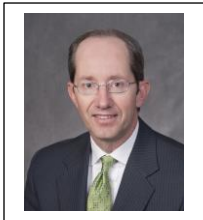


*June 2017***IN THIS ISSUE**

*On May 9, 2017, EPA Administrator Scott Pruitt issued a memorandum requiring that all Superfund remedies costing more than \$50 million be personally approved by him. This article presents a brief overview of CERCLA, the Superfund law, and examines the ramifications of Administrator Pruitt's delegation.*

## **EPA Administrator Delegates Approval of Superfund Remedies Costing More Than \$50 Million to Himself**

**ABOUT THE AUTHOR**

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On May 9, 2017, EPA Administrator Scott Pruitt issued a memorandum requiring that all Superfund remedies costing more than \$50 million be personally approved by him or his designee.

### Structure of CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, was enacted in 1980 to address the serious environmental and health risks posed by industrial pollution. *U.S. v. Bestfoods*, 524 U.S. 51, 55 (1988). CERCLA “is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites.” *Id.* (citation omitted).

CERCLA enabled the revision of the National Contingency Plan (NCP). The NCP provided the guidelines and procedures needed to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants. The NCP established the EPA’s National Priorities List (NPL).<sup>1</sup> The NPL “is the list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories. The NPL is intended

primarily to guide the EPA in determining which sites warrant further investigation.”<sup>2</sup>

CERCLA, commonly known as Superfund, “created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment.”<sup>3</sup> In short, CERCLA created a “Superfund” of federal money for state cleanup efforts. *Environmental Tech. Council v. Sierra Club*, 98 F.3d 774, 779 (4th Cir. 1996).

The Superfund program “is responsible for managing the cleanup of some of the country’s most contaminated hazardous waste sites, as well as responding to significant environmental emergencies. There are more than 1,300 Superfund sites around the country, and most past cleanups have been paid for by the parties responsible for polluting.”<sup>4</sup>

CERCLA has two primary goals: “(1) to ensure the prompt and effective cleanup of waste disposal sites, and (2) to assure that parties responsible for hazardous substances bear the cost of remedying the conditions they created.” *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 981 (9th Cir. 2016) (citations omitted).

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<sup>1</sup> <https://www.epa.gov/superfund/superfund-cercla-overview>.

<sup>2</sup> <https://www.epa.gov/superfund/superfund-national-priorities-list-npl>.

<sup>3</sup> <https://www.epa.gov/superfund/superfund-cercla-overview>.

<sup>4</sup> [https://www.washingtonpost.com/news/energy-environment/wp/2017/03/02/heres-one-part-of-epa-that-the-agencys-new-leader-wants-to-protect/?utm\\_term=.0f8725311e52](https://www.washingtonpost.com/news/energy-environment/wp/2017/03/02/heres-one-part-of-epa-that-the-agencys-new-leader-wants-to-protect/?utm_term=.0f8725311e52).

CERCLA imposes strict liability for remediating the release or threatened release of hazardous substances on four classes of “Potentially Responsible Parties” (PRPs) – *i.e.*, “owners and facility operators, on persons who arranged for the disposal or treatment of hazardous waste at the relevant site, and on persons who transported hazardous waste to the site.”<sup>5</sup> *New York v. Next Millennium Realty, LLC*, 160 F.Supp.3d 485, 504 (E.D.N.Y. 2016) (citation omitted).

In general, to make out a prima facie case for liability under CERCLA, “a plaintiff must establish that: (1) the defendant is an ‘owner’ or is otherwise liable under 42 U.S.C. § 9607(a)(1)–(4); (2) the site is a ‘facility’ as defined by 42 U.S.C. § 9601(9); (3) there has been a release or threatened release of hazardous substances at the facility; (4) the plaintiff incurred costs responding to the release or the threat; and (5) the costs and response conform to the National Contingency Plan.”<sup>6</sup> *Id.* at 504-05 (citations omitted).

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<sup>5</sup> Section 107(a) of CERCLA imposes liability upon four classes of responsible parties: “(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who

CERCLA permits the federal government to recover its remediation expenses directly from PRPs. *Atlantic Richfield Co. v. U.S.*, 181 F.Supp.3d 898, 908 (D.N.M. 2016), *citing* 42 U.S.C. § 9607(a)(4). CERCLA also “encourages private parties to assume the financial responsibility of cleanup” by creating a cause of action against PRPs for privately incurred removal and remediation costs. *Id.* at 908-09 (citations omitted). CERCLA provides two mechanisms for private parties to recover their environmental cleanup expenses from other parties: cost recovery and contribution. *Id.* at 909; *Whittaker Corp. v. U.S.*, 825 F.3d 1002, 1006 (9th Cir. 2016).

Cost recovery actions are brought under § 107(a) (*i.e.*, 42 U.S.C. § 9607(a)). *Whittaker Corp.*, 825 F.3d at 1006. Contribution actions are brought under § 113(f) (*i.e.*, 42 U.S.C. § 9613(a)). *Id.* Cost recovery and contribution are two distinct remedies:

[T]he remedies available in §§ 107(a) and 113(f) complement each other by

accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance....” *Next Millennium Realty, LLC*, 160 F.Supp.3d at 505, *quoting* 42 U.S.C. § 9607(a).

<sup>6</sup> The NCP provided the guidelines and procedures needed to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants.

<https://www.epa.gov/superfund/superfund-cercla-overview>.

providing causes of action to persons in different procedural circumstances. Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under ... § 107(a). And § 107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs. Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a). As a result, though eligible to seek contribution under § 113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under § 107(a).

*Id.* at 1007, quoting *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 139 (2007).

### The May 9 Delegation Memorandum

On May 9, 2017, EPA Administrator Scott Pruitt issued a revised CERCLA delegation of authority memorandum.<sup>7</sup> Under the revised delegation, the Administrator retained

authority to select remedies estimated to cost \$50 million or more at Superfund sites.<sup>8</sup> Such authority had been previously delegated to the Assistant Administrator for Office of Land and Emergency Management and the Regional Administrators.<sup>9</sup>

In a subsequent memorandum issued on May 22, 2017, Administrator Pruitt stated that, “notwithstanding this change, regional administrators and their staffs shall more closely and more frequently coordinate with the Administrator’s office throughout the process of developing and evaluating alternatives and selecting a remedy, particularly at sites with remedies estimated to cost \$50 million or more.”<sup>10</sup> Administrator Pruitt also established “a task force to provide recommendations on an expedited timeframe 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.”<sup>11</sup>

Reaction to Administrator Pruitt’s delegation memorandum was mixed. As reported by

<sup>7</sup> [https://www.epa.gov/sites/production/files/2017-05/documents/cercla\\_delegation\\_memo\\_and\\_delegations.pdf](https://www.epa.gov/sites/production/files/2017-05/documents/cercla_delegation_memo_and_delegations.pdf).

<sup>8</sup> [https://www.epa.gov/sites/production/files/2017-05/documents/cercla\\_delegation\\_memo\\_and\\_delegations.pdf](https://www.epa.gov/sites/production/files/2017-05/documents/cercla_delegation_memo_and_delegations.pdf).

<sup>9</sup> [https://www.epa.gov/sites/production/files/2017-05/documents/cercla\\_delegation\\_memo\\_and\\_delegations.pdf](https://www.epa.gov/sites/production/files/2017-05/documents/cercla_delegation_memo_and_delegations.pdf).

<sup>10</sup> [https://www.epa.gov/sites/production/files/2017-05/documents/prioritizing\\_the\\_superfund\\_program\\_memo\\_5-22-2017.pdf](https://www.epa.gov/sites/production/files/2017-05/documents/prioritizing_the_superfund_program_memo_5-22-2017.pdf).

<sup>11</sup> [https://www.epa.gov/sites/production/files/2017-05/documents/prioritizing\\_the\\_superfund\\_program\\_memo\\_5-22-2017.pdf](https://www.epa.gov/sites/production/files/2017-05/documents/prioritizing_the_superfund_program_memo_5-22-2017.pdf).

Bloomberg BNA: “EPA Administrator Scott Pruitt’s deeper involvement in Superfund cleanup decisions could weaken regional office ties to sites and favor less costly cleanup, attorneys and community residents say. The Environmental Protection Agency’s regional offices play a major role in deciding how contaminated sites should be remediated. Since Pruitt will now be involved in those decisions earlier, some say he could cut down on cleanup costs. But, local Superfund site advocates worry they’ll lose out on funding and opportunities to weigh in.”<sup>12</sup>

There is also disagreement regarding whether Administrator Pruitt’s delegation of approval of Superfund remedies costing more than \$50 million to himself will further politicize the Superfund process. According to a Law360 article, Superfund “remedy decisions always have been made by political appointees, and parties have always sought to influence that process. ‘What is changing is the level within EPA at which the decisions are made. Whether remedial decisions become more or less political – as opposed to science-based – will depend on how the administration handles those decisions.’”<sup>13</sup>

There is also concern about the impact of proposed budget cuts on Administrator Pruitt’s delegation of approval of Superfund remedies. One commentator noted a possible “collision course” between Superfund sites and proposed EPA budget cuts.<sup>14</sup> Although Administrator Pruitt “has vowed to prioritize the agency’s cleanup of hazardous waste sites, the president would cut funding for the [Superfund] program ... by about 25 percent .... Those cuts are part of an overall [EPA] budget reduction of about 30 percent, as outlined originally in March, when the White House unveiled the top-line budget requests for the fiscal year that begins in October. The agency’s budget would drop to \$5.7 billion – its lowest level in 40 years, adjusted for inflation – from its current \$8.2 billion.”<sup>15</sup>

The Boston Globe editorialized that, “In an unfathomable twist, Trump’s plan was rolled out shortly after the EPA’s administrator, Scott Pruitt, issued a memo calling Superfund a ‘vital function’ and recommending streamlined efforts to scrub polluted soil and water.”<sup>16</sup>

“Whatever budget changes are eventually implemented, there will obviously be a direct impact on CERCLA litigation involving

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<sup>12</sup> <https://www.bna.com/pruitts-superfund-focus-n73014450816/>.

<sup>13</sup>

[https://www.law360.com/environmental/articles/923886/pruitt-epa-gives-cos-new-way-to-fight-superfund-costs?nl\\_pk=0422b45f-aedf-497f-9d1e-82149f73aa13&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=environmental](https://www.law360.com/environmental/articles/923886/pruitt-epa-gives-cos-new-way-to-fight-superfund-costs?nl_pk=0422b45f-aedf-497f-9d1e-82149f73aa13&utm_source=newsletter&utm_medium=email&utm_campaign=environmental).

<sup>14</sup>

<https://www.law360.com/articles/928771/superfund-sites-and-epa-budget-cuts-a-collision-course>.

<sup>15</sup>

<https://www.nytimes.com/2017/05/19/climate/trump-epa-budget-superfund.html?r=0>.

<sup>16</sup>

<https://www.bostonglobe.com/opinion/editorials/2017/05/26/trump-budget-imperils-superfund-cleanup/X2xl4f3xtVAp9vhVvYXMvJN/story.html>.



the government. Moreover, if the cuts in fact ‘hobble’ the EPA as some have predicted, the reduction in federal action at waste sites may have a ripple effect on ‘private’ causes of action among parties seeking to recover costs for remediation efforts.”<sup>17</sup>

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<https://www.law360.com/articles/928771/superfund-sites-and-epa-budget-cuts-a-collision-course>.

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