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EPA TASK FORCE ISSUES RECOMMENDATIONS TO REFORM SUPERFUND PROGRAM

Written by Duke K. McCall, III and Conrad W. Bolston - August 08, 2017

The proposed reforms seek to accelerate cleanup and reuse of sites to reduce risks, reduce costs, and hasten redevelopment.

A key initiative of new US Environmental Protection Agency (EPA) Administrator Scott Pruitt has been to reform the federal Superfund program, the principal program under which contaminated sites across the country are cleaned up. On May 22, 2017, Administrator Pruitt established a “Superfund Task Force” to provide recommendations on how EPA can “restructure the cleanup process, realign incentives of all involved parties to promote expeditious remediation, reduce the burden on cooperating parties, incentivize parties to remediate sites, encourage private investment in cleanups and sites and promote the revitalization of properties across the country.” On July 25, 2017, the Superfund Task Force released its report, which identifies 14 strategies and 42 specific recommendations to achieve the following five goals:

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

Ultimately, the goals, strategies, and recommendations of the Task Force all seek to identify ways of accelerating the cleanup and reuse of Superfund sites in order to reduce risks to human health and the environment, reduce both program and cleanup costs, and hasten the return of contaminated sites to productive use.

Expediting Cleanup and Remediation

Eleven of the 42 recommendations in the report address how the Agency can expedite the cleanup and remediation of contaminated sites. The Task Force proposes to evaluate and accelerate the cleanup and deletion of sites on the National Priorities List (NPL)—the list of Superfund sites that pose the greatest risk to human health and the environment—by, among other actions, establishing a “Top Ten Administrator’s Emphasis List” of sites that will receive closer scrutiny and tracking. For large and complex sites (in particular, contaminated sediment and complex groundwater sites), the Task Force recommends using adaptive management principles, including greater use of early and interim actions, to address immediate risks, prevent source migration, and return portions of sites to reuse pending further action. The Task Force also recommends improved guidance in the area of groundwater restoration to promote timely remedy decisions and make use of the flexibilities inherent in the governing statute, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as well as the National Contingency Plan (NCP), which provides the regulatory blueprint for responding to hazardous substance releases. Finally, the Task Force proposes to use best management practices, systematic planning, remedy optimization, and expert technical resources to expedite remediation, including the use of third-party optimization evaluations

throughout the remediation process, and focus optimization on complex or significant sites.

Reinvigorating Responsible Party Cleanup and Reuse

The Task Force seeks to encourage and facilitate the prompt and thorough cleanup of sites by potentially responsible parties (PRPs), and thus the earlier reuse of such sites, through a number of measures, including requiring consideration of early response actions; providing reduced-oversight incentives to cooperative, high-performing PRPs; making full use of enforcement tools to act as a disincentive for protracted negotiations and slow performance of cleanups; and adjusting financial assurance requirements to reduce the financial burden on cooperating PRPs. The Task Force also proposes creating oversight efficiencies for PRP-led cleanups by designating a single lead agency for cleanups and engaging independent third parties to oversee certain aspects of such cleanups. Lastly, the Task Force seeks to promote the redevelopment and reuse of cleaned-up sites by encouraging PRPs to integrate and implement reuse opportunities into the investigation and cleanup of sites through creative mechanisms such as financial credits.

Encouraging Private Investment

The Task Force advocates using alternative and nontraditional approaches to promote the private financing of site cleanups through environmental liability transfer approaches and other risk management tools. The Task Force additionally recommends streamlining the process for the provision of comfort letters and execution of settlement agreements with third parties that are interested in purchasing and redeveloping contaminated sites but are concerned about potential liability and qualifying for the Bona Fide Prospective Purchaser (BFPP) protection added to CERCLA in

the 2002 Brownfield Amendments. The Task Force also proposes to encourage third-party investment through optimizing EPA's existing tools, including updating EPA's position on the use of site-specific agreements with third parties at NPL sites and updating EPA's model BFPP agreements, model Prospective Purchaser Agreements (PPAs), and model windfall lien settlement agreements. The Task Force further seeks to address the liability concerns of local governments by developing new "Local Government Enforcement Guidance" and model comfort letters to address concerns unique to those local governments that seek to acquire and redevelop Superfund sites.

Promoting Redevelopment and Community Revitalization

The Task Force proposes to facilitate site redevelopment through a number of actions, including identifying and focusing reuse resources on 20 NPL sites with the greatest reuse and commercial potential and conducting redevelopment training in all 10 EPA Regions. The Task Force also recommends that EPA assist communities in promoting redevelopment by, among other actions, creating a national team of redevelopment experts, offering technical assistance to local communities, and identifying other federal agencies that may provide additional redevelopment resources.

Engaging Partners and Stakeholders

Finally, the Task Force concludes that "[m]aking the Superfund process more efficient and promoting revitalization to gain long-term benefits for impacted communities must necessarily include building stronger strategic partnerships with key stakeholders across the Superfund process." The Task Force proposes that EPA do so by holding public and private dialogues with key public and private stakeholders, soliciting the

views of other federal agencies on how EPA can better engage those agencies, and establishing a federal advisory committee to identify barriers and opportunities to cleanup and reuse.

Conclusion and Implications

The Task Force states that all of the recommendations identified in its report are expected to commence, without the need for legislative action, within 12 months following approval of the Task Force plan, with many to be initiated immediately following approval. The Task Force notes that its report “does not represent all potential actions that may be needed in the future,” but that “it represents a good beginning that will lead to program efficiencies and identify areas for further refining.” In short, the Task Force’s report is reflective of and represents the initial step in the new Administrator’s prioritization of the Superfund program as a core element of the Agency’s mission to protect human health and the environment. For stakeholders, this renewed emphasis on the Superfund program and openness to novel approaches to facilitate accelerated cleanup and reuse of sites present significant opportunities to find new solutions, but also may portend new challenges in the push to move more quickly.

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