

## Environmental Law & Litigation

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### EPA's Recommendations to Jump-Start Superfund

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On May 22, 2017, United States Environmental Protection Agency ("USEPA") Administrator Scott Pruitt created a Superfund Task Force to "provide recommendations on an expedited timeframe on how the agency 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." The Task Force issued its **report** on June 21, 2017, identifying five goals and 42 recommendations for achieving those goals (the "Plan"). On July 25, 2017, USEPA published the Plan along with a **memorandum** from Administrator Pruitt identifying specific actions to be implemented expeditiously. The Plan also proposed time frames for initiating or completing each recommendation. The shortest time period proposed was 30 days from approval of the Plan; the longest is the fourth quarter of fiscal year ("FY") 2018 (i.e., July - September 2018). The recommendations were intended to be implemented without legislative changes during the coming year, but Administrator Pruitt acknowledged that some will require rulemaking to be fully implemented.

The five goals are:

1. Expediting Cleanup and Remediation;
2. Reinvigorating Responsible Party Cleanup and Reuse;
3. Encouraging Private Investment;
4. Promoting Redevelopment and Community Revitalization; and
5. Engaging Partners and Stakeholders.

Although the 42 recommendations are divided among the five goals, they can really be grouped into three broader categories: 1) methods for jump-starting the investigation and remediation process at sites that have not received sufficient attention; 2) incentives for potentially responsible parties ("PRPs") to perform high-quality work in accordance with, if not before, established deadlines; and 3) incentives for third parties – including developers, lenders, and local governments – to invest in and redevelop Superfund sites. The majority of the recommendations focus on this third category.

The specific actions Administrator Pruitt ordered USEPA to implement first (the "Administrator's Action Items") include:

1. Within 60 days, each region is to prepare a report to the Task Force identifying sites at which the risk of human exposure is not fully controlled and describing when such risks are expected to be controlled.
2. Use early or interim response actions to address immediate risks, prevent source migration, and return portions of sites to reuse while negotiations and more detailed evaluations are ongoing.
3. Prioritize the development of Remedial Investigation and Feasibility Studies for those sites that require more immediate attention so that funds and resources can be reallocated.
4. Identify potential pilot contaminated sediment or complex groundwater sites where Adaptive Management strategies (described below) can be implemented.
5. Compile existing information regarding the cleanup status and reuse potential of each site on the National Priorities List ("NPL").
6. Track remedy implementation and completion progress in real time.
7. Focus training, tools, and resources on current NPL sites with the most reuse potential.
8. Work with PRPs and with state, tribal, and local governments and real estate professionals to identify opportunities for PRP-led cleanups to consider future reuse in cleanups.
9. Each region is to submit to the Task Force chair within 60 days the total of its indirect costs charged to the PRPs for FY16 and FY17 to date, as well as the formula by which those indirect costs were derived.
10. Encourage PRPs to work with end users to voluntarily perform assessment and additional cleanup or enhancement work to achieve reuse objectives, and to fund or perform enhanced cleanup or "betterment" by voluntarily entering into agreements with end users.
11. Use purchase agreements for potential Bona Fide Prospective Purchasers ("BFPPs") outlining their actions necessary to preserve their BFPP status.

12. Use enforcement authorities, including unilateral orders to recalcitrant PRPs, more actively in order to discourage protracted negotiations over response actions.
13. In an effort to maximize deletions and partial deletions of sites that meet CERCLA<sup>1</sup> and National Contingency Plan requirements, within 60 days, regions are to develop a list of NPL sites expected to be proposed for deletion or deleted within one year, and submit the list to the chair of the Task Force.

Aside from these 13 actions, one of the recommendations already getting significant attention is that, within 30 days of approval of the Plan, USEPA will identify for the administrator a Top Ten list of sites that are determined to need “immediate and intense attention” and a second list of sites to target for completion. The Top Ten list is anticipated to be updated weekly; the criteria for designating these sites still need to be developed. USEPA will identify sites to target for completion based on any of the following criteria: five years on NPL without selection of a remedial action; a delay of more than two years between the selection of the remedy and the start of the remedial design; sites with at least one PRP at which remedial action has not begun (presumably this will be limited to sites at which a remedy has been selected and/or designed); or sites with special accounts, where the remedial design has been complete for more than two years without further progress.<sup>2</sup>

The Plan also recommends formalizing the use of Adaptive Management at complex sites. Adaptive Management is an approach used at large and/or complex sites that is intended to focus resources on the highest-priority actions while allowing flexibility to adapt the remedial strategy, in the event that uncertainties result in fundamental changes to site conditions. Items 2 and 4 of the Administrator’s Action Items encourage USEPA to apply Adaptive Management through greater use of early and/or interim actions to address immediate risks, prevent source migration, and return portions of sites to use pending more detailed review of other portions of the sites.

Although Adaptive Management can be used to focus remedial actions on targeted removals, implementation in phases also has the potential to extend remediation timelines beyond those initially anticipated at the time of settlement. Assuming the Plan time frames apply to Action Items 2 and 4, USEPA should publish its list of pilot sites for Adaptive Management in late summer 2018.

The Plan also proposes to accelerate cleanups by clarifying the principles of CERCLA groundwater restoration. The recommendation does not propose a change for drinking water aquifers, but for aquifers not reasonably anticipated for drinking water use, the Plan recommends evaluating modifications to the groundwater use designation criteria. Additionally, USEPA will

draft a policy for Clarification of Groundwater Flexibilities with emphasis on early action and a phased approach to remedy selection and implementation. Without specific reference to monitored natural attenuation (“MNA”) – i.e., the process of allowing contaminant plumes to naturally degrade over time without additional treatment – the recommendation seems to be proposing the development of a more straightforward path to selecting MNA as a remedy, at least for sites at which the groundwater is not reasonably anticipated to be used as a drinking water source. The draft policies are expected in mid- to late summer 2018.

The recommendations for encouraging PRPs to conduct timely and high-quality work mostly comprise financial incentives, combined with some enforcement strategies. The financial incentives include reducing oversight costs (including reviewing the calculation of indirect costs before the end of September 2018, pursuant to Action Item 9), reducing financial assurance requirements, using special account funds to reimburse PRPs, making the oversight process more efficient by reviewing third-party contracts and contracting procedures, and identifying opportunities to engage independent third parties to provide oversight for certain PRP-led remedial actions. This last recommendation of engaging independent third parties to provide oversight will likely seem familiar to PRPs in the northeast United States that have been working on state-supervised hazardous waste remedial actions with Licensed Site Remediation Professionals (New Jersey) or Licensed Site Professionals (Massachusetts). The enforcement strategies include using all available federal and state authorities to address hazardous waste (e.g., the Resource Conservation and Recovery Act and Safe Drinking Water Act), strictly enforcing adherence to project deadlines (for both USEPA and the PRPs), using work takeover provisions more frequently or accessing financial assurance funds when multiple deadlines are missed, and implementing early response actions simultaneously with PRP negotiations (particularly at complicated sites). Each of these recommendations is slated for consideration and performance in FY 2018.

More than half of the recommendations focus on integrating reuse and redevelopment opportunities in the remediation process as early as possible. Many of these recommendations focus on revising policies and model agreements to give prospective purchasers and local governments more comfort about the allocation of liability for Superfund sites and creating opportunities for prospective purchasers to remediate NPL sites without expending their own funds. The Task Force also recommended celebrating and replicating successful redevelopment efforts by local governments to further accelerate reuse and redevelopment of NPL sites.

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<sup>1</sup> CERCLA is the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

<sup>2</sup> Special accounts are funded solely with money received from PRPs through settlements. USEPA retains these funds in site-specific accounts to conduct planned future cleanup work at the site based on the terms of the settlement agreement.

Given the short deadlines for some of the Administrator's Action Items and recommendations, we may begin seeing draft policies by the end of August 2017 and the first of the Administrator's Action Items by the end of September 2017. For PRPs already engaged in investigation and/or remediation of their sites, however, the implementation of the incentives is more likely to occur in 2018. We will continue to monitor USEPA's progress in implementing the Plan, but if you have any questions about Superfund in the interim, please contact us.

## Contact

Please contact the listed attorneys, or any other member of Lowenstein Sandler's Environmental Law & Litigation for further information on the matters discussed herein.

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