

## What You Need to Know About the Superfund Task Force's Recommendations

Written by: Caleb J. Holmes

There are over 1,300 sites listed on the Environmental Protection Agency's National Priorities List of contaminated sites that require cleanup, over a hundred of which are located in Pennsylvania. In May, EPA Administrator Scott Pruitt promised to get "hands-on" with the Superfund program in order to expedite the cleanup of contaminated sites around the country, with a focus on those NPL sites. As part of Pruitt's strategy, he established a task force to provide recommendations on how to "restructure the cleanup process, realign incentives of all involved parties to remediate sites, encourage private investment in cleanups and sites and promote the revitalization of properties across the country."

On July 25, Pruitt announced the task force's recommendations. The 42 recommendations are wide-ranging and invite additional follow-up in many instances in the form of guidance and policy documents and the establishment of additional task groups. While the additional detail leaves us guessing for the moment on how Pruitt will execute many of these recommendations, several key themes emerge from the document. First, there is an emphasis on identifying bigger and costlier sites and focusing on expediting cleanups. To start, the EPA will identify "top 10" sites to focus on, while also developing efficiencies for speeding up remediation of mega-sites in general. Second, the Task Force's recommendations could be read as an invitation to potentially responsible parties (PRPs), investors, developers and bona fide prospective purchasers to get creative with remediation and the transfer of contaminated properties to third parties. The task force focuses on exploring opportunities for expediting the transfer of contaminated properties to parties focused on returning those properties to a beneficial use. Third, the task force seeks to identify instances where the costs to private parties can be reduced, including through the reduction of oversight costs.

The task force recommendations necessarily mean an increased role for the agency, including increased enforcement, at a time when the agency faces significant cuts. How Pruitt seeks to reconcile those two facts remains to be seen. Further, given the wide-ranging set of recommendations, most of which lack significant detail, we will have to wait for additional details to see whether the agency can execute much of the agenda developed by the task force.

The task force identifies five over-arching goals: expediting cleanup and remediation, re-invigorating responsible party cleanup and reuse, encouraging private investment, promoting redevelopment and community revitalization, and engaging partners and stakeholders. There are a number of key takeaways from the task force's goals and recommendations.

The first goal, expediting cleanup and remediation, includes the juiciest recommendation, an "Administrator's Top Ten" list. The Top Ten list is a list of 10 sites that require "immediate and intense attention." Although the task force recommends that the EPA determine the methods for designating sites, the task force recommendations provide enough detail to surmise what types of sites can expect to be on the list. The Task Force has a clear preference for tackling the

mega-sites first. Many of its recommendations are focused on those sites that will require remediation of at least \$50 million, and on those whose progress has been stagnant despite the identification of potentially responsible parties. That means that the agency will target sites listed on the National Priorities List for at least five years that have no selected action, sites that have no remedial design despite a remedy being selected two or more years ago, PRP sites where no remedial action has started, and sites with special accounts with a remedial design completed more than two years ago. In short, the task force is targeting big sites that are not being redeveloped expeditiously, despite responsible parties being identified.

The Top Ten list will be replenished as sites are completed, suggesting Pruitt is ambitious in tackling these sites, and the Top Ten list is intended to receive the administrator's weekly attention. Certainly some of the strategies the agency will take for speeding up remediation of these sites can be glossed from the set of recommendations, including adaptive management, interim and phased cleanups, more timely remedy selection decisions, prioritizing resources for both the Top Ten sites and other mega-sites, and more lenient groundwater requirements at sites where drinking water use is not anticipated.

Although we will have to wait to see how the agency envisions executing these recommendations, they do signal to parties at mega sites that, not only can those parties anticipate increased attention from EPA, but those parties may also have opportunities to move cleanups along more quickly, and to have the ear of the administrator on less costly and quicker remedies. This may lead to quicker cleanups for sites across Pennsylvania, but the implication of that is not without its drawbacks, including whether the administration is willing to let PRPs conduct less costly remedies at the expense of human health and the environment. Remedy selection takes a long time for a reason, as oftentimes PRPs and agencies devote significant time and resources to identify a remedy that both promotes timely cleanup but also protects human health and the environment. Stakeholders that are not responsible parties or agencies necessarily are involved in that process. The agency will have not easily be able to create efficiencies while satisfying all of these stakeholders.

The task force's second goal, to reinvigorate responsible party cleanup and reuse, identifies certain cost-savings measures—reduced oversight costs, modification of financial assurance requirements--as well as more active enforcement, including more prevalent issuance of unilateral orders to recalcitrant parties. This two-pronged goal invites the question of where the money will come from. Reduced oversight costs and increased enforcement both mean greater demand on the agency's resources. The proposed budget cuts for the EPA will significantly reduce the amount of money available for enforcement. Therefore, while the EPA may make it easier for PRPs to conduct cleanup, it is unclear whether the EPA will also have the resources to punish recalcitrant parties.

The task force's recommendations also seems to be intended to put investors, developers and insurance markets on notice that there will be increased opportunities for third party (nonresponsible) entities to redevelop contaminated properties. The task force recommends taking a number of steps to encourage private investment while addressing liability concerns of

third parties, including revising model "comfort letters," "marketing" property being remediated with financial incentives to encourage purchase by third parties and the use of risk liability transfers. In order to develop the strategies to do so, a national workgroup will be developed to identify the tools and products that are appropriate for third party participation.

There are many recommendations that invite discussion, but nearly all of the 42 recommendations will require significant work by the agency to develop policies for implementation. Pruitt's actions to date signal an opportunity for responsible parties to develop more expeditious, and perhaps more creative, remedial strategies, especially at larger sites. Whether the agency has the time and resources to tackle this ambitious list of recommendations, however, will remain an open question. •

*Caleb J. Holmes, a shareholder at Greenberg Traurig in Philadelphia, focuses his practice on environmental and commercial litigation. He represents businesses in state and federal courts in environmental and commercial litigation matters.*

Reprinted with permission from the August 29, 2017 edition of the Pennsylvania Law Weekly©2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or [reprints@alm.com](mailto:reprints@alm.com).