ CFAC's March 2016 project update newsletter reported that Roux would conduct reconnaissance, geographical survey and gas soil screening in April, while drilling to install sampling wells would take

place in May through September. The first groundwater sampling would begin in September and conclude in October. The Phase 1 summary draft report and draft screening level ecological risk assessment report were due to be sent to the EPA by February 2017. All of the work had to be approved and overseen by the EPA and DEQ.⁴⁴

Plant site concerns

According to the EPA website in January 2017, multiple potential sources of contamination at the CFAC facility posed risks to human health or the environment, including landfills and percolation ponds. Spent potliner produced at the plant was known to contain cyanide and fluoride compounds that could leach into groundwater. Spent potliner was disposed onsite from 1955 through 1985, and other landfills and ponds had been used to dispose of various waste streams throughout the lifespan of the plant, the EPA said. According to the EPA's April 2014 site reassessment report based on field work in September and October 2013, samples were not directly collected from landfills to avoid compromising the integrity of the protective covering. Instead, the EPA sampled monitoring wells previously installed in locations down-gradient and up-gradient of the landfill and sludge pond sources to determine if contaminants had been released to groundwater. Multiple contaminants were detected in groundwater above background concentrations, including cyanide, fluoride, aluminum, arsenic, chromium, copper, iron, lead, nickel, selenium, vanadium and other metals.⁴⁵

Waste sediment and surface water samples also were collected from two percolation ponds for a common hazardous-constituent analysis. Contaminants detected in the water and sediment samples included cyanide and fluoride; semi-volatile organic compounds, such as anthracene, benzo(a)pyrene, chrysene, fluoranthene and pyrene; metals including aluminum, arsenic, chromium, copper, iron, lead, magnesium, manganese, nickel, sodium, vanadium and zinc; and pesticides. According to the EPA, evaluation of samples taken down-gradient and up-gradient of the landfill and sludge ponds confirmed that the contaminants had been released to groundwater at the site. Groundwater samples collected from monitoring wells contained several contaminants, including cyanide, fluoride, arsenic, chromium, lead and selenium, with concentrations above federal drinking water standards. Although the groundwater at the facility was not used for drinking purposes, groundwater migration would be evaluated during the remedial investigation process.⁴⁶

According to the EPA website, the agency had also conducted three rounds of domestic well sampling at nearby residential properties. Five residential wells were sampled in September and October 2013, and cyanide was detected in one well southwest of the CFAC property and one well north of the facility. The cyanide detections were below the EPA's maximum contaminant levels for drinking water and Montana's numeric water

quality standards. However, when compared to the EPA's risk-based screening levels, the cyanide concentrations in both water samples were higher than the EPA's tap water risk-based screening level. The screening concentration was a conservative value that the EPA considered to be protective for humans over a lifetime. Exceeding those values did not necessarily indicate that a health effect would occur but instead suggested that a more detailed assessment was warranted. No other contaminants were detected above the regulatory benchmarks or risk-based screening levels in the residential wells during the first round of sampling. Twenty residential wells were sampled in April 2014 and 10 more in November 2014, and no contaminants were detected above the regulatory benchmarks or risk-based screening levels, including cyanide. Surface water and sediments from the Flathead River and Cedar Creek had also been collected, with downstream samples compared to background samples. Releases of copper, cyanide and potassium were observed in Cedar Creek, and releases of cyanide, manganese, sodium, zinc and fluoride were observed in the Flathead River. Fish tissue samples were not collected in September and October 2013 as part of the site reassessment. With the limited amount of data captured as part of this sampling event, it was unknown if bioaccumulation of these contaminants was a concern.⁴⁷

Following the EPA's Nov. 30, 2015, announcement that a final agreement had been reached with CFAC for an administrative order on consent, Mike Cirian had told local media that if CFAC met the objectives of the agreement to the EPA's satisfaction, it could qualify for a Superfund Alternate Approach designation. The alternative designation would hold CFAC to the same standards as a Superfund site without the stigma of being officially designated a Superfund site, he had explained. With growing concerns by some members of the public and government officials about a Superfund designation harming property values, the tourist industry and economic development, the possibility of a Superfund Alternate Approach designation was an attractive solution for the former smelter site. But as questions naturally arose about just what the alternative designation meant, the media often turned to Cirian for answers.

The EPA's project manager for the CFAC site graduated from the University of Nebraska-Omaha and worked for the Army Corps of Engineers designing water treatment plants. After serving as a project manager for the Army Corps of Engineers in Iraq, Cirian returned to the U.S. and applied for a job at the Superfund cleanup project in Libby. He moved there with his family and became a project manager for the EPA in 2005. Cirian headed up planning, safety, budgeting and scheduling for the Superfund cleanup in Libby, where asbestos from W.R. Grace's vermiculite mine and processing facility had made the small northwestern Montana town one of the nation's most notorious Superfund sites. As the Libby project began to wind down around 2015, Cirian was named the project manager for the CFAC site. Cirian told the Flathead Beacon that to be

successful, a Superfund project manager needed to live in the community and have a local presence. He was the only EPA project manager in Montana who didn't live in Helena or Missoula. Cirian's wife worked as a nurse in Libby, and he was a member of the Knights of Columbus and a leader in a local youth shooting program. When he was assigned the CFAC position, he opted to continue living in Libby and commute to Columbia Falls. Cirian said he was developing trust in the Columbia Falls community just like he did in Libby. "Some people, they don't trust their government, they don't want the government in their business," Cirian said. "There's a group that aren't even willing to talk to us. We don't even know why... We're in Montana, and some people just want to be left alone. And they have that right." Cirian said he had been accused of lying, cheating and even taking federal money while working in Libby. "We're spending millions here, and I'm not a millionaire – not even close," he said. Cirian added that the EPA Inspector General had investigated him several times as a matter of protocol, but no charges had resulted.⁴⁸

Cirian told local media on Jan. 26, 2016, that the EPA would not make a decision about putting the CFAC site on the Superfund list until the fall. "That's the soonest any decision will be made," he said. The EPA was still looking at the Superfund Alternate Approach, but he couldn't say why the agency had decided to push back the decision to the fall.⁴⁹ Opposition to listing the site in the Superfund program had come from the Flathead County Commissioners and Glencore, but some Columbia Falls city officials were leaning toward the alternative rather than a full-blown Superfund designation. Cirian said there had been some confusion about what the alternative approach meant. "A Superfund alternative is still part of the Superfund process without the actual designation," he said. "It gets us through the remedial investigation-feasibility study... that will determine what needs to be done for corrective action. That's all it gets us." Superfund designation would provide access to federal money for a cleanup. If any of the \$4 million that Glencore pledged for the remedial investigation and feasibility study remained after that process was completed, it couldn't be used for cleanup, Cirian said. He also noted that the Superfund Alternate Approach had been used only once in EPA Region 8 area – at the Kennecott mining district in Utah. The reason why the alternative approach was not used more often in EPA Region 8 "is because Superfund works well," Cirian told local media. "When we're done, the communities are cleaner and better off and can move forward. It sometimes takes a lot of years to clean up something that has been used over decades or even 100 years."⁵⁰

Local politics

The Superfund Alternate Approach found support in the recently remodeled county courthouse in Kalispell, where the county commissioners had expressed growing

concerns about the stigma of a Superfund designation. On Jan. 25, 2016, Commissioners Pam Holmquist and Phil Mitchell approved sending a letter in support of the alternative approach to the EPA Region 8 office in Denver, Colo. The letter said the county wanted to see the site cleaned up without the stigma of a Superfund designation. “We don’t want it to be a Superfund site unless Glencore quits doing what they’re doing,” Holmquist told local media. “Right now, they’ve stepped up to the plate.” The commissioners made note of Glencore’s reluctance to get involved, but also noted that the company had put up \$4 million toward a remedial investigation and feasibility study. As long as Glencore continued to pay and stay involved, Holmquist said, she was OK with supporting the Superfund Alternate Approach in order to protect tourism and the valley. The study could determine the cause and extent of any contamination at the site. “In reality, they haven’t really produced a smoking gun yet, and hopefully if we can give them time with this monitoring, we’ll know where the smoking gun is and then we can move forward,” Holmquist said. Commissioner Gary Krueger was on vacation at the time and said he couldn’t comment on a letter he hadn’t seen.⁵¹

Holmquist and Mitchell also noted progress at the former smelter site. “Glencore has already begun environmentally compliant removal of several buildings at the site and has made significant charitable contributions to the community as a show of good faith,” the commissioners’ letter to the EPA stated. “Throughout our discussions, the community liaison panel made clear to our EPA representatives that we preferred a Superfund alternative designation over a traditional Superfund listing, so long as Glencore continued to work with the community and abide by the terms of the administrative order on consent.” The commissioners said they believed the Superfund alternative designation could avoid the stigma of a full-blown Superfund designation “while retaining our options for engaging in the Superfund process later on if necessary.” On the other hand, they acknowledged that the alternative approach could result in a delay in the cleanup if Glencore walked away following the remedial investigation and feasibility study. “It’s important for EPA to recognize that this site had been untouched for decades and would likely have remained so had the community not reached out to our elected representative and the EPA for assistance,” the letter stated. “We did this hoping to remain in control of our fate, not to abdicate it to EPA decision-makers living miles from us.” The letter was sent to Montana’s congressional delegation, Gov. Steve Bullock, Montana Sen. Dee Brown and EPA officials.⁵²

The Columbia Falls City Council found its way to a more solid and diametrically-opposite position in the Superfund debate during a meeting on Feb. 1, 2016. Following lengthy discussion, the council unanimously approved sending letters to appropriate government officials in support of having the CFAC site designated for the Superfund’s National Priorities List – not the alternative designation. The council discussion began

with City Manager Susan Nicosia recapping past community liaison panel meetings and noting that a decision to list the site would not take place until November. In the meantime, the EPA was seeking input on that decision and now was the time for the council to decide what it would tell the EPA, Montana's congressional delegation, the governor's office and state legislators, she said. Mayor Don Barnhart expressed concern over what he called "conflicting information provided to us from the EPA," including the "sudden introduction" of the Superfund Alternate Approach. He said information provided to the city earlier made it seem like the CFAC site would not qualify for the alternative approach. He also noted that the aluminum plant site was in the county, not in the city, but the city had significant concerns about environmental issues and wanted the property cleaned up. Barnhart said he had spoken to Chad Campbell at Sen. Tester's office and was told that the city should be patient and wait for Tester's office to complete its investigation into the alternative Superfund approach.⁵³

Councilor Dave Petersen responded to the mayor by saying he believed the most important vote by the council was when it said it wanted the site cleaned up, and based on what he understood Cirian had said, the city should "stay the course and say clean it up now." Petersen said he had strong concerns about public perception being impacted by recent newspaper articles and letters sent by the county commissioners. He said he didn't believe listing the site would damage the city or the county, and he supported the council sending a letter in support of putting the site on the National Priorities List. Petersen also expressed concern about the makeup of the community liaison panel and presentations being made to it. He said he felt the panel was "geared to be on the side of CFAC."⁵⁴

Petersen pointed out to the city council that the community liaison panel was put together by Glencore and was run by a public relations firm. He said he believed talk of a Superfund stigma hanging over the city may have been crafted at the meetings set up by Glencore. "This isn't their first rodeo," he said. Getting the site cleaned up was his objective. "I'm not afraid of a Superfund listing," he said. Petersen also questioned the county commissioners' letter to the EPA which claimed there was a "consensus" in the community in favor of the Superfund Alternate Approach. "I'm totally unaware of any consensus," he said. Petersen also questioned whether Superfund sites stigmatized nearby communities. He said he made Google searches online for other cities with Superfund sites and found the negative connection did not exist. Petersen also questioned Glencore's financial stability. While Glencore had put up \$4 million so far toward a remedial investigation and feasibility study, the cleanup process could go on for four or five more years, and an actual cleanup could cost millions more. Without a Superfund designation, there was no guarantee the site would get cleaned up if Glencore declared bankruptcy, he said.⁵⁵

Councilor Mike Shepard, who had worked at CFAC, told the city council that buried waste material posed a potential threat to the city's water quality in the future if it wasn't cleaned up. "The material that is underground will continue to degrade the water quality," he said. "Let's get it listed and move forward."⁵⁶ Shepard also noted that former employees he had talked with were in favor of a Superfund cleanup. Councilor Jenny Lovering said she agreed with Shepard. Councilor John Piper said he believed the community could overcome any stigma attached to a Superfund designation and also favored supporting the Superfund listing. Councilor Doug Karper said he wanted the council to stay the course, and Councilor Darin Fisher said he agreed with the rest of the council. Barnhart, who like his father had served as a volunteer fireman and mayor and had a good reputation in Columbia Falls, now faced six councilors with an opposing point of view. Barnhart explained that he had attended every community liaison panel meeting, and at no time in any panel discussion did the panel indicate they didn't want the site cleaned up. The consensus of the panel was to get the site cleaned up properly and as quickly as possible. Barnhart said Cirian had introduced the idea of an alternative Superfund approach, and if that would assure that the site got cleaned up quicker, then he was "for it 100%." Barnhart also noted that the letter sent by the county commissioners was never sent to the city council for its signatures. Petersen motioned to send a letter in support of placing the CFAC site on the Superfund list. He said the city council needed to be on the record and let politicians know they wanted the site listed as soon as possible. Fisher seconded the motion, and the motion passed unanimously – including Barnhart.⁵⁷

CFAC Environmental Manager Steve Wright addressed the council at their next meeting on Feb. 16, 2016. CFAC wanted to avoid a Superfund listing because of the cost and length of time it could take to get the site off the list, he said. But the council's mind was made up – the city council's letter to Sen. Tester informed him that the city intended to "stay the course" and support placing the CFAC site on the Superfund list. "The council came to this decision after much discussion and debate," the letter stated. "The decision was not made lightly and was based on a thorough review of the actions and information to date. While the council is appreciative of the progress made to date, obtaining an administrative order (on consent) and bonding for the testing phase, the council would like to ensure there is no delay in getting through the actual clean up phase of the site." The council expressed concerns about spreading contamination. "Providing clean safe drinking water is important to the citizens of Columbia Falls," the letter stated. "While testing of the city's wells have not revealed that the known contaminants from the CFAC site have made their way into the city's drinking water supply as of now, the city would not like to see cleanup and remedial action delayed until the city is faced with costly emergency measures to protect the city's water supply."⁵⁸

The very same day, Rep. Ryan Zinke spoke against listing the CFAC site during a media tour of the former aluminum plant. "I think if the site can be cleaned up rapidly without Superfund, that's the correct path," Montana's lone Congressman told local media. "The more bureaucracy that's involved, it only lengthens the process. There's a downside of having a Superfund site. There's a stigmatization. Once you get in, it's really difficult to get out." Zinke, a Republican, said he favored having the DEQ in charge, an opinion shared by the county commissioners, all Republicans, but opposed by Gov. Bullock and Sen. Tester, both Democrats. The Columbia Falls city councilors were nonpartisan.⁵⁹

Zinke didn't say whether he would support the Superfund Alternate Approach and instead said he wanted the state to oversee the cleanup. "It needs to be cleaned up in the fastest and most expeditious way," he said. "Ideally, you'd want the state to be the lead and force industry to do their part." Zinke referred to efforts by Libby to rebrand itself after being designated a Superfund site. "When you Google 'Libby,' it comes up Superfund site," he said. "It hits you in the face." He criticized the EPA as "desk after desk bureaucracy." Zinke said he hoped to see the site's infrastructure put to good use as a future industrial site once the cleanup was completed. The site's three transmission lines, 15-inch natural gas line, rail access, water from the Flathead River and the site's sewage treatment plant was backed up with a large number of former CFAC and lumber workers seeking employment. "Tourism, God bless it, it can't sustain an economy," Zinke said.⁶⁰ He also had a long talk with Calbag project manager Cliff Boyd about the demolition project. According to local media, Boyd said Calbag was awaiting a final permit from the DEQ for removal of spent potliner, and a large shear was expected to arrive soon for tearing down the Paste Plant. Boyd noted there had been no talk of a Superfund designation when his company first signed a contract to demolish the plant.

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On April 20, 2016, Zinke presented his case in an op-piece in the Hungry Horse News that Montana and the community would be better off if the state oversaw the cleanup at the CFAC site and not the federal government. "I think we can all agree that Glencore must be held accountable and the site must be fully cleaned and restored so that it can once again contribute to, not weaken, the community," he said. "The question is the process of how we restore the site." Zinke said the EPA was not the solution. "The EPA is the definition of government bureaucracy," he said. "It's top-heavy, cumbersome and costly." Zinke noted that none of Montana's 18 Superfund sites had yet been fully cleaned up. "We know from past experience in Montana and across the country that once a community gets put under the EPA's thumb, all state and local control is gone, and all we have to look forward to is a long and expensive process that often leaves communities stigmatized with low property values." He also cited several controversial political issues, such as the EPA's role in the recent Waters Of The U.S. rule and the

Clean Power Plan. A Superfund site in the Flathead Valley would harm the tourist industry, Zinke said, citing the Superfund site in Libby as an example. "I challenge anyone to Google 'Libby Montana,'" he said, and see if the results didn't reflect badly on the area. He also noted that, unlike in the past, polluting companies "can't cut and run."

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Superfund supporters

Local responses to Zinke began with opinion pieces in the Hungry Horse News from two Columbia Falls city councilors. On April 27, 2016, City Councilor Darin Fisher and his wife Carla said they were new business owners in Columbia Falls and were very optimistic about the community's future. They said they found it "insulting that Zinke thinks that a Superfund designation would keep Columbia Falls from becoming a 'thriving community,'" and they questioned comparing the CFAC site to the Superfund site at Libby, where asbestos contaminants had affected the entire city, including schools, homes and play fields. That wasn't the case with CFAC, they noted. They also questioned Zinke's version of the Superfund process to date. "Zinke continues to push the idea of state control despite the fact that Glencore stopped talking to the state over a year ago," they said. "At that point, the EPA stepped in, and since then Glencore has actually started to take some steps towards a cleanup." The Fishers encouraged Columbia Falls residents to "question Zinke's assumptions that a Superfund designation leads to a stigma that hampers growth and property values."⁶³

Mike Shepard also responded to Zinke's idea that the state should take over the cleanup project. "A reminder is needed in that Glencore's attorneys got up from the bargaining table with our governor and his agencies, and thus turned their backs on the state taking the lead on whatever will be needed to salvage that property to a usable piece of real estate," he said in his May 4 opinion piece. "At that point, the city council of Columbia Falls, of which I am an elected member, then lettered D.C. for help." He noted that Sen. Tester responded quickly. The DEQ did not have sufficient staff or funding to deal with such a big cleanup project, Shepard said. He also disagreed with comparing CFAC with the Libby Superfund site. Hazardous materials at CFAC were underground and leaking into groundwater, and the site was outside the city limits. At Libby, dangerous materials were all around, including inside the city limits, he noted.⁶⁴

Erin Sexton, who worked for more than a decade researching water quality in the Flathead area and lived on the Flathead River in Hungry Horse, addressed the Superfund debate in a May 27 opinion piece in the Flathead Beacon. "To me, the best solution to the CFAC issue is a cleaned up site and a thriving Columbia Falls community," she said. "Those go hand in hand, and the EPA is the best ally we have to hold Glencore and the other responsible parties accountable for cleaning up the property." She expressed

doubt about leaving the matter in Glencore's hands. "I understand the fear of a Superfund site label, but I am far more afraid that trusting the company and dismissing the EPA will leave Columbia Falls abandoned, polluted and broke." She noted that Western Montana was "full of abandoned mines" where the owners extracted wealth and left the taxpayers with the cleanup. She called for working with the EPA and the DEQ to investigate the site. "Right now, we don't know how much damage has been done, or how much it will cost to clean up," she said. "I hear folks talk about wanting to hurry up and get things cleaned up. Do we want a 'quick and dirty' cleanup or a quality effort overseen by experts?"⁶⁵

Sexton noted how difficult it can be to clean up pollutants after they have leached underground and into streams. She also responded to comments about problem sites in Montana never getting off the Superfund list. "It takes decades or more to clean up contaminated sites," she said. "It is not the fault of the EPA that the sites aren't off the list. It is the fault of the companies that opened up shop, made their money and left behind a legacy of contamination." She also claimed that she knew of Superfund communities where the EPA was active which had "thriving economies, major tourist attractions, revitalized sites with cleaner industry, community infrastructure and jobs." She cited Whitefish as an example, a thriving tourist city with a Superfund site in its downtown.⁶⁶ Chris Schustrom, president of Flathead Valley Trout Unlimited, responded to Zinke and whether Glencore should be trusted to lead a CFAC cleanup in a June 6 opinion piece in the Daily Inter Lake. "Glencore, however, has demonstrated little interest in cooperating," Schustrom said. He pointed out that the EPA was needed to force a major asbestos cleanup in Libby – "Certainly W.R. Grace wasn't going to help" – and to get the Upper Clark Fork River cleaned up after it was severely polluted by mine waste from Anaconda Company mines in Butte and its smelter in Anaconda.⁶⁷

During a media tour of the former smelter on March 24, 2016, Sen. Tester said he still hoped to see the site placed on the Superfund list for cleanup. He also expressed skepticism about Glencore and the Swiss company's resolve to see the site cleaned up. "The only way they got here was the EPA," Tester said. "I'm afraid if it becomes a voluntary thing, they could walk away or they could restructure." He said he opposed the Superfund Alternate Approach and said he was disappointed by Glencore's failure to work with him years ago when he attempted to broker an electrical power deal between Glencore and the Bonneville Power Administration that would have kept the plant operating. City Manager Susan Nicosia, who accompanied Tester on the tour, said she simply wanted to see the site cleaned up and repurposed into a new economic driver for the city, whatever the process. She also noted that the loss of the plant meant loss of tax revenue to the school district. "These were good-paying jobs, and we need to find a way to make this into a benefit to the community," she said.⁶⁸

Tester explained his tough position on Glencore. “We need to hold their feet to the fire,” Tester said during the media tour. “I applaud their efforts to clean up the site so far, but I think if this were to become a voluntary effort, they’d walk away from their responsibilities. They’ve walked away from past deals time and time again. We may be dealing with different people now, but it’s still Glencore.” CFAC Corporate Secretary Cheryl Driscoll, who accompanied Tester on the visit to the plant on March 24, told local media that CFAC wanted the site cleaned up without a Superfund designation. “Once this place is cleaned up, there will be no stigma attached to it,” she said, noting that the site boasted proximity to a scenic river and a rail line.⁶⁹ Following the media tour of the plant, Mayor Barnhart pointed out that it took the threat of federal Superfund designation to get Glencore working toward a cleanup plan. “It worked – they got put on the proposed list,” he said. “It’s a short road to Superfund listing at this point.” Barnhart also commended Glencore for putting up \$4 million toward a remedial investigation of the CFAC site, which was expected to begin April 1.⁷⁰

Zinke’s hope that the Montana DEQ could reclaim oversight responsibility of the CFAC cleanup project was dimmed following statements made by John Stroiazzo, an Xstrata environmental engineer with Glencore who was serving as project engineer at the CFAC site, and DEQ Public Policy Director Kristi Ponozzo in late April. Glencore and the EPA by that time were bound by a four-year agreement through an administrative order on consent – a contract that called for Glencore to pay for and conduct a remedial investigation and feasibility study under EPA oversight. “We’re locked in with the EPA,” Stroiazzo told local media, adding that DEQ staff attended all the meetings on the parameters of the studies. Ponozzo noted that the DEQ had tried to work with Glencore about the cleanup. “Initially CFAC said they wanted to move the cleanup along faster, so the state offered to negotiate a consent order,” she said. “DEQ must make sure that the cleanup is done correctly, and that is protective. To do this, DEQ must retain certain authorities. CFAC was not in agreement with that, and they broke off negotiations. Now DEQ supports EPA in moving forward using federal authority to ensure all necessary work will occur. Superfund listing is the strongest guarantee the site will be cleaned up.” According to a work plan drafted by Roux, cyanide pollution in groundwater at the site had been known for decades, and a cyanide seep into the Flathead River had been known for more than 20 years. The concentrations were low, and two different species of live fish survived a toxicity test of the contaminated water conducted in 2014. An environmental risk analysis would be part of the feasibility study.⁷¹

Public updates on the site continued. Mike Cirian spoke to about 40 people at an EPA open house in early April 2016. Work on a remedial investigation of the CFAC site was moving forward, with plans for 100 bore holes from 12 feet to more than 100 feet deep, 43 test wells with an average depth of 100 feet and 15 surface-water sampling sites, he

said. Well installation was to begin by May 18 and take a year to complete. The remedial investigation was expected to take about four years to complete, and a list of proposed alternatives could be submitted for public comment in 2020. “We want to make sure we do a really good investigation here,” Cirian said. “We know there is some contamination there. We don’t know how much. We know there’s enough to meet the hazard index on the National Priorities List.” Citizen Bank President Don Bennett asked Cirian if the EPA could delay placing the site on the Superfund list while Glencore and CFAC investigated the site. “We’ve got three years, and everything is working really well right now,” Bennett said. “Why can’t we continue the way it is?” Cirian pointed out that a Superfund designation would ensure that Glencore cleaned up the site properly, and delaying the listing would hamper cleanup efforts – including getting Glencore to pay for one of the alternatives. “If it’s not listed, that means we may have to start that whole process over,” Cirian said. The EPA also planned to establish a community advisory group to ensure the public was involved in the cleanup process, he said.⁷²

Superfund designation

The public’s concerns about the CFAC site were two-fold – pollution and economic impacts. Losing tax revenue had already taken place by 2016 – the site’s taxable value had declined from \$4 million in 1996 to \$114,000 in 2016.⁷³ CFAC paid \$462,000 in taxes on the site in 2010. Its bill for 2016 was \$73,862. “It’s not worth much anymore,” Montana Revenue Department Spokeswoman Mary Ann Dunwell told local media.⁷⁴ These figures were a far cry from the plant’s heyday – CFAC had once been the No. 1 taxpayer in the county. Its tax bill in 1973 was \$1.38 million. In 1986 it was \$2.35 million. The plant also was a major employer in its heyday, whether it had 1,200 employees under ARCO in the 1970s or around 600 under CFAC. In 1973, the payroll at the Anaconda Aluminum Co. smelter was about \$9.5 million. Between 1986 and 1993, CFAC paid out an average of \$18 million per year in wages and \$12 million per year in profit-sharing.⁷⁵

With the aluminum plant shut down since fall 2009, the main employer in Columbia Falls was the Plum Creek Timber Co., which first moved to Columbia Falls in 1946. The company eventually established a saw mill, plywood plant and medium-density fiberboard plant in Columbia Falls and a saw mill and plywood plant near Kalispell.⁷⁶ On Nov. 8, 2015, timber giant Weyerhaeuser announced plans to merge with Plum Creek, creating the largest private landowner of timberland in the U.S. with more than 13 million acres and \$23 billion in equity based on current share prices. Plum Creek employed 750 workers, mostly in Columbia Falls, with an annual payroll of about \$60 million. Weyerhaeuser employed about 12,800 workers worldwide with about \$7.4 billion in sales in 2014.⁷⁷ But with the merger came downsizing. In addition to

eliminating about 100 jobs at Plum Creek's "Cedar Palace" headquarters in Columbia Falls, Weyerhaeuser announced on June 22, 2016, that it planned to permanently close the sawmill and plywood plant in Columbia Falls, eliminating another 100 jobs.⁷⁸ It was another hammer blow to the Columbia Falls economy.

The EPA officially placed the CFAC site on the Superfund's National Priorities List on Sept. 9, 2016. "The addition of the Columbia Falls Aluminum Company site to the National Priorities List will ensure the comprehensive investigation and cleanup of contaminants and help secure future opportunities for the reuse of this prominent property along the Flathead River," EPA Region 8 Administrator Shaun McGrath said in a press release. "EPA's action is based on a thorough review of site data and input from the local community." A remedial investigation of the site was being conducted by CFAC and its contractors through an administrative agreement with the EPA signed in November 2015. The EPA said it had carefully considered all comments that it received and would coordinate with the community of Columbia Falls to schedule public meetings and other outreach opportunities to discuss further steps and outline how the public could engage in the Superfund process moving forward.⁷⁹ Mike Cirian told local media not much would change on the ground from a project standpoint. Testing would continue, but the Superfund listing provided financial assurances from the federal government that the site would get cleaned up – with or without CFAC support, he said.⁸⁰

Support documents for the final rule that placed the CFAC site on the Superfund list described five sources and releases to groundwater of cyanide, dissolved arsenic, dissolved chromium and dissolved manganese – the East Percolation Pond, West Percolation Pond, West South Percolation Pond, East South Percolation Pond and West Landfill. The first was considered a "surface impoundment," the second through fourth were considered a "pile," and the fifth was considered a "landfill." Targets of these hazardous substances included groundwater users, fisheries, wetlands and sensitive environments. A drinking well in the Aluminum City neighborhood that served nine people had been evaluated, along with the Flathead River up to 15 miles downstream of the plant.⁸¹

Sen. Tester supported the EPA's announcement. "Glencore can no longer try and turn their back on families in Columbia Falls," he said. "This decision guarantees that after seven years of broken promises and stonewalling, Glencore will finally be held accountable for the cleanup of CFAC. Today is a step in the right direction, and I will continue to work with folks in Columbia Falls so we can strengthen the local economy, revitalize this site and create jobs." Rep. Zinke had long opposed the Superfund designation, saying it would stigmatize the local community. "I grew up in the Flathead. I

know how vibrant the Columbia Falls community and economy can be. EPA bureaucracy in Washington, D.C., is betting against Columbia Falls and taking away our local control,” he said. “I stand with county commissioners who say we need to hold the company accountable, but we also need to retain our right to do what we see is fit for the land. Once communities are put on the National Priorities List as a Superfund site, they rarely come off. That stigma remains. It draws down property values and hinders investment and future economic development. For a community that just lost a hundred timber jobs, I don’t think that’s something we can afford. I’m very disappointed in the EPA’s decision and will be working with community leaders to figure out ways to revitalize the area and bring jobs back to the Flathead.” Sen. Steve Daines also commented on the EPA’s decision. “This needed to be a community-led decision,” he said. “I will maintain vigorous oversight of the EPA on this project.”⁸²

Stroiazza also commented on the EPA’s announcement. “Needless to say, we are disappointed and believe listing the site is not in the best interest of the project or the community,” he said. “The Superfund process does not benefit the project at this time and changes nothing during the remedial investigation and feasibility study... CFAC believes that if the site had been addressed under the (Superfund alternative), it would have enhanced the opportunities to redevelop the site in a much faster timeframe and allow it to contribute to the local economy.”⁸³ Although Glencore had opposed the listing, Stroiazza said the company would continue working with the EPA on the remedial investigation and feasibility study. “From the way we understand it, all of the other (Superfund) projects that we’ve seen, these things seem to take a lot more time,” Stroiazza said. “It’s a debatable topic, but we were able to move very quickly with what we’ve done with the EPA thus far. Since the EPA brought this to us in 2015, we were able to negotiate the (agreement) very quickly.”⁸⁴

The Flathead County Commissioners had opposed the listing for many of the same reasons as Zinke. “There’s no need to do this at this time. Glencore has completely funded all cleanup work for two years,” Commissioner Mitchell said. “The EPA negated all the cooperation to date and essentially said big government knows best.” The Columbia Falls City Council after much discussion had chosen to back the listing. “The EPA has announced its final decision on our shuttered aluminum plant. I, for one, laud it,” Councilor Shepard said. “This plant is located in the county, not Columbia Falls, but the location of the problem materials that are buried jeopardizes the whole river and well system. The Columbia Falls City Council led the way on asking Sen. Tester for his help, and we are thankful he has stepped up. Now because of this listing, we will grow stronger and create more jobs in the region.”⁸⁵

Mayor Barnhart said he was hopeful the listing would ultimately get the CFAC site fully decontaminated and redeveloped. “The only reason we were pushing initially to get the EPA involved, not to list it but to get it on their radar, was so that Glencore would move,” Barnhart said. Referring to the so-called “Superfund stigma” issue, he added, “I’ve been around here enough that, quite honestly, I don’t think it’s going to be an issue. I think it shows that we’re getting it cleaned up.”⁸⁶ Local business owners like O’Brien Byrd welcomed a possible change. “God knows what we’ll see if we don’t do anything about it,” he said. “We can sit on our hands like we have, or we can be proactive and do something about it.” Many locals welcomed the EPA designation, Byrd said. “We want somebody like the EPA to come in, the professionals, the professionals in the environmental business, to come and do a thorough job of the cleanup,” he said.⁸⁷

EPA officials said the Superfund process would include input from the local community. “We rely heavily on local community and local government to help us determine or help us identify the needs of the community, so whatever cleanup we decide upon meets the needs of the local community,” EPA Site Supervisor Joe Vranka told local media.⁸⁸ The designation would open up federal resources for the community while providing certainty that the site ultimately would get cleaned up, Vranka said. “One of the important requirements is what we do meets the needs of the local community,” he said. “We can make some funds available to help with that planning process and then that feeds into the decisions we make about this.” Critics of the listing had argued that federal involvement would slow down the cleanup process, but Vranka said many Superfund sites in Montana had been improved significantly since their designation. He cited the Milltown Dam cleanup in Missoula and the Mouat Industries site in Columbus. “Our goal is to get cleanup in place, to get redevelopment going. That’s happening in communities across Montana,” Vranka said. “You get a new park put in, trail systems, encourage development – those are the types of things that really start to turn those communities around.”⁸⁹

Vranka noted that the EPA had been successful in compelling polluters to finance remediation – even if it required taking them to court. “There’s no guarantee that they’re going to (pay), but by going final it allows us to access the Superfund trust,” he said. “It allows us to access public money to implement the cleanup decision should we not have a viable potentially responsible party at the time.” If the EPA failed to compel the responsible parties to pay, the state could be required to cover 10% of the cost of the cleanup – not including the site investigation or feasibility study – as well as any operation and maintenance costs, such as long-term water treatment, he said. While Glencore had voluntarily entered into an administrative order on consent to conduct the remedial investigation and feasibility study, Vranka pointed out that the company’s

cooperation was not an admission of responsibility. “If we identify potentially responsible parties that we think can perform the cleanup under our oversight, we try to get them to agree to do it under an administrative order on consent,” he said. “Right now, we’re very fortunate in that Columbia Falls Aluminum Co. has been working with us.” Vranka noted that Superfund designation would not affect the ongoing remedial investigation.⁹⁰

According to the EPA’s final decision, the agency had received 73 public comments in support of listing the CFAC site. Opponents claimed the listing could delay cleanup or cause negative economic impacts by stigma. Other opponents questioned whether risks to human health existed, claimed that the EPA’s evaluation was inconsistent or in error, or noted that Glencore was doing a good job with the ongoing remedial investigation. One supporter for listing noted that since the site qualified for listing, then to not do so “would be negligent.” Another supporter noted that the cleanup project would be complex and the Superfund program was established to handle those types of sites. Other supporters pointed to widespread backing by the public and officials, cited successful cleanups at other Montana Superfund sites, or refuted the claim that a Superfund designation would stigmatize the local community. Some supporters wanted the potentially responsible parties to pay for the cleanup and expressed distrust of Glencore.⁹¹

Some comments in support of putting the site on the Superfund list claimed Glencore had deliberately tried to deceive the community. Some supporters felt that the listing would actually improve rather than stigmatize the community. Some supporters claimed that the existence of contamination at the aluminum plant site was preventing business opportunities. Some supporters claimed they knew of human health impacts caused by the CFAC site, including cancer and autism. Numerous supporters cited potential impacts to fish and wildlife, and the Wild and Scenic River designation of the Flathead River. Some supporters cited past airborne pollution by plant, including polycyclical aromatic hydrocarbons and fluoride in nearby forest land and Glacier National Park. Some supporters wanted the public to play a role in determining how the CFAC site would be used after it was cleaned up – including handing it over to public ownership. Some supporters wanted local workers to be hired for the cleanup work. One commenter noted the presence of a wide variety of pollutants in the CFAC landfills and asked that the material be removed rather than covered over as a corrective action management unit (CAMU).⁹²

The hidden alternative

An issue that hadn’t seen much public discussion in the Superfund debate was the possibility that Glencore might be allowed to use corrective action management units at

the CFAC site – building new engineered landfills to store waste onsite rather than hauling it away to out-of-state landfills. The plant’s sprawling historic landfill, used from 1955 to 1980, contained large amounts of spent potliner and other potentially hazardous waste, and the DEQ suspected the old landfill was a main source of cyanide that had contaminated groundwater. Mike Shepard said he raised the issue of CAMUs at the April 5, 2016, open house meeting hosted by the EPA. A Roux representative at the meeting said CAMUs might be on the table once initial groundwater testing was looked at in fall 2016.⁹³ Shepard later remarked on the size of the demolition work at the CFAC plant and its impact on the Flathead County Landfill, a carefully engineered landfill with individual cells, thick synthetic liners, leachate collection systems and even an electrical-generating plant fired by landfill gas. “Fast approaching 1 million pounds of asbestos removed, with 85,000 pounds of it friable, all hauled to the Flathead County Landfill – from one Superfund site to a future one, eh?” he wrote in an October 2016 email.⁹⁴ About a third of the 119,179 tons of waste hauled to the county landfill located between Kalispell and Whitefish in 2016, a big year for the Flathead County Solid Waste Department, came from construction and demolition debris, and the CFAC site was a main contributor.⁹⁵

According to the EPA website in January 2017, a CAMU was a special unit created under the authority of the Resource Conservation and Recovery Act to facilitate treatment, storage and disposal of hazardous wastes managed for implementing cleanup. CAMU regulations originally were promulgated on Feb. 16, 1993. The EPA amended the 1993 CAMU rule in 2002 with six changes. One reason cited by the EPA for allowing potentially responsible parties to use CAMUs was “to remove the disincentives to cleanup that the application of RCRA to these wastes can sometimes impose” – in other words, to provide a less expensive way to deal with hazardous waste disposal. According to the EPA, a CAMU “is used only for managing CAMU-eligible wastes for implementing corrective action or cleanup at the facility” and “must be located within the lower contiguous property under the control of the owner or operator where wastes to be managed in the CAMU originated.”⁹⁶

According to federal law, an EPA regional administrator could designate one or more areas at a facility as a CAMU unit. The regional administrator could prohibit the placement of waste in a CAMU when the wastes were not managed in compliance with applicable land-disposal treatment standards. Unless alternative requirements had been approved by the regional administrator, a CAMU that consisted of new, replacement or laterally-expanded units were required to have a composite liner and a leachate-collection system that was designed and constructed to maintain less than a 30-centimeter leachate depth over the liner. The regional administrator was required to provide public notice and a reasonable opportunity for public comment before

designating a CAMU. Federal law also described minimum treatment standards for wastes deposited in a CAMU. For non-metals, treatment was required to achieve 90% reduction in total principal hazardous constituent concentrations, with exceptions. For metals, treatment was required to achieve 90% reduction in principal hazardous constituent concentrations, with exceptions. A CAMU used for storage and/or treatment could not contain wastes after closure. Post-closure requirements would be established at CAMUs to protect human health and the environment. For units where wastes would remain in place, monitoring and maintenance activities would be required to ensure the integrity of any cap, final cover or other containment system.⁹⁷ Prior to the start of the April 19, 2017 CFAC Community Liaison Panel meeting at the Columbia Falls High School, EPA Project Manager Mike Cirian said a CAMU would not be used at the CFAC site because the amount of waste in the landfills was too great. He implied that use of CAMUs was never seriously considered for the CFAC Superfund site.⁹⁸

Potentially responsible parties

Montana had a long history of dealing with contaminated sites without a responsible owner – particularly historic mining and mineral processing sites. Very old sites were simply abandoned without reliable paperwork. Newer sites sometimes were left with a responsible owner who had declared bankruptcy, leaving the state government to pick up the bill for stabilizing contaminants before they migrated into groundwater or surface water. In some cases, responsible parties for closed industrial sites and mines were temporary shell companies with one or two employees in a rented office and no financial resources. Several of the Pacific Northwest’s aluminum smelters were owned by companies that had filed for bankruptcy, but cleanup progress nonetheless was achieved.

According to the EPA, the goal of the Superfund Enforcement Program was to get Superfund sites cleaned up by finding the companies or people responsible for contamination at a site and negotiating with them to do the cleanup themselves or to pay for a cleanup completed by another party, such as the EPA, a state or another responsible party. If a responsible party did not agree to do the cleanup, the EPA could issue an order to do certain work, or the agency could work with the Justice Department to pursue the party through the federal court system. If a party was out of compliance with an order or settlement, the Superfund Enforcement Program could take action to bring them into compliance by referring the case to the Justice Department for enforcement, assessing penalties or taking over the cleanup project.⁹⁹

The 1986 Superfund Amendments and Reauthorization Act encouraged the use of voluntary settlements, which resulted in less protracted and litigious interaction with potentially responsible parties. It also created provisions to ensure that federal agencies

cleaned up their own contamination, just like private parties. In the mid-1990s, the EPA established additional administrative reforms to improve the Superfund cleanup and enforcement program. According to the EPA, the reforms created a faster, fairer and more efficient cleanup program and addressed several critical enforcement issues, including allocation of responsibility, handling small-waste contributors and providing orphan-share compensation for cases where some of the potentially responsible parties lacked the funds to help pay for a cleanup. The 2002 Brownfield Amendments to the Superfund law addressed real and perceived liability barriers to redeveloping blighted and abandoned industrial property. Under the authority of CERCLA since it was enacted in 1980, the Superfund Enforcement Program's efforts to negotiate settlement agreements and issue orders for cleanup work accounted for about 69% of all cleanup work underway at Superfund sites around the U.S. by 2017, according to the EPA. For every dollar that the Superfund Enforcement Program spent, private parties committed eight dollars toward cleanup work.¹⁰⁰

According to the EPA, the agency would conduct a search to find all of the potentially responsible parties early in the Superfund cleanup process, looking for evidence to determine liability by matching wastes found at the site with parties that may have contributed wastes to the site. The EPA used many approaches to conduct this research, including reviewing documents, site investigation and sampling, interviews, using information-request letters to gather information, title searches, and conducting research on the internet and at libraries, courthouses and state offices. In addition to identifying potentially responsible parties, the EPA would try to determine the nature of a party's involvement as owner, waste generator or other role, a party's potential legal defenses, any applicable exemptions or exclusions, the amount of waste a party contributed, and whether a party could pay only very little or nothing at all toward the cleanup. According to the EPA's "Enforcement First for Remedial Actions at Superfund Sites," the EPA would usually ask potentially responsible parties to conduct site investigations and to perform the cleanup before using Superfund money.¹⁰¹

The smelter in Columbia Falls was built by the Anaconda Company, which merged with the Atlantic Richfield Co. in 1979. ARCO sold the plant to Brack Duker and Jerome Broussard in 1985, and the two men sold the plant to Glencore in 1999. ARCO, which was acquired by BP America in April 2000, also was the responsible party for the Butte-Anaconda cleanup project – the largest Superfund site in the U.S. On Feb. 7, 2008, the EPA announced that prolonged litigation with ARCO ended when the company agreed to pay \$187 million to finance natural resource restoration activities in the Butte and Anaconda areas at the head of the Clark Fork River Basin.¹⁰² Coincidentally, Glencore-Xstrata announced on May 8, 2014, that Tony Hayward was the new permanent chairman of the board for the Swiss commodities-trading company. Hayward was a

former chief executive for BP and was working his way back to prominence following the Gulf of Mexico oil spill in 2010.¹⁰³ Glencore had received about \$9 million from Calbag Resources LLC for demolition of the aluminum plant's buildings and had put up about \$4 million for a remedial investigation and feasibility study to be completed by Roux, which left Glencore about \$5 million ahead. If Glencore followed all the rules for hazardous wastes and shipped out of state all spent potliner produced after acquiring the smelter in 1999, the company might not feel responsible for contamination by landfills created by Anaconda or ARCO. That actual determination, however, likely would be made by attorneys working behind closed doors.

Charles Watenphul, a communications manager for Glencore in Baar, Switzerland, told Sen. Tester in a June 17, 2014, letter that Glencore was aware of recent sampling by the EPA and had "notified the previous owner of the property, Atlantic Richfield Co. and BP, about their obligations in respect of any potential remediation of the site."¹⁰⁴ When Jenny Chambers, the division administrator for the DEQ's Remediation Division, met with officials from the EPA, CFAC and Glencore in July 2014, the CFAC and Glencore representatives brought up BP, but Chambers said the DEQ intended to work directly with the current owner about the cleanup.¹⁰⁵

ARCO was very experienced with Superfund sites – particularly in Montana – and the company's officials were keeping an eye on the Columbia Falls aluminum plant site. On May 29, 2015, ARCO Vice President Patricia Gallery sent a letter to the EPA Docket Coordinator to officially comment on the proposal to place the CFAC site on the Superfund's National Priorities List. The company had numerous objections to how the EPA had scored the site on the Hazard Ranking System and had hired Copper Environmental Consulting to review the data. Gallery also noted that because CFAC, "a wholly-owned subsidiary" of Glencore, "has publicly stated its willingness to investigate the site and assess the nature and extent of public health and environmental risks associated with any releases of hazardous substances... listing is unnecessary since it will not result in a more prompt or effective cleanup." She also noted that Glencore was one of the world's largest diversified natural resource companies in the world and a major producer and marketer of more than 90 different commodities, so "Glencore's ownership of CFAC should allay any concerns EPA may have about CFAC's longevity or the potential need to access the Superfund."¹⁰⁶

Avoiding potentially responsible party status at future Superfund sites was the topic of a Feb. 24, 2016, journal article by four Roux Associates employees. Daniel Sullivan, the lead author, was vice president of Roux and a former EPA enforcement coordinator. The key point to avoiding potentially responsible party status was to be proactive and not reactive, they wrote. Liability for cleanup at sites with hazardous wastes was defined in

CERCLA and numerous state statutes. The National Contingency Plan allowed cost-recovery actions to be brought against a potentially responsible party by both private parties and government agencies. The article advised two key steps: 1) due diligence prior to acquisition of any new property and 2) “an appropriately robust waste management and environmental compliance program.” Under CERCLA, to avoid liability as a new owner of an historically contaminated property, the company needed to show that it “did not know and had no reason to know” of contamination prior to acquisition. Brownfield amendments to CERCLA offered some liability protection to “bona fide prospective purchasers,” but state laws often contained significant cleanup requirements that could affect new owners that were not responsible for historical contamination, they wrote. An important step for a company seeking to acquire a new property was to review internal documents or to look at a master list of responsible parties maintained by the EPA in its Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database. The database contained sites that were on the Superfund’s National Priorities List or had been proposed for listing. The Roux authors warned that some sites that should be on the list may not be, and corporate names often changed over time as a result of acquisitions, mergers, divestitures or bankruptcies.¹⁰⁷

The authors advised against doing nothing, noting that the EPA “typically casts a wide net when attempting to identify PRPs, sometimes implicating companies that have legitimate reasons to believe they are not liable.” If a company was identified as a potentially responsible party, there were steps that could be taken to minimize risk or mitigate financial exposure. “Remember, PRP means ‘potentially’ responsible party,” the authors said. The first and perhaps most common approach to getting a company out of potentially responsible party status was to demonstrate that it was not a corporate successor of the companies that were responsible for the contamination. That could be proven through a legal review of corporate history and successorship, which could be complex and disputed by various parties, and ultimately decided by legal proceedings. In some cases, a company reached a prior settlement with a regulatory agency or received indemnification from private parties as part of a corporate restructuring or property sale, the authors noted. In those cases, a company might be able to shield itself from action by a fellow potentially responsible party. The key could be that the indemnitor was solvent and willing to pay without further judicial intervention. A company that generated hazardous waste that was transported to a waste storage facility undergoing CERCLA review might be protected through the Resource Conservation and Recovery Act, the authors said. A company that had been identified as a potentially responsible party due to previous or current ownership of a property where historical releases occurred might be able to show that it was an “innocent landowner” if it did not contribute to the hazardous substances. The innocent landowner defense was added to

CERCLA in 1986, and it required that the company that acquired a property “did not know and had no reason to know” of contamination that was present at the property prior to acquisition.¹⁰⁸

In cases with multiple potentially responsible parties, the EPA and state agencies “almost never apportion liability amongst the PRPs,” the Roux authors said. “Typically, the government will allow the PRP group to perform its own apportionment using whatever methods the group finds acceptable.” For landfills, potentially responsible party groups used volumetric methods, apportioning liability by volume of waste or by relative years of ownership. The U.S. Supreme Court made an important ruling on apportionment in a 2009 case involving the Burlington Northern Railroad. The court recognized the use of “reasonable methods” to apportion liability, but that left the door open for the railroad to avoid liability for “orphan shares” of the cleanup, which ultimately deflected 85% of the cleanup costs to the government. CERCLA also provided for statute of limitations based on the starting time for different cleanup phases – remedial action, remedial design, remedial investigation/feasibility study, or removal action, the authors said.¹⁰⁹

A pollution case in Wisconsin that involved liability apportionment set a legal precedent under the de minimis defense. Several companies in the case had been held liable under the federal Superfund law for PCBs that left their properties and eventually made their way about 30 miles downstream to Green Bay. The defendants argued that the amount of PCBs released from their facilities was so small that they should not be held liable under CERCLA for downriver response costs. In his decision, Judge William Griesbach noted that the defendants were attempting to argue for a de minimis defense, which they had conceded was not provided for under CERCLA. “In other words, there need be no ‘nexus’ between a given defendant’s release and a specific response cost incurred,” Judge Griesbach said in ruling against the companies. “It is enough that (a) the defendant released a pollutant and (b) response costs were incurred to clean up ‘a’ release.”¹¹⁰

Public access

For the media and the general public, access to information was a key element to understanding and even participating in lengthy Superfund cases, but a federal decision in a Butte-Anaconda Superfund lawsuit marked a setback to transparency. On Sept. 20, 2016, the Montana Standard newspaper and the Silver Bow Creek Headwaters Coalition filed papers in federal court in Butte seeking to intervene in a case between ARCO and the EPA over cleanup of mining and smelter waste in the Butte area. The newspaper wanted U.S. District Court Judge Sam Haddon to open up negotiations for the cleanup, saying the public and the press had a right to keep a “watchful eye on the workings of

government.” The cleanup had been going on for more than 20 years and was governed by a consent decree between the EPA, ARCO, two state agencies and Butte-Silver Bow County. “There are few matters more important to the people of Butte and Silver Bow County than the environmental cleanup of the Silver Bow Creek/Butte Area Superfund Site — including the manner in which that cleanup is conducted and whether the cleanup proposals will in fact ensure a clean and restored Silver Bow Creek,” a brief in support of the motion said. According to the newspaper’s brief, Judge Haddon’s initial order in August 2002 to make the talks confidential was granted through a single motion by the EPA that was unopposed and contained no substantive reasons. The state of Montana had agreed to the confidentiality provisions. Then in December 2003, ARCO asked that an additional provision be made making communications during negotiations remain confidential after the talks were over. The judge approved ARCO’s request, and Butte-Silver Bow County agreed to the terms in November 2004.¹¹¹

The state and the county denied open-records requests and open-meeting requests by the newspaper in June 2016. “At the Montana Standard we believe that when three levels of government — state, federal and local — are holding talks that will affect life in Butte for generations, the public is entitled to know what’s going on in real time,” Montana Standard Editor David McCumber said. The newspaper said the EPA and ARCO “had no right to bargain away the public’s rights” to know about government dealings that affect Montana. The newspaper also rejected the suggestion made privately that cleanup talks should remain confidential because it was the only way negotiators could be frank and reach agreements similar to those on other Superfund matters. “Does anybody believe that this process could have been any more tortured and less effective if it had been carried out in public?” the newspaper asked in a July 24, 2016 editorial.¹¹²

Judge Haddon ruled against the Montana Standard and the Silver Bow Creek Headwaters Coalition on Dec. 7, 2016, saying the request by the newspaper and the advocacy group came 13 years too late and could prejudice the parties involved. The public would be able to read and comment on the final settlement once it was reached, Haddon said. McCumber said the newspaper had not yet decided on whether it would appeal. “By filing this action, we were able to underscore the helplessness that a lot of people in Butte feel,” he said. “There’s a lot of dissatisfaction here in Butte with the status quo.” James Goetz, who represented the newspaper, said local residents had lost faith in the EPA as the negotiations dragged on. The federal government initially sued ARCO in 1989 over the cleanup of mining wastes in Butte. Haddon rejected claims that the EPA was not protecting the interest of Butte residents. “Nothing before the court supports the conclusion that the United States has betrayed the public’s interest in environmental remediation,” he said in his ruling.¹¹³

On July 31, 2017, the Columbia Falls City Council listened to EPA representatives Robert Moler and Mike Cirian explain the EPA's Technical Assistance Grant program, which could provide up to \$50,000 to community groups so they could pay for technical advisors to interpret and explain reports, site conditions, and the Superfund process at the CFAC site. A technical advisor might be a lawyer, engineer or hydrogeologist, depending on what information the nonprofit needed explained in layman's terms. "If they're a 501(c)(3), they can have technical assistance to have technical information translated to them and made available to the public," Moler said. Mayor Barnhart asked Moler whether a TAG-assisted nonprofit would overlap or replace the current community liaison panel. Moler said the panel was not eligible for a technical grant because it was funded by Glencore, CFAC's parent company. Only nonprofits were eligible for the grant, he said. He also noted that in Libby, community stakeholders formed a Community Advisory Group and then applied for a technical grant. The challenge with forming a community group, Moler noted, is that people must be willing to volunteer and donate their time for several hours a month. But without a community group or other nonprofit to receive the Technical Assistance Grant, there was no independent technical reviewer – meaning the community would have to accept data put forth by a privately funded group. A Technical Assistance Grant was "a really good thing if you have lots of questions or lots of documents," Cirian told the city council.¹¹⁴

Councilor Shepard said he favored use of the grant program so former CFAC employees wouldn't need to rely on the community liaison panel for information and decisions. He said he liked the idea of an independent group which would welcome former employees and allow them to share their thoughts. CFAC Corporate Secretary Cheryl Driscoll, who was present at the council meeting, spoke up at that point. "We've worked very hard to work with the community," she said, noting that the community liaison panel meetings were organized to address member concerns, not dismiss them. City Manager Nicosia asked whether a Columbia Falls nonprofit could receive a TAG for the CFAC site, which was outside the city limits. Matt Vincent, former chief executive of Butte-Silver Bow County and former director of the Clark Fork Watershed Education program, responded to Nicosia's question. "Whatever happens at that site has more bearing on the health and safety of this community than anywhere else," he said. Nicosia supported the idea of using the TAG program, noting her concern that the way the community liaison panel meetings were conducted created undue panic – if the word cyanide or fluoride came up, people left the meeting convinced that the community drinking water was harming them because there was no technical advisor to provide plain-language answers to citizens, she explained. "Let it be publicized that we think it's a great idea," Mayor Barnhart said. The city council agreed to formally vote on the TAG program at their next meeting.¹¹⁵

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- ¹ “Superfund history,” Environmental Protection Agency online, Jan. 29, 2016 [AL5067]
- ² Thomas Edsall, “Gutted ‘Superfund’ plan considered likely to pass,” *Missoulian*, Nov. 26, 1980 [AL5378]
- ³ Federal Register, Vol. 80 No. 58, March 26, 2015, Proposed Rules, Environmental Protection Agency, 40 CFR Part 300, National Priorities List, March 26, 2015 [AL4729]
- ⁴ For more information, see Kaley Beins and Stephen Lester, “Superfund Polluters Pay So Children Can Play,” 35th Anniversary Report, The Center for Health, Environment & Justice, December 2015
- ⁵ Environmental Protection Agency online, Jan. 29, 2016 [AL5067]
- ⁶ Federal Register, March 26, 2015 [AL4729]
- ⁷ Environmental Protection Agency online, Jan. 29, 2016 [AL5067]
- ⁸ Federal Register, March 26, 2015 [AL4729]
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