Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Environmental Transactions and Brownfields Committee Newsletter

A joint newsletter of the Environmental Transactions and Brownfields Committee and the Superfund and Natural Resource Damages Litigation Committee.

Vol. 20, No. 2 **July 2018**

CHAIRS' MESSAGE

Gene Schmittgens Jr., Anne Viner, John Gullace, and Lauren Daniel

On May 22, 2017, Scott Pruitt, Administrator of the U.S. Environmental Protection Agency (EPA), established a Task Force to review the federal Superfund program and to "provide recommendations . . . 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 completed its work within a month of its creation, and on July 25, 2017, released a 26-page report to the public with 42 specific recommendations for improving the Superfund program.

The pace at which EPA will address the Task Force recommendations is not entirely known at this point, but as of now all signs point to speed. In December 2017, EPA published an initial list of sites targeted "for immediate and intense attention"—one of the specific recommendations made by the Task Force. The list is intended to be dynamic, with sites moving on and off, but for now it includes 22 sites with which the Administrator intends to be directly involved. In addition, in the first few months of 2018, EPA released a list of sites "with the greatest expected redevelopment and commercial potential," and issued new guidance designed to enable EPA to use money from site special accounts to provide incentives for developers and other bona fide prospective purchasers to undertake cleanups. EPA intends to issue quarterly reports on its progress toward implementing the Task Force's recommendations, and to host a series of "listening sessions" for interested stakeholders.

In this special joint newsletter, the Environmental Transactions and Brownfields (ETAB) Committee and the Superfund and Natural Resource Damages Litigation Committee have teamed up to present a series of articles to our readership that are specifically focused on the Task Force recommendations. The newsletter presents six articles covering a range of topics from strategies on effective implementation of the Task Force recommendations to what the Task Force may have missed altogether. We thank each of our authors for their contributions, and hope you enjoy the articles!

Gene Schmittgens Jr. *and* **Anne Viner** *are chairs of the Environmental Transactions and Brownfields Committee.* **John Gullace** *and* **Lauren Daniel** *are chairs of the Superfund and Natural Resource Damages Litigation Committee.*

Environmental Transactions and Brownfields Committee Newsletter
Vol. 20, No. 2, July 2018
Rob Gelblum, Tom Doyle, and Lindsay Howard, Editors

In this issue:

AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

CALENDAR OF SECTION EVENTS

July 24, 2018
The Administration's Regulatory Reform for Fuel Economy and Vehicle Greenhouse Gas Standards: Assessing the Significant Changes and Potential State Conflicts
Committee Program Call

August 2-7, 2018
ABA Annual Meeting
Chicago, IL

August 10, 2018
30th Annual Texas Environmental Superconference
Austin, TX
Primary Sponsor: State Bar of Texas, Environment & Natural Resources Law Section

August 23, 2018
SEER Social—Happy Hour
Portland, OR

October 17-20, 2018
26th Fall Conference
Marriott Marquis San Diego Marina
San Diego, CA

March 25-27, 2019
37th Water Law Conference
Grand Hyatt Denver
Denver, CO

March 27-29, 2019
48th Spring Conference
Grand Hyatt Denver
Denver, CO

For full details, please visit www.ambar.org/EnvironCalendar

42 SHADES OF SUPERFUND

Larry Schnapf
Schnapf LLC
New York, New York

One of the highlights of Scott Pruitt's first year as Environmental Protection Agency (EPA) Administrator has been his focus on improving the federal Superfund program. One of his strategies was to appoint a Superfund Task Force to provide recommendations for achieving five goals, although the principal problem that Administrator Pruitt asked the Task Force to address was the long period that Superfund sites languish on the National Priorities List (NPL).

The 13 strategies and 42 recommendations of the Task Force Report actually consisted of 153 specific actions and 85 additional sub-actions, for a total of 238 potential actions that EPA could take "to reinvigorate and prioritize the Superfund program in a most expeditious manner."

The Task Force conceded that the recommendations "do not represent all potential actions that may be needed in the future," but rather are "a good beginning" aimed at leading to program efficiencies and areas in need of refinement. The sheer number of proposed actions resembles the old aphorism of "throwing spaghetti against the wall to see what sticks."[1]

While the Task Force Report contains good, common-sense management practices, it contains few recommendations for addressing the primary reason for the slow pace of site cleanups—the rigid and complex remedy selection process. Instead, most of the Task Force proposals focus on actions that could be taken after the remedial investigation/feasibility study (RI/FS) has been completed. Thus, this author believes the Task Force Report will likely only improve the Superfund program at the margins.

The Most Promising Task Force Recommendations

From this author's standpoint, the following Task Force recommendations hold the most promise for expediting cleanups and promoting redevelopment of NPL and brownfield sites.[2]

- Specific Action #4–Identify sites where human exposure is not under control and prioritize effecting controls (included in Recommendation 1);
- Specific Action #12–Issue directive for greater use of early actions and interim Records of Decision (RODs) (Recommendation 3);
- Specific Action # 24–Issue directive for greater use of early/interim actions utilizing interim response actions (Recommendation 5);
- Specific Action #26–Evaluate the groundwater beneficial use policy involving aquifers that are not reasonably anticipated to be used for drinking water use (Recommendation 6);
- Specific Action #46–Issue directive requiring consideration of early actions and a separate track for Remedial Design (RD) actions at PRP-funded Superfund Sites (Recommendation 12);
- Specific Action #47–Reissue/revise remedial design guidance (Recommendation 12);
- Specific Action #48–Develop criteria for utilizing alternate tools to pursue liable parties at NPL-caliber sites such as greater use of the Superfund Alternative Approach (SAA) (Recommendation 13);
- Specific Action #50–Designate states as leads on sites where appropriate (Recommendation 13);
- Specific Action #52–Examine use of special accounts for Bona Fide Prospective Purchasers (BFPPs) that agree to perform cleanup, develop guidance for disbursing such funds to BFPPs, and consider financial incentives available to BFPPs (Recommendation 14);

- Specific Action #64–Identify efficiency opportunities for timely resolution of disputes with PRPs that arise in implementing cleanups (Recommendation 16);
- Specific Action # 65–Establish and promote strict adherence to project deadlines (Recommendation 16);
- Specific Action #70–Consider greater use of unilateral orders for recalcitrant parties to discourage protracted negotiations (Recommendation 16);
- Specific Action #75–Increase use of Memoranda of Understanding to identify state agencies that can take lead for sites (Recommendation 19);
- Specific Action #76–Identify situations or phases of cleanup where state agencies can assume primary responsibility (Recommendation 19);
- Specific Action #81–Work with PRPs, local governments, and local professionals to identify opportunities for PRP-led cleanups to integrate reuse outcomes (Recommendation 21);
- Specific Action #82–Issue directive to encourage integration of reuse outcomes into PRP-led cleanups (Recommendation 21);
- Specific Action #84–Create a task force to explore uses of insurance, indemnification, and other tools to incentivize third-party liability transfers and revise comfort letters to encourage such approaches (Recommendation 22);
- Specific Action #85–Identify regional best management practices for addressing BFPP concerns and use tailored comfort/status letters/BFPP agreements (Recommendation 23);
- Specific Action #86–Improve process for responding to requests for site-specific tools and create regional third-party inquiry teams (Recommendation 23);
- Specific Action #87–Develop a model for such requests and streamline/expedite regional/headquarters/DOJ approval process (Recommendation 23);
- Specific Action #88–Expand use of prospective purchaser agreements (Recommendation 23);
- Specific Action #93–Develop new policy memorandum for expanded use of Prospective Purchase Agreements (PPAs) and windfall lien resolution agreements with third parties at NPL sites (Recommendation 25);
- Specific Action #96–Revise BFPP agreements to identify site-specific reasonable steps for satisfying appropriate care obligations to address future liability (Recommendation 26);
- Specific Action #109–review and revise comfort letters to address concerns such as windfall lien uncertainties, comprehensive reasonable steps, lender liability (Recommendation 28);
- Specific Action #110–Revise "Common Elements Guidance" and identify potential opportunities to expand Good Samaritan settlements (Recommendation 29);
- Specific Action #113–Propose guidance to address concerns over municipal liability (Recommendation 31); and
- Specific Action #114–Revise model comfort letter to address municipal liability concerns (Recommendation 32).

The bulk of the recommendations would be implemented by guidance and policy. While it is understandable that the Task Force would heavily rely on the use of guidance since these documents can be drafted quickly, there is no shortage of irony in this approach, considering the recent Department of Justice memorandum barring the use of guidance documents for purposes of civil enforcement litigation. Indeed, guidance documents and policies were principal mechanisms used by the Clinton Administration to adopt its own Superfund reforms.

The good news is that the Task Force considers its Report to be a living document that will evolve over time. To truly implement meaningful reforms

to the Superfund program, the Task Force should now turn its attention to revising the National Contingency Plan (NCP), the critical response planning document that is at the heart of what ails the Superfund program.

Proposed Changes to the NCP

The Hazardous Substance Response subpart of the NCP was last revised in 1990. In the ensuing years, EPA and the states have learned much about remediating contaminated sites. EPA should consider the following amendments to the NCP:

Amend ARARs—The NCP requires remedial actions to comply with applicable or relevant and appropriate requirements (ARARs).[3] When the NCP was amended in 1982 to incorporate CERCLA, states had not yet established soil or groundwater cleanup standards or guidance.[4] The principal cleanup criteria that were then available were federal and state water quality criteria that EPA concluded were too rigid and would require the use of potentially inappropriate levels of cleanup that would not allow consideration of individual circumstances at each release.[5] So, instead of establishing cleanup standards, EPA developed "a system for decision-making which has as its primary feature a reasoned process that contains a series of checks throughout to ensure that the decision-making process produces an effective remedy. The methodology emphasizes cost-effective, environmentally sound remedies which are feasible and reliable from an engineering standpoint."[6]

The state of New Jersey and the Environmental Defense Fund challenged the 1982 NCP revisions for not including cleanup standards.[7] EPA settled this litigation by agreeing to amend the NCP to include the concept of ARARs. In the preamble to the 1985 revisions to the NCP, EPA stated that ARARs could only be determined on a site-by-site basis.[8]

The process of establishing ARARs can be time-consuming, confusing and often results in disputes among EPA, responsible parties and states. According to a position paper by the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), the problems with ARARs have included:

- Inconsistencies in ARAR determinations;
- Inconsistent application of State requirements by EPA;
- EPA inappropriately determining that a State requirement is procedural rather than substantive when the State believes it is an ARAR critical to implementation of the chosen remedy;
- Reluctance of other federal entities to recognize State environmental laws and regulations as ARARs;
- Lack of written documentation when EPA finds that a State cleanup requirement was not an ARAR; and
- Inadequate time for states to challenge EPA's determination that a State requirement is not an ARAR.[9]

As previously explained, the ARAR concept was developed when state soil and cleanup standards and criteria did not exist. Now that virtually every state has adopted risk-based cleanup criteria, EPA should redefine ARARs so that there is a rebuttable presumption that state cleanup standards should be used to establish the remedial goals. If a state has established a risk-based cleanup standard for a particular contaminant, the process for searching for a remedial goal should stop there. The cumbersome process of identifying other cleanup criteria should only be used when a state has not adopted a cleanup criterion for a particular contaminant or a specific exposure pathway such as vapor intrusion. While some will argue this could result in different cleanup standards at different sites depending on state cleanup criteria, such a critique is really a Trojan horse since inconsistent cleanups among the regional offices have long plagued the Superfund program.

Incorporate Land Use and Groundwater Policy in the NCP—When one reads the preamble to the 1988 proposed NCP amendments and the 1990 final regulation, the dearth of any discussion on considering land use or redevelopment in the remedy selection process is striking. EPA first issued guidance and policy in the 1990s to incorporate land use considerations in remedy selection and has also adopted several groundwater protection/restoration policies as well as institutional/engineering controls guidance. Given increasing criticism of agency use of guidance, EPA should incorporate these principles into the NCP.[10]

Revise Subpart H to Allow for Streamlined RI/FS Process—Recall that EPA adopted the RI/FS approach when it added the Hazardous Substance Response Subpart F to the NCP. The purpose of this addition was to provide a reasoned decision-making process for remedy selection in the absence of media cleanup standards and limited agency experience with remedial technologies. Another rationale for adopting the rigid stepwise approach was to ensure that the federal government could recover its response costs. It may have made sense to require the evaluation of five alternative remedies in 1982 and 1985, but this is a wasteful and time-consuming exercise in 2018.

The states now have mature remedial programs that use risk-based cleanup criteria, and many have adopted streamlined site investigation and remedial procedures. EPA should revise NCP Subpart H to allow responsible party- and BFPP-funded cleanups to proceed under these state superfund, RCRA and voluntary/brownfield cleanup programs without having to comply with the more rigid Subpart F requirements.

For example, dozens of NPL-caliber sites have been remediated under the New York State Brownfield Cleanup Program (BCP), which does not require an assessment of five alternatives. The BCP requires applicants to select a proposed remedy and evaluate an unrestricted cleanup alternative. The New Jersey Technical Requirements for Site Remediation (Tech Regs)[11] do not require an alternatives analysis, but instead rely on the state minimum Remediation Standards.[12] Indeed, in responding to comments to its Tech Regs, the New Jersey Department of Environmental Protection stated in 1993:

> The Department, however, does not advocate the specific stepwise approach used by the Environmental Protection Agency in the CERCLA RI/FS process because the Department does not believe it is necessary or appropriate for all sites.[13]

EPA can enter into State Memoranda of Understanding (SMOUs) with states with remedial programs that satisfy the requirements of Section 128 (State Response Programs) that would allow the states to implement CERCLA in lieu of EPA. Indeed, it may be that EPA's resources may be best focused on performing removal actions to eliminate imminent risks and issuing unilateral administrative orders with the long-term remedial actions performed by or under state oversight.

Other Recommended Changes to Help Expedite Cleanups

There are additional suggestions that go beyond the Superfund program but that could help expedite the cleanup of the nation's inventory of contaminated sites, which is estimated to be approximately 294,000 sites:[14]

Require States to Use Parceling to Encourage RCRA Brownfields—EPA RCRA Brownfield Reforms urged states to allow owners or operators of Treatment, Storage and Disposal Facilities (TSDFs) to sell off clean parcels of their facilities (e.g., portions never used for any waste management) while the Hazardous Waste Management Units (HWMUs) or Solid Waste Management Units (SWMUs) were undergoing corrective action. Only a handful of states have followed this suggestion. EPA could use its Section

128 State Response Program approval authority to require states to adopt parceling at corrective action sites.

Clarify RCRA Liability for Generator-only Sites—There is much confusion if closure obligations for a generator site run with the land. A prospective purchaser may be interested in redevelopment of a site that appears on the RCRA generator database but is concerned that it will become subject to closure obligations for the areas where wastes were managed. Presumably, generator sites could be treated as any brownfield site without the need to undergo formal RCRA closure.

Add Landowner Liability Protections to TSCA for PCB Cleanups—Purchasers often take steps to qualify for CERCLA BFPP only to learn after taking title that the property has been impacted with PCBs, and that they are subject to the Toxic Substances Control Act cleanup obligations. Given the ubiquity of PCBs in the environment and particularly in the nation's water infrastructure, EPA should consider including this concept when it submits a legislative package to Congress for Superfund reforms.

TSCA PCB Reform—The PCB cleanup and disposal rules are a bit RCRA-like, a bit CERCLA-like, and not well integrated. The cleanup should also not depend on the original spill concentration but on current concentrations and media. EPA should take another look at its PCB cleanup regulations and consider repealing the entire Subpart D to 40 C.F.R. 761. Disposal of PCB-containing material could be handled entirely within RCRA via the listed-waste and Land Disposal Restrictions (LDR) route.

Pursue Cost Recovery from PRPs for Sites Receiving Brownfield Grants—EPA has been awarding brownfield grants to local governments without considering if there is a responsible party that could be incentivized to participate in a cleanup. EPA should conduct PRP searches for all sites that are awarded brownfield grants or loans, and then seek cost recovery from those entities to replenish the brownfield funding program or the Superfund Trust. This will allow these programs to be more sustainable and not be as reliant on Congressional appropriations. This approach would ensure that polluters are forced to pay for the contamination they leave behind when they abandon a community and would also impose "consequences" on those firms that closed plants to export jobs to foreign nations. Congress could instruct EPA to seek recovery from responsible parties for brownfield funds that are awarded for sites where such responsible parties exist.

Reform EPA Remedial Programs into a Single Unified Cleanup Program—The federal government's remedial programs were created as we became aware of new environmental concerns. As a result, multiple remedial programs were established by separate laws. This has resulted in different cleanup standards and procedures.

EPA has separate staffs for CERCLA, RCRA, TSCA (PCBs), and USTs. We now have four decades of experience remediating sites. If Administrator Pruitt wants to implement truly transformative changes to the federal remedial programs, he could task the Office of Land and Emergency Management with consolidating the CERCLA, RCRA corrective action, and PCB cleanup program of TSCA into one remedial program with a consistent regulatory approach. Such an approach could reduce redundant staff and therefore advance the Administration's goal of shrinking the EPA workforce.

In closing, the Task Force recommendations remind the author of the first fireside chat of President Carter in 1977 when he announced that Department of Energy Secretary James Schlesinger would come up with a national energy plan within 90 days. President Carter came to understand that strict deadlines—while occasionally useful for prodding the bureaucracy—could also be destructive since such deadlines might force him to go ahead with ideas that are not effective or viable. Hopefully, the Task Force will now turn its attention to developing longer-term

recommendations like those discussed above so that EPA's administrator 20 years hence will not have to announce another round of management efficiency and guidance-based Superfund reforms.

Larry Schnapf *is the principal of Schnapf LLC and adjunct professor at New York Law School. His practice focuses on environmental issues associated with business, real estate and financing transactions as well as brownfield redevelopment projects.*

Endnotes

1 The process of testing many different tactics at the same time to identify what works (sticks) and what doesn't work (falls to the floor).

2 The author numbered the specific actions. The Task Force Report only assigned numbers to the Recommendations. For the ease of the reader, the Recommendation number where the specific action is located follows each item.

3 Generally, "applicable" standards are those that would otherwise be legally applicable if the actions were not undertaken pursuant to CERCLA section 104 or section 106. "Relevant" standards are those designed to apply to problems sufficiently similar to those encountered at CERCLA sites that their application is appropriate, although not legally required. Standards are also relevant if they would be legally applicable to the CERCLA cleanup but for jurisdictional restrictions associated with the requirement. See 50 Fed. Reg. at 5861, 47917 (Feb. 12 and Nov. 20, 1885). The 1986 Superfund Amendments and Reauthorization Act (SARA) codified EPA's definition of ARARs with some variations. See 42 U.S.C. 9621(d).

4 The NCP was originally developed to provide a framework for emergency responses to oil spills. The passage of CERCLA required revision of the NCP because CERCLA provided that the NCP would become the national roadmap for responding to releases of hazardous substances, pollutants, and contaminants.

5 See 47 Fed. Reg. 10972, 10978 (Mar. 12, 1982) "Most of the comment focused on the provisions for determining the appropriate extent of remedy. While some commenters supported the process established in § 300.68 for selecting a remedy, many commenters criticized the Plan for not explicitly requiring consideration of State and Federal health and environmental standards in development of remedies. Similar comments stated that the Plan should include specific levels of clean-up that must be attained with any remedy. . . . It must be noted, however, that circumstances will frequently arise in which there are no clearly applicable standards. For instance, acceptable levels of hazardous substances in soil are not established, and there are no generally accepted levels for many other hazardous substances in other media."

6 47 Fed. Reg. 31180 (July 16, 1982). The 1982 NCP placed heavy emphasis on cost-effectiveness (§ 300.68(j)), and Fund-balancing (§ 300.68(k)).

7 *Environmental Defense Fund v. EPA*, No. 82-2234; *New Jersey v. EPA*, No. 82-2238 (D.C. Cir. Feb. 1, 1984). *See* 50 Fed. Reg. 5862 (Feb. 12, 1985).

8 EPA was again sued over the 1985 NCP amendments, with some litigants complaining that ARARs were too vague. The ARARs were upheld in *Ohio v. EPA*, 997 F.2d 1520, 1525 n.1 (D.C. Cir. 1993).

9 "State Concerns with the Process of Identifying Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Applicable, or Relevant and Appropriate Requirements" (Feb. 28, 2018) (*available at* http://astswmo.org//files/policies/PositionPapers/ARARs-Position-Paper-Feb-2018.pdf). The position paper was prepared in response to a recent EPA memorandum, "Best Practice Process for Identifying and Determining State Applicable or Relevant and Appropriate Requirements Status Pilot," OLEM Directive 9200.2-187 (Oct. 20, 2017).

10 For example, see "Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration," OSWER Directive 9283.1-33 (June 26, 2009), listing various policies.

11 N.J.A.C. 7:26E.

12 N.J.A.C. 7:26D.

13 25 N.J.R. 2412 (June 7, 1993) (response to comment 1193).

14 *See* Cleaning Up the Nation's Waste Sites: Markets and Technology Trends, EPA 542-R-04-015 (2004).