

Testimony Supporting SB0125
Senate Judicial Proceedings Committee
January 30, 2024
Position: Support

Dear Chair Smith and Members of the Committee:

This discussion is about whether or not it should be state law that proximity to a Superfund Site should be specifically disclosed to a potential buyer of Real Property. There is no debate on whether or not this requirement already clearly exists. It does not.

According to the EPA, **a Superfund site on the National Priorities List is a national priority due to a known or threatened release of hazardous substances posing a risk to human health and/or the environment.**

To earn a spot on the National Priorities List, according to the EPA, a site has to score high on the Hazard Ranking List.

The Hazard Ranking system places heavy emphasis on the RISK that (the) toxins (at the site) pose to human and environmental health of SURROUNDING areas.

This risk is examined over four potential exposure pathways:

surface water migration, groundwater migration, soil exposure, and air migration.

When calculating this risk the EPA takes into consideration the LIKELIHOOD OF RELEASE, THE CHARACTER OF THE CONTAMINATION AND THE SURROUNDING POPULATION AND ENVIRONMENT.”

If a site scores high enough on the Hazard Ranking System it is by Federal Law then placed on the **National Priorities List.**

Only 5-10% of sites evaluated are contaminated enough to make this cutoff.

A place with a high enough score on this list is designated as a Superfund Site on the National Priorities List (NPL). It is among the worst in quantity and quality of contamination. Not all Superfund Sites are on the NPL.

To sum it up, by the time something has been declared a Superfund Site it is contaminated enough that it is determined by Federal Law to pose a threat to human health and the environment because of the risk of a known or potential release of hazardous substances. To be on the NPL, the site has to be a top priority based on its score. The purpose of this Bill is to alert a potential home buyer via a specific disclosure addendum that states proximity to this substantiated risk.

According to Cornell Law School, places that receive the designation Superfund Site are the heavy hitters of contaminated properties, considered to pose the *greatest risk to local populations and the environment. “The hazardous chemicals that are associated with Superfund sites tend to contaminate groundwater and soil most readily. {These types of contaminants can pose varying forms of risk to nearby homeowners including exposures by drinking and bathing in the water, vapor intrusion into the home, or other airborne pathways.}

Of the 30 hazardous substances found most often at Superfund Sites, more than half are known or suspected human carcinogens and nearly all are associated with some negative health effects including being toxic to the liver, kidney, or reproductive systems. Starting in the mid-1970s, countless governmental and nongovernmental studies have revealed disturbing patterns of elevated health problems, including heart disease, spontaneous abortions and death rates. Data has proven that infants and children {living near Superfund Sites in general} suffer higher incidences of cardiac abnormalities, leukemia, kidney-urinary tract infections, seizures, learning disabilities, hyperactivity, skin disorders, reduced weight, central nervous system damage, and Hodgkin’s disease.”

It is prudent that Maryland enacts this Bill to ensure standard prescribed purview and protocol disclosure for Real Estate Agents to utilize.

Currently there is no Maryland disclosure law specific enough to accomplish this with no vagueness, room for interpretation or loopholes. All current versions of such disclosure allow for interpretation.

This bill is simple. This bill:

- *makes it clear that if a property is within a .5 mile radius of a Superfund Site on the NPL, the listing agent must include that in the contract and assure that the purchaser has seen and understood this disclosure by providing a separate disclosure addendum noting this proximity by following the language in the bill

- *the bill states the disclosure addendum must be presented at the signing of the contract (last session we asked for this to be 5 days before signing the contract or in the listing and realtors said no)

- *the bill states that the purchaser has 5 days past signing the addendum to complete their Due Diligence

- *this bill allows a Rescission Right within those 5 days of review with refund of any earnest money deposit (last year when you amended the bill you removed this 5 day right to void the contract and replaced it with only the right to void the contract if the addendum was never given - this left the buyer with no recourse- they need 5 days to review the information and make an informed decision)

*provides a standard source, two US EPA URL's for realtors and buyers to gather official information

*(last year the bill was amended to remove the word “any” or “all” preceding “real estate transactions, that left the same current exclusions and loopholes as the current disclosure protocol, exempting new builds, estate sales, etc...)

According to the National Association of Realtors Code of Ethics, Realtors “shall avoid ...misrepresentation or concealment or pertinent facts relating to the property of the transaction...” and “...the term REALTOR® has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations.”

We believe that this bill strengthens the ability for Maryland Realtors to uphold their current Code of Ethics by avoiding material misrepresentation and sustaining moral conduct by assigning universal standard protocol and purview for disclosure that is not covered explicitly under current procedure and law and is in fact excluded in some instances in Maryland's current disclosure and disclaimer form.

This bill will help to prevent any charge of concealment or consumer fraud assertions thus protecting Realtors from liability. Not disclosing what has been legally defined and accepted under Federal definition by law as a potential threat to human health and the environment is concealment. The intention of this Bill serves all parties by making the process of disclosure fair and equitable.

According to the National Association of Realtors, Fiduciary duties are all the duties that that a real estate agent or broker is legally beholden to when working with a client. Two of the most important are: disclosure of all material facts and exercising with a sound Duty of Care. This Bill would assure standard legal and ethical protocol that would help Realtors uphold their Fiduciary Duties.

Reasonable care in real estate transactions is typically hinged on state laws. In some states this Duty of Care is defined as the legal obligation to use reasonable care to avoid injuring others. Not disclosing proximity to a Superfund Site, which defines a risk, is contrary to Reasonable Care. This Bill protects the Realtors, the property owners and the potential buyers by setting guidelines.

Legislators set protocol and purview into law that facilitates order and protects their constituents. There is no grey area that can be argued asserting that disclosure of

proximity of a Superfund Site is not in the best interest of all parties. The current disclosure laws leave too many holes and exceptions as seen in the Maryland 10-702.

The Maryland Board of Realtors statement last year was in favor of the bill with amendment. They assert that there already exists protocol and purview specifically for this situation as per the Maryland's Property Condition Disclosure Law AKA the Maryland 10-702 Disclosure and Disclaimer form. Again, this form does not work for this situation. It places the onus of disclosure on the seller, not the expert, the real estate agent, and it allows a seller to disclaim rather than disclose.

In addition, this disclosure form exempts new builds. It exempts foreclosures, estate sales. Buried in the document on page 2, number 14 is a line to answer, "are there any hazardous or regulated materials (including but not limited to licensed landfills, asbestos, radon gas, lead-based paint, underground storage tanks, **OR OTHER CONTAMINATION** on the property. Yes, No, or Unknown." Page four includes a blanket "as is" statement.

There are too many escape clauses and not enough in this disclosure form (current protocol, MD 10-702) that would specifically cover or flag notification in an appropriately conspicuous manner, in **all** purchases of proximity to a Superfund Site (which again, is declared such due to a known risk to public health and the environment).

Realtors want the disclosure written broadly into what appears to be all Maryland contracts, i.e. that a purchaser of Real Property in Maryland is advised to determine on their own if a Superfund Site is near the property instead of requiring .5mi disclosure by an expert agent of the sale. Most people do not even understand what a Superfund Site on the NPL is: **this bill gives the basic, clear information and source to a buyer, while narrowing the net to those who this disclosure actually and specifically pertains to.**

Realtors, last year, also allow no Right of Rescission based on what the potential buyer learns based on Superfund proximity unless the addendum was not provided at all (again, their amendment took out the 5 day right to void the contract and have their deposits returned): the **Maryland Bar Association noted last year that without the right to void the contract once reviewing the information, there is no recourse. The 5 day Right of Rescission protects the buyer.**

The Maryland Builder's Association asserted last year that the bill would create needless apprehension. Disclosure of material facts is, ... what it is. It is then up to the individual to determine whether or not a specific Superfund Site, designated so because of its potential risk, warrants apprehension or not.

If it is benign, it will assure the purchaser. Their association asserts that this issue is not easy to understand. Just because something is hard to understand does not negate the fact that it is important or that it deserves protection under law. The fact that it can be hard to understand is exactly why it deserves to be flagged as its own disclosure addendum and assigned a review period before purchase. **Laws are important ESPECIALLY when things are hard to understand and involve health and the safety of your family.**

If there were no possible risk, it would not be designated a Superfund Site, if it were not a prioritized risk due to its nature, it would not be on the NPL... the risk is by definition what makes it so.

So asserting that disclosing the facts will create an unnecessary stigma borders on concealment. Facts are facts and the weight of this deserves disclosure and alleviates apprehension from potential law suits and liability down the road.

There was a court case about nondisclosure in New Jersey that was brought to court by a condo owner who claimed a loss of resale value due to proximity to a Superfund Site. The claim was based on Consumer Fraud. The defendant/developer argued that the disclosure laws "limited the scope of disclosure obligations," and thus protected them from liability. The judge agreed with the defendants but the Appellate Division "reversed, finding that the sellers of new residential properties can be held liable under the Consumer Fraud Protection Act for failing to inform the buyers of nearby Superfund Sites....plaintiffs were allowed to prove ...that there was concealment."

In another case the New Jersey Supreme Court ruled:

"the broker...is not only liable to the purchaser for affirmative and intentional misrepresentation, but is also liable for nondisclosure of off-site physical conditions known to it and unknown and not readily observable by the purchaser if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and, therefore, renders the property substantially less desirable or valuable to an objectively reasonable purchaser."

Don't let this happen in Maryland. This Bill would prevent such cases.

Our bill sets uniform protocol that strengthens and upholds the Board of Realtor's Code of Ethics, protects all parties down the road from litigation, and allows the purchaser to have all information necessary before purchasing a home to confirm or deny apprehension and risk.

The Builder's Association called our request to simply disclose material facts, "egregious." What is egregious is wanting to conceal information that by data and law declares a risk to public health, specifically potentially near where you put your children to bed at night.

They argue that "if this information is relevant to the homeowner they already have a legal right to be informed." Relevant, is relative. I do not think there is any person in this room who would not want to know if they lived next door to a Superfund Site. We too believe they have a legal right to be informed which is why we are presenting this Bill. As we have stated, current purview and specific protocol, contrary to what the Builder's Association asserted, does not yet exist or we would not be here today.

We have a subdivision in our community that was given Master Plan Approval before it was confirmed that contamination from the neighboring Superfund Site had gone under the fence. We now know that the back three rows of townhomes are slated to be built on top of contamination that poses a vapor intrusion risk. Because these are new builds there is no disclosure that is clear cut that the developer or builder must offer. Luckily this contamination is courtesy of a military base, so the Army is mandated to pay for vapor intrusion barriers to be installed in these homes as they are built. I have sat on the Restoration Advisory Board for a decade, and no one yet can say definitively what disclosure would look like in this situation. The Army has declared no purview and the developer says they will let us know when the time comes. The local realtors I have asked understand that you don't know what you don't know and if there is no one that has lived there before they admit the 10-702 does not work. It is time to create protocol for an unprecedented situation.

Another way a situation like that can be tricky without a bill such as this, is that the Army suspected contamination on that property decades ago but because no homes were there, the area became a low priority for testing. We have a very active community on our local Restoration Advisory Board that took this issue on. After a long court battle for Right of Entry to test this land, the Army found what it had suspected but the Master Plan Approval had already happened because of the delay in testing. This is why the half mile designation is important.

Another example was in 2015 when the Army's contractor stated in a RAB meeting that "no current risks were identified" on the property just over the fence line of our local NPL site. I spoke up and asked why there was no risk if two sentences prior they revealed the type of groundwater contamination well above maximum contaminant levels that could cause vapor intrusion into homes. The answer was "because no one was living there currently." This was the same land that had been approved for townhomes, but because they were not built yet, the Army declared no risk on that land. To have risk there

must be exposure. By law there was no one to notify, the homes were not yet built. When we asked how eventually they would assess and proclaim risk, we were told the MD 10-702, which we saw on page 1, excluded new builds and therefore would not be applicable in this situation. This bill fixes any uncertainty of this type of disclosure in all residential real estate transactions moving forward with straightforward legal protocol.

Many large Superfund Sites sit in the Remedial Investigation (RI) phase for a long time. This is the phase where they characterize the quality and quantity of the problem. (Don't confuse this with testing to see if it is a Superfund, Hazard Ranking happens after that designation has been assigned.) When contamination is migrating through groundwater for example, wells have to keep being added to collect data until they get past the point of detection. **Many times this RI process moves closer to pre-existing homes as they catalogue that information.** So what was a property, perhaps purchased 5 years prior and a half a mile away, doesn't always, but could end up 1/4 of a mile away or found to be within distance of a vapor intrusion risk one they complete their testing years later. They do not know how far out will warrant testing until each current data set comes in.

We are not talking today about the 90% or more site investigations that do not end up Superfund Sites or are not on the NPL. This bill creates a disclosure law for the .5 mile vicinity of already **declared** Superfund Sites on the NPL which earned that designation through testing under Federal Mandates, EPA oversight and CERCLA Law which is short for the Comprehensive Environmental Response, Compensation Liability Act by the United States Environmental Protection Agency. Betty has provided, in her written testimony, a chart of the CERCLA process.

The Builder's Association, last year, referred to this bill as hurting Maryland's efforts to supply 97,000 units of low income housing, which by their very assertion is an Environmental Justice Issue saying that the disclosure of this Bill would place a stigma on the low income housing. At least they are being honest that this bill would affect low income housing perhaps the most. Statistics show that most communities that border Superfund Sites are low income areas. According to Poverty law.org 70% of the most polluted sites within the US are located within 1 mile of federal assisted housing.

The confusion over fact and duty brought up in the unfavorable opinions last year alone should put an explanation point on why this law is paramount for these transactions.

Last session, the Bar Association stated that many people live within a half mile and there are no consequences. Research negates that assertion. There is "a significant positive association between Superfund density and overall cancer rates across the 48 contiguous USA, in addition to a significant trend of number of Superfund Sites per county and the corresponding cancer rates...results show that geographic areas with greater numbers of Superfund Sites tend to have elevated cancer risk," as well as multiple other health risks. A list of such studies can be presented at your request.

Superfund Sites pose risk by definition. Proximity to a Superfund Site is a Material Fact and “under Maryland Law a real estate licensee must disclose to all parties Material Facts the licensee knows or should have known.” This bill sets protocol, allocates purview, protects all parties from liability, and fulfills the basic right to know through a prescribed Duty of Care.

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