

**DAILY NEWS**

# Legal Expert Urges Trump EPA To Adopt Brownfields, Other Cleanup Reforms

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A legal expert on brownfields and environmental law is recommending the Trump EPA reform several aspects of the brownfields and other cleanup programs that he says would advance the new administration's goals without weakening environmental laws, such as replacing brownfields grants -- which are in danger of being zeroed out under a White House proposal -- with tax credits.

Lawrence Schnapf, who chairs the environmental law section of the New York State Bar Association, says the reform measures would address gaps or inefficiencies in brownfields and Superfund programs. Some of the actions could be taken administratively although some would require legislative changes.

Schnapf, who told *Inside EPA* that he developed the reform measures during Mitt Romney's run for president in 2012 when he was part of Romney's environmental transition team, has now sent the outline of 17 reforms to EPA Administrator Scott Pruitt. He is also considering forwarding them to congressional committees as well, he says.

President Donald Trump's administration is placing regulatory reform at the center of a plan to stimulate economic growth, Schnapf notes in a Feb. 27 blog posted on his law firm's website, adding that based on Pruitt's recent congressional testimony, the administrator appears to recognize "the value of brownfields programs and the need to remediate contaminated sites." Schnapf also points to the strong bipartisan support in Congress for the brownfields program.

Schnapf's suggestions come as the Trump administration's budget office has proposed to cut nearly 25 percent of the agency's budget in fiscal year 2018, reportedly including plans to "zero out" almost two dozen programs, including popular brownfields grants.

Among the measures Schnapf suggests are revisions that would alter financial aspects of the brownfields and cleanup programs. These include a suggestion that EPA move away from brownfields grants and adopt tax credits instead as a financial incentive for brownfields cleanups, his blog says. "The brownfield financial incentives are becoming like public works projects," he says. He told *Inside EPA* that the current process -- which he says includes a cumbersome application process and competition for limited funds -- is not nimble enough for the private sector.

Rather than giving funds to local governments to investigate sites and conduct reuse planning, "EPA could incentivize the private market to do this work by expanding and extending brownfield tax credits," he says in the blog, pointing to the New York brownfields tax credit program that has generated about \$7.5 billion investment in the state at a cost of \$750 million. He concedes though that tax credits for projects in rural areas may not be enough of an incentive for developers.

He also suggests that EPA adopt a cost recovery stance when it comes to brownfields, before using public money for brownfields grants to pay for the cleanup. He notes that many brownfields were created when plants closed and companies relocated operations either elsewhere in the United States or abroad. The idea behind this is to ensure that responsible parties who abandoned these plants and sent jobs overseas would pay for the mess they left behind, he said in the interview.

**'Transactional' Approach**

He also is advocating that companies closing operations be required to give notice to EPA or other permitting authorities at least 90 days in advance of shutting down. That would allow EPA or a state to assess the property before it is abandoned, and perhaps issue a unilateral administrative order against the company, he suggested in the interview, noting however that details on this would have to be worked out.

Schnapf says Trump has referred to the many incentives that exist for companies to export jobs. But Schnapf says existing environmental laws could advance the president's goals, working as the "engine" to prevent companies from exporting jobs.

Schnapf concedes that his suggested reforms are an "unconventional way of thinking," but notes Trump is unconventional and "very transactional." Therefore, he says he is trying to have Trump think of environmental laws in a transactional way.

Another measure that would affect the financial arena would be to clarify lenders' obligations following foreclosure.

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While lender liability amendments were added to the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) in 1996, Congress omitted the “bright-line” test EPA had adopted in a lender liability rule that gave lenders steps to follow after foreclosure to ensure they stayed with the secured creditor exemption from liability. The rule was vacated after the amendments were adopted, but lenders now “have no guidance on how to proceed” following foreclosure, his blog says. He says greater clarity on this is needed.

Other brownfields-related measures Schnapf suggests are to bolster bona fide prospective purchaser (BFPP) and contiguous property owner defenses in light of inadequate EPA guidance and recent case law that “have created uncertainty for developers and undermined the value of these defenses,” the blog says. He also calls for revising enforcement discretion guidance as the initial guidance failed to adequately address concerns that arose from the *PCS Nitrogen Inc. v. Ashley II of Charleston LLC* “decision that purchasers of contaminated property could lose their eligibility for the BFPP by agreeing to indemnify sellers.” **In the decision**, the U.S. Court of Appeals for the 4th Circuit ruled that BFPPs should not be held to a less aggressive liability standard than other parties and found a buyer of contaminated property failed to meet BFPP criteria to shield it from cleanup liability.

He also calls for EPA to more robustly and uniformly use prospective purchaser agreement letters, under which the agency agrees not to hold a purchaser liable for contamination that predated the purchase in exchange for cleanup response work.

Another liability-related change EPA should make is to clarify for municipalities the scope of liability protections under CERCLA in order to encourage local governments to take title of vacant properties and redevelop them. And he advocates giving current property owners a one-year amnesty period in which to voluntarily disclose historic contamination, in order to provide an incentive for accelerated cleanups, rather than leaving the sites unremediated until an owner is ready to sell the property, his blog says.

He also calls for two Resource Conservation & Recovery Act (RCRA)-related brownfield measures, calling on EPA to “more forcefully use its delegation authority” to allow a reform that would urge states to allow treatment, storage and disposal facilities to sell clean parcels while cleaning up other portions of their RCRA corrective action sites. And EPA should clarify RCRA liability at generator-only sites, which Schnapf says presumably “could be treated as any brownfield site without the need to undergo formal RCRA closure.”

### Streamlining Cleanups

On regulatory review, Schnapf says CERCLA’s National Contingency Plan (NCP) -- the regulatory blueprint for cleanups -- should be revised, as it dates to 1990 when the law was 10 years old. It “[d]oesn’t make sense to continue to follow the [remedial investigation/feasibility study] lockstep process,” he says.

Also on CERCLA, he says Congress should “clarify that CERCLA liability should be based on the Third Restatement[,] or EPA could issue interpretative guidance that it now considers the Third Restatement to be the governing law for CERCLA liability.” This refers to his suggestion that courts replace the Second Restatement of torts approach, which favored the use of joint liability for indivisible harm, with the Third Restatement, which favors apportioning liability where there is a reasonable basis.

On other cleanup reforms, he suggests realigning within the agency all of EPA’s remedial programs -- CERCLA, RCRA, underground storage tanks and the polychlorinated biphenyls (PCBs) portion of the Toxic Substances Control Act (TSCA) -- into a single cleanup program, given the longtime experience in remediating sites that the agency has. This could provide a “consistent regulatory approach and reduce unnecessary staff,” his blog says.

The George W. Bush administration sought to streamline remediation actions under its One Cleanup initiative, under which the agency agreed to settle RCRA, TSCA and Superfund liabilities for sites remediated under a state’s cleanup program. But **the effort stalled** due to internal agency disputes over whether such pacts with states could limit EPA enforcement rights against RCRA waste management facilities if they were included in the pacts.

Schnapf also suggests that to address states’ resource constraints, that EPA encourage states to adopt licensed professional programs such as those adopted in Massachusetts and New Jersey to oversee cleanups.

Schnapf notes problems with the placement of PCB cleanups under TSCA. To address this, liability protections should be extended to innocent landowners buying property that includes PCB contamination. Such a measure may require a legislative amendment, his blog says. He said in the interview that currently there is no BFPP defense if PCBs are found on a newly acquired property, because PCBs fall under TSCA and, unlike CERCLA, that law does not have such a protection. Also, he says PCB disposal requirements should be placed within RCRA, and removed from TSCA, he says. -- *Suzanne Yohannan* ([syohannan@iwppnews.com](mailto:syohannan@iwppnews.com))

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