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Superfund Sites And EPA Budget Cuts: A Collision Course

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Like many of the "first 100 day" initiatives of his new administration, President Donald Trump's proposal to slash the 2018 budget and workforce of the U.S. Environmental Protection Agency has generated commentary over its potential ramifications. Commentators have voiced concern over the severity of the cuts and speculation over how pervasive their effect will be on the EPA's ability to administer its statutory responsibilities. One of the most significant proposals affects the federal Superfund program, where the president initially recommended a budget reduction of $330 million, roughly one-third of the program's budget from last year.[1]

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Assuming that a budget along the lines of the president's proposal is eventually adopted, governmental actions to address and remediate hazardous waste sites will undoubtedly be delayed or scaled back. Moreover, given the scope of the changes proposed, even "private" actions among parties to address site cleanups may be affected.

The 1980 enactment of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) ushered in a wave of litigation surrounding responsibility for the clean up of federally designated Superfund sites. CERCLA established a mechanism whereby the EPA placed waste sites on a "National Priorities List" (NPL) for cleanup. While the Superfund was initially subsidized through a tax on industrial companies to fund the remediations, CERCLA also included a novel liability framework under which the government could sue potentially responsible parties (PRPs) for their involvement in, or contribution to, hazardous waste sites, in many cases stemming from activities conducted decades in the past that were unregulated at the time. CERCLA allowed the government to either perform the cleanup and seek reimbursement for the costs from PRPs, or to obtain orders or settlements directing PRP groups to perform approved remediation plans. Because liability under CERCLA is "joint and several," remediation of even those sites where many PRP's had disappeared or gone out of business ended up funded through whichever entities were still around to bear the brunt of the liability.

The task of initiating litigation to identify PRPs and determine their share of responsibility for waste cleanups comes within the purview of the Environmental and Natural Resources section of the U.S. Department of Justice. Because the tax that initially funded the cleanups expired in 1996, the pool of available federal funds was significantly reduced, making the identification and prosecution of actions against viable PRPs of utmost importance to the continued cleanups of the sites and a focus of the ENR section's efforts. As of 2006, PRP's had funded over 70 percent of all completed remedial actions.[2]

As of March 21, 2017, the National Priority List contained 1,337 hazardous waste sites that the EPA has determined require remediation.[3] That list includes sites where the cleanup has been paid for by the Superfund tax, by PRPs and/or some combination thereof. Some sites are considered “orphan” sites where no solvent PRPs can be located to fund the required work.

Even prior to the Trump administration’s proposal to slash the EPA budget by 31 percent and to eliminate over 3,200 agency positions, the lack of direct funding for the Superfund program had significantly delayed completion of remedial actions and prevented initiation of projects on sites eligible for remediation. Cuts to the budget will undoubtedly slow the ongoing cleanup at presently listed sites and further delay initiation of remedial action projects, a phenomenon that the EPA has already experienced as a result of 15 years of reduced budgets between 1999 and 2013.[4] However, the magnitude of the cuts suggested by the present administration would likely trigger a far harsher effect on both existing and planned remedial actions. While the effect on “orphan” sites will be the most acute (as the sole funding source for remediation is the government coffers)[5], the reduced agency manpower will undoubtedly slow down review and approval of remedial plans at sites where private parties are paying for and performing the cleanup.

In addition to the budget cuts, EPA Administrator Scott Pruitt has recently issued a memorandum requiring that all Superfund remedies estimated to cost over $50 million be personally approved by the administrator.[6] While the stated goal of the new policy is to “facilitate the more-rapid remediation and revitalization of contaminated sites and to promote accountability and consistency in remedy selection,”[7] at least one commentator has opined that “in the real world, PRPs just want certainty and timely decisions. Aside from a few cases where Pruitt might put the kibosh on expensive remedies that don’t eliminate real risks, I fear that in the majority of cases, all that will happen will be that cleanup decisions will be delayed; PRPs will pay more as the result of such delays.”[8]

Whatever budget changes are eventually implemented, there will obviously be a direct impact on CERCLA litigation involving 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. After more than 20 years of litigation and case law attempting to parse the statute’s muddled language, the U.S. Supreme Court has established that CERCLA allows two general methods of private actions. The first is a “direct” action to recover voluntarily incurred response costs from other PRPs under Section 107(a)(4)(B). The second is an action for contribution under Sections 113(f)(1) and 113(f)(3)(B) to recover costs incurred after a CERCLA action initiated by the government.[9]

The private party’s contribution right is obviously derivative of its liability for costs it has incurred in responding to or settling a governmental action. Section 113(f) authorizes a PRP to seek contribution “during or following” a suit under CERCLA, which means that the private action can be initiated before or after common liability among the PRPs is established.[10] Yet litigating and/or negotiating contribution claims will be affected if budget cuts prevent the EPA and the Justice Department from initiating or seeing through to completion the primary claim upon which the Section 113 claim is based. Put another way, the private action to determine relative shares of contribution may be stuck in traffic behind the slow-moving or broken-down bus being driven by the feds.

In contrast, it would seem that an action under 107(a), where a private party may recover without any establishment of liability to a third party,[11] would roll along without being impeded by the tumult that may result from the contemplated cuts at the EPA. Indeed, there is no requirement that a private

CERCLA plaintiff wait for any governmental order before incurring "necessary costs of response." Yet the "volunteer" remediator must be wary of the statutory requirement that costs incurred must be "consistent with the national contingency plan" (NCP) in order to be recoverable under Section 107(a)(4)(B). Where a private party is cleaning up a site pursuant to an administrative order issued by the EPA or pursuant to a consent order entered into between the party and the EPA, federal regulations establish an irrebuttable presumption that the private party's actions were consistent with the National Contingency Plan.[1]2 However, "independent" actions enjoy no such presumption, and the CERCLA plaintiff has the burden of proving consistency with the NCP in order to recover its costs.[13]

The NCP consistency requirement means that even a private CERCLA plaintiff cannot entirely avoid the involvement of the government in performing a cleanup that will permit recovery of response costs. The NCP mandates, among other things, that the party seeking recovery provide an opportunity for public comment and participation on its cleanup plan. Some courts have held that "participation by a public agency is sufficient to demonstrate compliance with the NCP public comment requirement."[14] Thus, it may be prudent for a private actor to involve a state or local agency to "publicly" review its plans in order to satisfy the NCP. In that event, the difficulties of dealing with a diminished and cash-strapped U.S. EPA may be effectively avoided. Many observers have noted that an increased role for state and local officials in dealing with environmental issues would be a consequence of Congress enacting the proposed cuts;[15] increased participation in oversight of private cleanups may be only one example.

It is possible that Congress may temper the effect of the president's proposed budget on the EPA and the Superfund program, but the potential ramifications loom large for both governmental and private actors dealing with environmental remediation.

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[1] Lyons, Dana, "Trump Budget Cuts Signal Increased Delays to Superfund Site Cleanups," Georgetown Environmental Law Review, online article, April 8, 2017, (https://gelr.org/2017/04/08/trump-budget-cuts-signal- increased-delays- to-superfund- site-cleanups/) at 1.

[2] Schmid, Kathleen, The Depletion of the Superfund and Natural Resource Damages, 16 N.Y.U. Env. L.J. 483, 517 (2008).

[3] Lyons, supra, note 21

[4] "Superfund: Trends in Federal Funding and Cleanup of EPA's Nonfederal National Priorities List Sites," United States Government Accountability office, GAO-15- 812 (September 2015), page 16.

[5] Lyons, supra, p. 2, note 23.

[6] Revisions to CERCLA Delegations of Authority 14-2 Responses and 14-21A Consultations, Determinations, Reviews and Selection of Remedial Actions at Federal Facilities, May 9, 2017.

[7] Id.

[8] Jaffe, Seth, “Scott Pruitt Just Solved All of the Problems with Superfund. Not.” (https://www.acoel.org/post/2017/05/17/Scott-Pruitt- Just-Solved- All-of- the-Problems- with-Superfund- Not.aspx)

[9] Jeffrey M. Gaba, The Private Causes of Action under CERCLA: Navigating the Intersection of Sections 107(a) and 113(f), 5 S. Mich. J. Envtl. & Admin. L. 117 (2015).

[10] United States v. Atlantic Research Corp., 551 U.S. 128, 138-39 (2007).

[11] Id. at 139.

[12] 40 C.F.R. § 300.700(c)(3)(ii) (“Any response action carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA, will be considered ‘consistent with the NCP.’ ”).

[13] Carson Harbor Village Ltd. v. County of Los Angeles, 433 F.3d 1260, 1265 (9 th Cir. 2006).

[14] Id.

[15] “EPA Remains top Target with Trump Administration Proposing 31 Percent Budget Cut,” Washington Post, May 22, 2017 (https://www.washingtonpost.com/news/energy-environment/wp/2017/05/22/epa-remains-top- target-with- trump-administration- proposing-31-percent-budget- cut/?utm_term=.78b37d7dae1a)

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