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DAILY NEWS

Former Trump Transition Official Pushes Devolving Superfund To States

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The former top Trump transition official at EPA is urging the new administration to push to devolve the Superfund program to the states, a legislative step that would mark a major overhaul of the cleanup law, which unlike other statutes EPA implements does not allow for a significant transfer of power to states in the same way as permit programs do.

"I think Superfund is a good candidate to be devolved to the states," with associated funding distributed to the states to implement it, Myron Ebell, the former head of the EPA transition team, told *Inside EPA* March 3.

But some industry sources and legal experts say that any effort to devolve the program to the states could lead to uneven cleanup requirements and enforcement measures among states, which could create competitive disadvantages for companies subject to stricter state laws.

They say such a move would create inefficiencies, delays and resource constraints.

"We could see the classic 'race-to-the-bottom' that other environmental laws . . . were designed to prevent through the delegated program process," Lawrence Schnapf, a Superfund legal expert who chairs the environmental law section of the New York State Bar Association (NYSBA), told *Inside EPA* in a written response to questions.

Any effort to devolve more of the program to the states would likely have to be part of a longer term congressional review that GOP lawmakers have signaled they are eyeing over the next few years, though their early consideration of the issue has already signaled that they plan to devolve additional authorities to the states.

In the shorter term, though, EPA Administrator Scott Pruitt is promising to preserve the cleanup program's budget in fiscal year 2018 in the face of the White House's proposed 25 percent cut to the the agency.

Pruitt told the U.S. Conference of Mayors March 2 that the program is "essential to protect."

And in written answers to the Senate Democrats' questions during his confirmation proceedings, Pruitt said he planned to "make cleanup of contaminated sites one of my priorities."

Ebell, director of the Competitive Enterprise Institute's Center for Energy and Environment who was speaking in his personal capacity, said that given Trump's interest in abolishing or curtailing EPA and his support for states on regulatory matters, it makes sense to encourage more devolution to the states.

He said Superfund -- also known as the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) -- should be included in that discussion.

Congress then clearly would have to alter laws, he said. This would also lead to discussing what reforms should be made to Superfund, he said, noting it would provide a good opportunity for a "deep review" of what could be done to streamline the program, and lower its costs, he said.

Ebell said to the extent the proposed cut can be imposed on appropriators, that should push some members of Congress to think creatively about these programs, including Superfund.

Superfund 'Deep Dive'

Ebell's suggestions come as House Republican lawmakers are planning a review of the Superfund law. Rep. John Shimkus (R-IL), chairman of a House environment subcommittee, told reporters March 1 that one of his long-term goals over the next 4-6 years is to undertake a "deep dive on Superfund -- big."

At hearings his subcommittee held over the past few years on CERCLA issues, Shimkus has questioned the delegation of CERCLA cleanup authority to federal facilities, the extent of the sovereign immunity waiver under the law, and the role of states in CERCLA cleanups, as well as what problems have arisen in EPA's implementation of the law and whether there is "too much process associated with cleanups under CERCLA," according to memos for the hearings.

The House in 2014 passed a GOP-backed legislative package on CERCLA, which in part embraced the concept of a

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greater state role in cleanups.

The three-pronged package, which did not make it out of the Senate in the face of an Obama administration veto threat, sought an explicit waiver of sovereign immunity to allow states to sue federal agencies over remedies selected at Superfund and federal facility sites. It also elevated states' roles in listing and selecting cleanup remedies at Superfund sites and eliminated mandatory requirements for EPA to review, and update if necessary, its rules issued under CERCLA and the Resource Conservation & Recovery Act (RCRA).

Shimkus noted during a July 2016 House hearing that 35 years ago, few states had their own cleanup programs. "We need to assess whether States should have a more significant role in CERCLA cleanups and are there cleanups that are best handled entirely by the States?"

The comment echoed testimony from Marianne Lamont Horinko, the Bush-era head of EPA's waste office, who said in testimony that Superfund currently only includes a state review component.

She suggested that it "is time to consider authorizing states for all of our federal cleanup capabilities," noting that today, "virtually every state has a strong and capable cleanup program."

But legal experts and industry officials are decrying a possible move to devolve Superfund -- which unlike many other environmental laws lacks a state delegation component.

Schnapf, of the NYSBA, says that because CERCLA is not a delegated program, there would not be a requirement for minimum standards to be established before devolving the program to states.

He added that "[i]n theory, EPA could try to force the states to upgrade their state superfund authorities by using CERCLA Section 128 State Response Authority to require states to enact similar authorities as a condition of receiving grants to support their [hazardous] waste/substance programs." But it is unclear such a tool would remain in the face of cuts proposed by the Trump administration to states' grants.

He also told *Inside EPA* that states may lack the resources or the will to pursue cost recovery from PRPs that are located out-of-state, and in some cases may be reluctant to pursue PRPs that are major employers in the state.

Schnapf recently conducted an analysis of how New York state would be impacted by a devolved Superfund program. The study, to be published in a column in NYSBA's *The New York Environmental Lawyer* this month, found that EPA Region 2 in fiscal year 2016 spent almost \$40 million on cleanups in New York but doubts the state would be able to come up with those funds even if federal CERCLA funds were provided to states in a block grant.

Schnapf does not believe legislation would be required to devolve CERCLA to the states.

Weaker Oversight

But one former EPA waste official says that it "would not be done easily and certainly couldn't be done efficiently without legislation." Such a move also would not address the law's strict liability system, and would mean "50 different levels of capability at the state level," with some states being "significantly tougher" on PRPs than EPA currently is, the former official says.

Likewise, one longtime environmental advocate calls devolvement "a bad idea," noting that both federal and private PRPs with sites across the country prefer consistent regulation. The source says devolvement would reduce such consistency. Further, the source points to the currently delegated corrective action program under RCRA -- where "you see a great deal of variation in capacity, enthusiasm, and reliability." Weaker oversight would harm many communities, the source says.

Schnapf also noted that many state cleanup laws provide local agencies with authorities that are not as broad as that afforded to EPA by CERCLA section 104. For instance, many states do not have the authority to perform removal actions at sites not listed on the Superfund list.

In addition, the environmental advocate says EPA has many competent teams overseeing cleanup sites for years, and transferring responsibility for those sites now "would create delays and chaos." The source notes that this is why states and EPA are careful when deciding whether to elevate a site from state oversight to NPL status with EPA oversight. -- *Suzanne Yohannan* (syohannan@iwpnews.com)

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