

# Congress of the United States

Washington, DC 20510

February 26, 2016

The Honorable Gina McCarthy  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Ms. Heather McTeer Toney  
Regional Administrator, Region 4  
Environmental Protection Agency  
Atlanta Federal Center  
61 Forsyth Avenue, SW  
Atlanta, GA 30303

Dear Madam Administrator and Ms. Toney:

We write to express serious concern regarding the Environmental Protection Agency's (EPA) administration of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), otherwise known as Superfund. In particular, EPA's designation of "potentially responsible parties" (PRPs) through an "air deposition" theory of liability appears to rest on questionable legal authority and may set a troubling precedent for all facilities in the United States which generate air emissions subject to the Clean Air Act and other relevant statutes.

As you are aware, on September 22, 2014, EPA proposed placing the 35th Avenue site in North Birmingham on the National Priorities List. According to the EPA Hazard Ranking System record that accompanied the proposal, "[a]ir is the primary source of deposition within the 35th Avenue site . . . from smokestacks and windblown particles from process fines and other stockpiled material." In conjunction with this air deposition theory, the agency has designated several facilities as PRPs and has informed the facilities that they may be forced to undertake cleanup actions or incur financial liability for costs associated with any cleanup of the site.

We are mindful of EPA's repeated attempts to increase the scope of federal regulatory authority, and we fear the application of the air deposition theory to supposed "arrangers" under CERCLA represents a significant expansion of the agency's Superfund enforcement powers. Arranger liability attaches to any person who disposes of hazardous substances,<sup>1</sup> with "disposal" defined as the "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste *into or on any land or water* so that such solid waste or hazardous waste or any

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<sup>1</sup> 42 U.S.C. § 9607(a)(3).

constituent thereof may enter the environment or be *emitted into the air* or discharge into any waters.”<sup>2</sup>

A plain reading of this definition demonstrates that, to the extent air emissions may be a factor in determining arranger liability, such emissions must result directly from the discharge of solid or hazardous waste directly into or onto any land or water. In other words, industrial air emissions from lawful sources are to be regulated under the Clean Air Act, not CERCLA. However, EPA seems intent on pressing the air deposition theory in North Birmingham, while having also endorsed the theory in an amicus curiae brief filed recently in the Ninth Circuit Court of Appeals. EPA’s legal positions raise serious questions regarding the agency’s understanding of its statutory authority.

Similar reservations are expressed in the enclosed resolution, adopted jointly by the Alabama House of Representatives and Alabama Senate and approved by the Governor of Alabama on June 9, 2015. The resolution describes the 35th Avenue site proposal and provides that EPA is “attempting to impose a novel and overbroad ‘air deposition’ theory of Superfund liability which would allow EPA to pursue industrial facilities for contamination at non-contiguous properties on the basis of air emissions which are subject to the federal Clean Air Act and authorized by a valid air operating permit.” The resolution notes further that EPA’s “broad air deposition theory would allow EPA to order businesses to clean up hazardous contamination within an indefinite area before proving that the business was actually responsible.” Thus, we are especially concerned with the due process implications associated with this charge.

The resolution also suggests that EPA is pursuing the air deposition theory “as an illicit means for funding policy initiatives which are outside its regulatory authority.” Indeed, the 35th Avenue site proposal appears to be part of an “environmental justice” initiative for EPA to become a *de facto* redevelopment authority in Birmingham.<sup>3</sup> Tellingly, the proposal follows a 2011 planning document in which EPA announced its intent to “go beyond traditional injunctive relief to stop illegal pollution . . . and, where appropriate and agreed to by defendants, to include Supplemental Environmental Projects . . . that provide benefits to communities,” as well as to “leverage benefits resulting from enforcement activities.”<sup>4</sup>

Finally, the resolution describes prior objections to the 35th Avenue site proposal from the Alabama Attorney General and Alabama Department of Environmental Management (ADEM). For example, ADEM repeatedly informed EPA that it did not concur with the proposed listing, as the Attorney General explained in a letter provided

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<sup>2</sup> *Id.* § 6903(3) (emphasis added).

<sup>3</sup> See Environmental Protection Agency, Region 4 Superfund, Annual Report, FY 2014 at 5.

<sup>4</sup> Environmental Protection Agency, *Plan EJ 2014: Advancing Environmental Justice Through Compliance and Enforcement* (Sept. 2011).

to EPA on January 20, 2015. Under the 1997 "Fields Memorandum," ADEM's decision to withhold concurrence required EPA to work closely with the State of Alabama prior to formally proposing a site for the National Priorities List. Yet the Attorney General's comment letter indicates that EPA neglected to follow the procedure outlined in the Fields Memorandum, suggesting agency disregard for state coordination and input during the site proposal process.

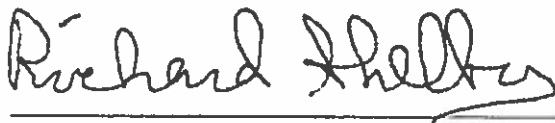
EPA's air deposition theory and corresponding proposal to place the 35th Avenue site on the National Priorities List raise important legal and scientific questions and present substantial risk for businesses that may have little to no responsibility for site contamination. For these reasons, the state Legislature, Governor, and Attorney General for Alabama have each requested EPA to reconsider its position.

We believe these requests are justified, and we urge EPA to give them careful attention. Furthermore, so that we may confirm the agency's appropriate understanding of CERCLA and related legal authorities, we request your staff to schedule a meeting with our offices at the earliest opportunity to discuss the concerns raised above and in the enclosed resolution.

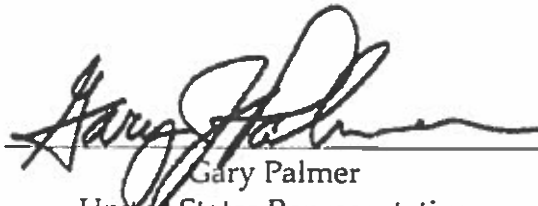
Yours very truly,



Jeff Sessions  
United States Senator



Richard Shelby  
United States Senator



Gary Palmer  
United States Representative

- cc: Sen. James M. Inhofe, Chairman, Committee on Environment and Public Works  
Sen. Thad Cochran, Chairman, Committee on Appropriations  
Sen. M. Michael Rounds, Chairman, Subcommittee on Superfund, Waste Management, and Regulatory Oversight, Committee on Environment and Public Works  
Sen. Lisa Murkowski, Chairman, Subcommittee on the Interior, Environment, and Related Agencies, Committee on Appropriations