

# EPA Issues Recommendations to Streamline Superfund Cleanup Process and Promote Site Reuse

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On July 25, 2017, the United States Environmental Protection Agency (“EPA”) Superfund Task Force (the “Task Force”) released a report that aims to improve the federal Superfund contaminated site cleanup program. The policies included in this report may provide new opportunities for buyers and sellers looking to allocate and manage contaminated site cleanup costs in the context of transactions and site development. The overarching aims of the report are to expedite the cleanup process, remove contaminated sites from the Superfund National Priorities List (“NPL”) and encourage site redevelopment, including by promoting private investment into reusable sites. The report was issued in response to a May 22, 2017 request from EPA Administrator Scott Pruitt.

The Superfund Task Force Recommendations report is divided into five goals and includes 42 recommendations to achieve such goals. If the recommendations in the report are approved by Administrator Pruitt, the recommendations are planned to go into effect in various time frames between 30 days and 12 months of approval. The goals of the report are described below.

- **Expedite Cleanup and Remediation.** This goal aims to clarify policies and guidance on remediation, resolve contaminated sites quicker, with a focus on those that have been listed on the NPL for five years or where a remedy design has not commenced in two years, and prioritize a “top ten” list of contaminated sites that require immediate attention.
- **Re-invigorate Responsible Party Cleanup and Reuse.** This goal aims to provide protections for cooperating potentially responsible parties (“PRPs”) who settle early. Financial incentives in the form of reduced EPA oversight costs for PRPs who perform timely, quality work are suggested. The Task Force recommends policy changes to promote expedited settlements, including by finalizing model agency settlement and reservation language. This goal recommends adjusting financial assurance requirements to reduce cooperating PRPs’ financial burdens and consideration of protracted informal dispute resolution. The Task Force also recommends encouraging PRPs to work with end-users to voluntarily perform work to achieve reuse objectives and fund or perform enhanced cleanup by entering into agreements with end-users. Under this goal, it is also recommended for EPA to designate states as leads on sites, where appropriate.
- **Encourage Private Investment.** This goal outlines alternative approaches to financing contaminated site cleanups. Companies looking to shift contamination liabilities in transactions through indemnities, insurance, and other risk allocation devices may see opportunities arising out of this goal. This goal

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identifies an effort to streamline the process for comfort letters and settlement agreements with third parties, and incentivize third-party investment. Further investigation is recommended into environmental liability transfer (“ELT”) approaches or other risk management tools (e.g., liens on property, bonds, trusts, indemnification, insurance) where third parties can buy and sell the risk of a cleanup and using comfort letters or other settlement tools to reassure PRPs using an ELT or other tool. This goal recommends expanding the use of Prospective Purchaser Agreements, windfall lien agreements, and Bona Fide Prospective Purchaser work agreements to limit third parties’ liability, including via the development of a new policy memorandum on the use of such and updates to the related model agreements. Outreach to third-party investors to identify their specific liability concerns and the development of potential new tools to address such concerns (e.g., via enforcement guidance, model reuse assessment agreements, prospective operator agreements, and prospective easement agreements) are recommended. The Task Force recommends developing a model request for prior written approval of site-specific letters and agreement to streamline agency approval and revising the model comfort/status letter to provide stronger statements that will address liability concerns. Finally, this goal recommends the enhancement of EPA’s web content to provide access to enforcement information and tools to support cleanups and reuse (including a list of sites with the greatest potential for reuse).

- **Promote Redevelopment and Community Revitalization.** This goal focuses on encouraging redevelopment via community, industry, and business engagement. The development and sharing of information regarding the current status of sites, including the development of “reuse” fact sheets, is also a focus of this goal.
- **Engage Partners and Stakeholders.** This goal aims for more robust communication, cooperation, and involvement from key stakeholders, including state and local governments, community organizations, Native American Tribes, members of the business community, PRPs, contractors, corporations, and other private organizations. It also recommends the establishment of a federal advisory committee to work with stakeholders to identify barriers and opportunities relating to the cleanup and reuse of sites.

It is too early to know if these plans will be approved by Administrator Pruitt, and, if approved, how the Task Force’s recommendations will substantively impact transactions involving contaminated sites. However, parties should be aware that these Task Force recommendations provide incentives for timely, high-quality cleanup-related work and support creative and new solutions to allocate risk and promote reuse.

A subcommittee of the Senate Environment and Public Works Committee held a hearing on the “Oversight of the [EPA’s] Superfund Program” on August 1, 2017. Many of the speakers at the hearing indicated skepticism of the EPA’s plans to expedite and improve the Superfund process given the Trump Administration’s 30% proposed budget cut to the Superfund program and its planned 24% proposed budget cut to the EPA, both for the 2018 fiscal year. Speakers also raised concerns over the Task Force’s seeming prioritization of quick cleanups and redevelopment over public health and long-term solutions, specifically with regard to the proposed weakening of requirements for responsible parties to show that they can pay for cleanups and the reduction of oversight costs. One speaker also indicated that the focus on quick cleanups and redevelopment instead of public health is not in accordance with intent of the relevant Superfund law, the Comprehensive Environmental Response, Compensation, and Liability Act. The impacts of this hearing on Administrator Pruitt’s potential approval of the Task Force’s recommendation are unclear.

The Task Force’s report can be found [here](#).

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