



insights

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EPA Is Calling: Can It Clean Up Old Telephone Lines?

Dalton R. Mott

In June 2023, *The Wall Street Journal* published a series of articles alleging that turn-of-the-century telephone cables presented a serious human health risk all across the country. *Lead Legacy: A Wall Street Journal Investigation*, Wall Street J. (2023). In the late 1800s, telecommunication companies began installing telephone lines throughout the United States. Until the 1950s, these lines were covered with lead to protect them from being damaged by the elements. Many of these lines have become obsolete and are no longer used, but they have remained in place, and in some cases may have been long ago abandoned by companies that no longer exist.

The Wall Street Journal's investigation identified more than 2,000 lead-covered cables across the United States, including aerial, underground, and underwater cables. *Id.* The *Journal's* investigation alleges that these lines have caused lead contamination in soil and water in many different places in the

United States. *Id.* In September 2023, in response to *The Wall Street Journal's* investigation, the U.S. Environmental Protection Agency issued a statement saying that telecommunication cables “are no threats to the health of people nearby that would warrant an immediate EPA response action.” U.S. Env’t Prot. Agency, *California and Coal Center Lead* (2023). The EPA issued this statement after conducting sampling at many of the locations that *The Wall Street Journal* alleged were health risks. *Id.*

Nevertheless, in January of this year, the EPA called a meeting between it and the telecom companies to discuss the lead line issue. Shalini Ramachandran et al., *EPA Calls on Telecom Executives to Meet About Lead-Sheathed Phone Cables*, Wall Street J., Jan. 11, 2024. It appears that the EPA is intending to address the issue via the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund program. *Id.*; see 42 U.S.C. § 9601 *et seq.* Superfund allows the EPA to address and remediate facilities in the United States contaminated by hazardous substances and to recover the costs of such remediation from existing responsible parties. While this program may sound like an adequate tool for the job, the reality is that it is a complex program with often-unwieldy procedural requirements. Both the EPA and telecom companies will face many challenges if the EPA decides to address the telephone line issue via Superfund.

One of the first challenges is the scope of the problem. As previously mentioned, *The Wall Street Journal's* investigation has located at least 2,000 former telephone cables with lead covering. Ramachandran, Pulliam & Jones, *supra*. These lines were located by using open records requests to obtain historical federal permits and likely represent an underestimation. Notably, telephone lines that were within a single state and not designed to connect to interstate lines did not require a federal permit. 47 U.S.C. § 214. Also, lines installed before 1910 did not require a federal permit. Mann-Elkins Act, 61st Cong., 2d Sess., ch. 309, 36 Stat. 539 (June 18, 1910). Furthermore, the investigation focused on former lines associated with the Bell Telephone System, and so does not account for any of the independent companies that built telephone lines. Telecom company AT&T has represented in a court filing that only 10% of its two million miles of telephone cables have lead coatings. That would still represent nearly 200,000 miles of lead-based cables. Def.’s Supp. Status Rep., *Cal. Sportfishing Prot. All. v. Pac. Bell Tel. Co.*, No. 2:21-cv-00073-MCE-JDP (E.D. Cal. July 19, 2023) [hereinafter Def.’s Supp. Status Rep.]. The chief financial officer of Lumen Technologies estimated the company had 35,000 miles of lead-covered cables. Joe Panettieri, *Lumen Lead Cables: CFO Statements About Telecom Network*, Sustainable Tech Partner (Aug. 1, 2023). Other companies such as Verizon have indicated that they are not sure how many miles of lead-coated cables they control. Joe Panettieri, *Verizon Lead Cables FAQ: CEO, CFO Statements About Telecom Network*, Sustainable Tech Partner (July 26, 2013).

If each of these lead cables or even portions of these cables were addressed under the Superfund program, it would present extraordinary administrative challenges. For example, to proceed under CERCLA, the EPA would generally first need to list the “site” (however EPA may choose to delineate it) on

the National Priorities List, after an assessment of present and future risks to human health and the environment posed by a given site. 42 U.S.C. § 9604. The EPA would then need to identify potential responsible parties, notify those parties, and attempt to negotiate with those parties to perform requisite investigations and remedial efforts. 47 U.S.C. § 9622. This is a long, often-burdensome process. Geographically speaking, some portions of telephone lines could potentially be combined into unified single sites, but even with those combinations, that would still likely result in thousands of new Superfund sites. The EPA could bypass listing a site on the National Priorities List, but only if they have a party that will consent to do all of the required work. See U.S. Env't Prot. Agency, *Transmittal of Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach (SAA Guidance)* (Sept. 28, 2012).

That represents just the administrative process of getting a site into the Superfund program. Once that is complete then a remedial investigation, feasibility study, record of decision, remedial design, and remedial action must take place. Each of these steps will be subject to regulatory scrutiny and public comment. The EPA would likely be able to take knowledge from site to site, but new issues and challenges would arise. One analyst has estimated the cost to remediate all of the telephone lines at \$59 billion. Thomas Gryta & Coulter Jones, *AT&T Other Telecom Stocks Sink After WSJ Investigation on Toxic Lead Cables*, Wall Street J., July 14, 2023.

The extent of and risks posed by lead contamination can be difficult to characterize. For example, *The Wall Street Journal's* investigation showed elevated lead levels at many different locations associated with telephone lines. *Id.* But the industry's own testing has not found similar levels. Def.'s Supp. Status Rep., *supra*. For its part, the EPA itself double-checked some of the *Wall Street Journal's* own work and found nonelevated lead levels with its own sampling. *California and Coal Center Lead*, *supra*. Determining which locations require remediation will require considerable investigation and risk analysis.

Remediation presents another set of challenges: The primary means of remediating lead in soil and water is the removal of the source of lead and removal of lead-contaminated soil sufficient to reduce the overall risks. Industry experts have noted that the removal of lead-coated telephone lines actually can cause more contamination. Def.'s Supp. Status Report, *supra*. Proper disposal of lead-contaminated materials may include disposal in a landfill capable of accepting such waste, rather than a typical municipal landfill, leading to significantly increased costs.

Another challenge that the EPA will face is proving corporate responsibility for individual telephone lines, including abandoned lines. The telecom industry's corporate history is not simple. Many of the telephone lines were originally installed by the Bell Telephone Company (though some were installed by independent companies of varying sizes). See Clayton Strider, *A Study of the History, Development, and Use of the Telegraph, Telephone, Radio, and Related Devices (1947)* (thesis, Ohio State University). In 1984, the company (under a different name) was broken up for antitrust purposes into seven different new companies. *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp.

131 (D.D.C. 1983). Since 1984, these companies have gone through a series of mergers, asset purchases, and acquisitions.

While certain companies today have historical ties to Bell Telephone, whether they are a legal successor for purposes of CERCLA liability may be a different question. Under CERCLA, an owner or operator of a facility is liable if "disposal" of the lead occurred during its ownership or operations. 42 U.S.C. § 6907. The EPA likely will not have a difficult time showing liability for any company that currently owns or operates a lead-covered telephone line, but—especially for abandoned lines—identifying viable past owners and operators may be significantly more difficult, which puts the onus on EPA to find the right successor to earlier liable companies that no longer exist.


Proving that a current company is the legal successor to a company that owned or operated the telephone line at the time of "disposal" (as defined in CERCLA) can take years of investigation and litigation in itself. For example, if a corporation merely purchased the assets of an owner or operator at some point, then, under black-letter corporate law, the purchasing company would not have corporate successorship liability unless one of the exceptions to that rule applied. 15 Fletcher Cyclopedia Corps. § 7122. Whether any particular transaction transferred liability for past actions under CERCLA is highly fact dependent and depends greatly on state law. See *United States v. Bestfoods*, 524 U.S. 51, 63 (1998). Corporate successorship fights can be both costly and time-consuming and may be even more of a challenge for lines that have no current established owner.

One final complicating factor is the EPA is not the only government agency with jurisdiction over this issue. The Army Corps of Engineers is responsible for managing and permitting changes to navigable waterways in the United States, including the installation of telephone lines that go through navigable waters. 33 U.S.C. § 403. This responsibility continues to this day. For a telephone line to be removed from such waters requires permission from the Army Corps. Therefore, the Army Corps may have concurrent or primary jurisdiction over these telephone lines. State regulator agencies also may have a role to play.

If the EPA goes forward with its plan to use the Superfund program to address lead-covered telephone lines, it is likely to have a long, expensive, and difficult road ahead, testing the limits of EPA's authority and capability. The U.S. government could explore alternative routes to accomplish its goals. Former Federal Communications Commission (FCC) officials have asserted that the FCC not only has more expertise and history with these issues, its involvement is likely to be better accepted by the telecom industry. Tom Wheeler & Blair Levin, *Toxic Lead Telephone Lines: Searching for Solutions*, Brookings (July 28, 2023). However, it is unclear whether the FCC has authority to compel remediation of lead contamination caused by telephone lines.

Ultimately, Congress may need to act to create a more specialized tool for the agencies to address these issues. Because CERCLA imposes both strict liability and joint and several liability, any company singled out by EPA to shoulder full responsibility may have more incentive to litigate at every turn, potentially significantly delaying cleanup. In their article, the former FCC commissioners noted that if the U.S. government wants a speedy solution to the problem, new funding is likely

to be the best, and possibly only, solution. *Id.* At very least, the EPA is likely to have more success working with the telecom companies rather than using its enforcement powers to force them to perform work. The EPA may be able to attract more corporate buy-in by looking at ways to keep costs limited, such as focusing on the most critical telephone lines and tying multiple telephone lines into larger administrative sites to reduce

overhead costs. CERCLA may represent a solution to the lead-in-telephone-line issue, but one must ask: at what cost and in what time frame? 

Dalton R. Mott is an associate at Shook, Hardy & Bacon LLP in Kansas City, Missouri. He may be reached at dmott@shb.com.