

CERCLA and the Superfund Task Force: The more things change, the more they stay the same?

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The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601, known as CERCLA or the Superfund law, was enacted in 1980 during the final days of the Carter administration. It was intended to provide the Environmental Protection Agency with funds and enforcement tools to address past industrial practices that resulted in releases or threatened releases of hazardous substances into the environment.

New York's Love Canal, Kentucky's Valley of the Drums, and California's Stringfellow Acid Pits prompted widespread and bipartisan support for the initial Superfund law.

However, the statute's liability scheme — which provides for strict and retroactive liability along with potential joint and several liability among the various broad classes of potentially responsible parties — often resulted in protracted litigation and substantial transaction costs. Consequently, Superfund sites moved slowly, if at all, through the cleanup process and redevelopment rarely occurred.

During the almost 40 years since CERCLA's enactment, various efforts have been made to address some of the problems associated with the original law. Congress has passed several amendments, including the Brownfields Utilization, Investment and Local Development Act of 2018, known as the BUILD Act.¹

The EPA has issued numerous guidance documents and rules to make navigating the law easier. One notable example is the "all appropriate inquiry" rule, which gives potential purchasers of impacted property a blueprint for avoiding Superfund liability.

In addition, courts have resolved a number of Superfund liability cases. For example, the U.S. Supreme Court's decision in *Burlington Northern & Santa Fe Railway v. United States*, 556 U.S. 599 (2009), clarified that joint and several liability does not necessarily apply where there is a "reasonable basis" to apportion liability.

Notwithstanding these efforts, as of Oct. 1 there were over 1,300 sites listed on the National Priorities List² and 53 proposed NPL

sites. There are also more than 50 sites being addressed under the Superfund Alternative Approach, which uses the same investigation and cleanup process and standards as NPL sites.

The Trump administration's EPA has taken a renewed interest in the Superfund program, starting with the creation of the Superfund Task Force in 2017.

SUPERFUND TASK FORCE

On May 27, 2017, then-EPA Administrator Scott Pruitt commissioned a Superfund Task Force to recommend improvements to the site cleanup process at NPL-listed and proposed sites. In its initial recommendations, the task force addressed five goals identified by Pruitt:

- Expediting cleanup and remediation.
- Reinvigorating responsible party cleanup and reuse.
- Encouraging private investment.
- Promoting redevelopment and community revitalization.
- Engaging partners and stakeholders.³

For each goal, the task force recommended specific actions that could be undertaken to accomplish or advance the goal. In total, it "identified 42 recommendations that can be initiated without legislative changes during the next year."⁴

Approximately one year later, the task force published an update on the status of its recommendations.⁵ The 2018 update reviewed each of the 42 recommendations and provided a completion status and anticipated completion date for those items that have not been completed.⁶ The task force expects all remaining recommendations to be completed by September 2019.⁷

It remains to be seen whether implementing the Superfund Task Force's recommendations will promote the movement of impacted sites through the investigation and remediation phases



of Superfund and back to productive use. This article reviews some of the 42 recommendations and assesses their impact on future Superfund activities.

RECOMMENDATION: ADMINISTRATOR'S EMPHASIS LIST

Recommendation 1 from the task force was to “target NPL sites that are not showing sufficient progress towards site cleanup and completion.” This recommendation was quickly implemented, in part through the release of an “administrator’s emphasis list.” Also identified as “Superfund sites targeted for immediate, intense action,” the initial emphasis list was published Dec. 8, 2017, and included 21 sites from across the United States. The initial list included both NPL and non-NPL sites.

According to the EPA, the list should be viewed as dynamic and is designed to identify those sites that will benefit from direct involvement with the administrator.

In April two sites were deleted from the list and three sites were added. The San Jacinto River Waste Pits site in Texas was removed following an agreement on an administrative order on consent with potentially responsible parties to conduct the remedial design of the remedy approved by the EPA in October 2017.

The other site, the Anaconda Mining Site, became the subject of a deferral agreement between the EPA and the state of Nevada. Under this agreement, the EPA deferred listing the site on the NPL to allow the state and the potentially responsible parties to conduct an NPL-caliber cleanup.

Eight sites were removed from the list on July 31, reducing the total to 14. Milestones that led to the removal of these sites from the list included settlements with PRPs, the release of proposed cleanup plans for public comment, the completion of time-critical removal actions, the initiation of a non-time-critical removal action plan, and the issuance of a record of decision.

The list⁸ also identifies steps that must be taken to remove the remaining 14 sites from it. Some issues only require action by the EPA, including completion of an NPL Listing (Orange County Basin, EPA Region 9), release of a proposed cleanup plan for public review (Quendall Terminal, EPA Region 10), and finalization of an amendment to a ROD (West Lake Landfill, EPA Region 7).

Others require the completion of various negotiated agreements with PRPs (Portland Harbor, EPA Region 10 and Silver Bow Creek/Butte Area, EPA Region 8).

The list appears to be designed to spur movement at sites where progress has slowed or even stopped. As a result, it is possible that a site might be removed from the list only to be added back if progress slows down or reaches an impasse at a future stage.

“Identifying the right metrics for tracking will be key to judging the Superfund Task Force’s success.”

For example, the Portland Harbor site was listed on the NPL in 2000. In 2017, the EPA issued a ROD for a 10-mile stretch of the Lower Willamette River. The site is on the list, and the identified milestone associated with it is to “[n]egotiate agreements with additional potentially responsible parties to conduct sampling to support remedial design by the end of the calendar year.”

Such agreements to conduct sampling do not commit the PRPs to agree to implement any portion of the remedy. Since the remedial action is anticipated to take 13 years and cost about \$1 billion, the Portland Harbor certainly has the potential to make several appearances on the list.

According to the 2018 update, the EPA plans to update the list four times per year. If it does so, the list can focus the administrator’s and the agency’s attention on sites that require specific action to move forward in the Superfund process.

However, as anyone familiar with the Superfund process knows, the completion of certain administrative steps (e.g., issuance of a record of decision) only leads to additional legal or administrative requirements (e.g., issuance of a special notice letter to a potentially responsible party) before the record of decision and remediation may be implemented.

Thus, many of the items identified in the list as issues/ milestones may signify important administrative steps but

may not herald significant progress toward the remediation and return of the site to productive use.

As a consequence, the list may create confusion with community stakeholders who might not understand how a site on the list gets removed from it without any noticeable progress toward remediation.

Providing detailed reasons for removing a site from the list and what the public should expect at a former list site following removal will be an important aspect of educating community and other stakeholders within the context of cleaning up an NPL or non-NPL site.

The EPA should ensure that as a site is removed from the list, it provides detailed information regarding the next steps for the site to all stakeholders, particularly the community.

RECOMMENDATION: EARLY RESPONSE ACTIONS

The 2018 update reports that Recommendation 12 of the Task Force Report has also been completed. Recommendation 12 was identified as the “consideration and use of early response actions at Superfund sites, particularly sediment sites, while comprehensive negotiations are underway for the entire cleanup.”⁹

The early response actions portion of Recommendation 12 is being implemented through other recommendations. The EPA considers Recommendation 12 complete following the issuance of a new guidance memorandum June 21 by the Office of Site Remediation Enforcement titled “Bifurcating Remedial Design and Remedial Action to Accelerate Remedial Design Starts at PRP-Lead Superfund Sites.”¹⁰

Any remedial action agreement with PRPs must be embodied in a judicial consent decree. As a result, negotiations relating to consent decrees for both remedial design and remedial action, also known as RD/RA consent decrees, are often protracted.

This is particularly true when multiple PRPs or complex sites are involved. In contrast, an agreement for PRPs to perform remedial design work does not require the entry of a consent decree by a federal court but may be set forth in an administrative agreement.

Separating agreements to perform the remedial design from the remedial action allows the remedial design to proceed while negotiations over the remedial action implementation continue. The Office of Site Remediation Enforcement believes bifurcating the settlement negotiations will expedite the implementation and completion of the remedial design work, thus allowing a site to reach a point where the remedial action may be implemented.

However, the OSRE guidance memorandum does not represent a new direction in EPA policy. Policy documents issued in 1988¹¹ and 1992¹² both address accelerating remedial design work at Superfund sites by using administrative, as opposed to judicial, tools.

Before the task force was established, the EPA had already published a model administrative settlement agreement and order on consent for remedial design and a new model statement of work for such agreements in 2016.¹³

Even if the remedial design is performed under an administrative agreement, there is still a substantial likelihood that any agreement to implement the remedial action will lead to protracted negotiations before a consent decree is reached and the remediation moves forward.

Ultimately, whether a bifurcated approach leads to expedited remediation at PRP-funded sites depends on whether an agreement or another enforcement tool is used to implement the remedial action following the design phase.

Because remedial design work is usually much less expensive than the remedial action, PRPs may be willing to enter into administrative agreements on consent for the remedial design as a means of managing their remediation expenses and environmental commitments. By cooperating with such an approach, the PRPs may take advantage of current and future incentives to encourage settlements and avoid being considered a recalcitrant PRP.

The 2018 update identifies several sites where remedial design-only agreements have been reached. However, it is too early to tell whether the agreements will result in truly accelerated post-design cleanup.

TASK FORCE GOALS

- EXPEDITE CLEANUP AND REMEDIATION
- REINVIGORATE PRP CLEANUP AND REUSE
- ENCOURAGE PRIVATE INVESTMENT
- PROMOTE REDEVELOPMENT AND REVITALIZATION
- ENGAGE PARTNERS AND STAKEHOLDERS

It will also be interesting to see if EPA will use its enforcement powers in this area. It could require PRPs to undertake remedial design activities separately if negotiations for an RD/RA are unsuccessful. Or it could require PRPs to undertake remedial designs combined with a remedial action, whether or not remedial design agreements are reached.

Until sites using these agreements advance to implementing remedial actions, there are numerous potential hurdles that may prevent a bifurcated approach from expediting Superfund site cleanups.

RECOMMENDATION: THIRD-PARTY OPTIMIZATION

Other task force recommendations reflect implementation of policies that pre-existed the Superfund Task Force. For example, Recommendation 7 addresses the use of “third-party optimization throughout the remediation process.”

Although the 2018 update identifies the completion of 18 optimization evaluations as an accomplishment, the optimization process was first set forth in 2013 guidance issued by the Office of Remediation and Technology Innovation titled “Remediation Optimization: Definition, Scope and Approach.”¹⁴

The 2018 update ties the prioritization of the use of optimization resources to other task force recommendations, but it would be inaccurate to tout the completion of Recommendation 7 as something completely new.

RECOMMENDATION: REDEVELOPMENT FOCUS LIST

Any discussion of the 2018 update would be incomplete without mentioning development of the Superfund Redevelopment Focus List.¹⁵ This list was developed in direct response to task force Recommendation 33.

According to the EPA, sites on the redevelopment list have “significant redevelopment potential based on previous outside interest, access to transportation corridors, land values and other critical development drivers.”

A redevelopment fact sheet has been prepared for each of these sites. These sheets provide information to potential developers regarding the current site status, i.e., whether removal or remedial actions are complete, and when such sites will be development-ready.

The 2018 update reports that since the list was published in January, the EPA has responded to over 120 redevelopment inquiries from prospective purchasers of sites on the redevelopment list as well as other cleanup sites.

Providing tools like the redevelopment list is a good first step toward connecting prospective developers to former NPL sites that are or will be development-ready. The ability to sustain the effort through the continued refinement and movement of sites on and off the list will be key.

Whether redevelopment ultimately occurs on a formerly contaminated site may require some additional modifications and adjustments to some of the EPA’s current policies, like windfall liens, that continue to create potential obstacles to site redevelopment.

NEXT STEPS

Identifying the right metrics for tracking will be key to judging the Superfund Task Force’s success. One of the better metrics for measuring Superfund success is the process for delisting or deleting a site from the NPL.

The 2018 update identifies seven full site deletions and five partial site deletions that have occurred since the task force was created and anticipates up to 10 additional deletions in the short term. If sites continue to be deleted at an accelerated pace, the task force will be judged as a least a partial success.

Another important metric to track will be whether and to what extent the sites on the redevelopment list are put back into productive use. As sites are removed from the redevelopment list, it will be important for the EPA to be transparent and disclose why such sites were removed, what type of redevelopment was implemented, and what incentives were used, if any, to facilitate the redevelopment.

The more information that is provided to prospective purchasers and developers regarding the EPA’s site redevelopment activities, the more likely it will be that developers and prospective purchasers will be open to the possibility of putting remediated properties back into use.

While the implementation of some task force recommendations will continue over the next year, the impact of the task force and whether it accomplished any of the five goals identified in 2017 may remain an open question for years to come.

NOTES

¹ See Cox & Kempf, “BUILD Act Includes Added Protection and Incentives for Brownfield Redevelopment and Renewable Energy,” March 28, 2018, available at <https://bit.ly/2OrGGZL>.

² The NPL is published as Appendix B to the National Contingency Plan, 40 C.F.R. Part 300, and is the list of sites of national priority among the known releases or threatened releases of hazardous substances, pollutants or contaminants throughout the United States and its territories.

³ Report of Superfund Task Force Recommendations, Executive Summary, p. iii (released July 25, 2017), available at <https://bit.ly/2EZNUEO>.

⁴ *Id.* at p. iv.

⁵ Superfund Task Force Recommendations, 2018 Update (released July 23, 2018) (“2018 Update”), available at <https://bit.ly/2JI4TKC>.

⁶ *Id.* at p. 13, Table 1, Status of Superfund Task Force Recommendations.

⁷ *Id.* However, the EPA does not intend to implement Recommendation 17 (regarding adjustments to Financial Assurance requirements) as written, because “adjustments [to financial assurance] need to be based on site-specific circumstances. *Id.*, p. 32.

⁸ The most current version of the AEL is available at <https://bit.ly/2B5s27V>.

⁹ 2018 Update, at p. 28.

¹⁰ Available at <https://bit.ly/2D3X8xd>.

¹¹ OSWER Directive Number 9835, 4-2a (November 18, 1988).

¹² OSWER Directive Number 9835, 4-2b (April 2, 1992).

¹³ OSRE Bifurcation Memo, p. 2, f.n. 6.

¹⁴ Available at <https://bit.ly/2PcFz5w>.

¹⁵ See <https://bit.ly/2DKkaaN>.

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