
EPA Centralizes CERCLA Remedy Selection Authority

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Introduction

Environmental Protection Agency (EPA) Administrator Scott Pruitt last week issued a memorandum revising the existing delegations of authority related to implementation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or “Superfund” law. Administrator Pruitt’s action consolidates his authority to make remedy selections at the most significant of CERCLA cleanup sites. The revised delegation reserves for the Administrator, with the option to further delegate only to the Deputy Administrator the authority to select any remedy estimated to cost more than \$50 million. This retention of authority applies at both privately owned sites and federal facilities.

Rationale for Revising the Delegations

In his memorandum announcing the changes, Administrator Pruitt writes, “[U]nder my administration, Superfund and the EPA’s land and water cleanup efforts will be restored to their rightful place at the center of the agency’s core mission.” By centralizing the authority to select remedies at major cleanup sites, EPA hopes to engender consistency that will “improve the remedy selection process” while creating efficiencies that lead to “more-rapid remediation.”

Regional Coordination

As part of the restructuring of CERCLA implementation authority, Mr. Pruitt calls for increased coordination with the Administrator’s Office. Although that request is directed at the Assistant Administrator for the Office of Land and Emergency Management (OLEM) and the Regional Administrators, the prospect of more and earlier involvement by the Administrator may present strategic questions to potentially responsible parties (PRPs) at major CERCLA sites as well. PRPs should look for and evaluate opportunities to engage the Administrator’s Office during the preliminary assessment and site investigation stages, and to help shape the development of remedial alternatives.

Earlier engagement with the Administrator may add complexities. It is likely that the Administrator’s Office will continue to rely on the regions for information and advice on local issues affecting remedy

selection. And during the early stages of an investigation, it may not be clear whether a remedy will exceed the \$50 million threshold. For sites carrying estimated costs below that threshold, the Assistant Administrator for OLEM and the relevant Regional Administrator will select the remedy. The revised delegations may require PRPs to coordinate at multiple levels within the agency to ensure their views are accounted for and to best shape the remedy.

The revised delegations do not affect the roles of other stakeholders that have a say in remedy selection. For example, states and certain Indian tribes have a role in selecting the remedy at some sites under the National Contingency Plan (NCP), Section 300.515, and related EPA guidance. Where the NCP gives states and tribes such authority, they will remain important voices in the remedy selection process. As discussed in detail below, other federal agencies will also retain their role in remedy selection for federal facilities at which they are the owner or operator.

Federal Facilities

The revised delegations return authority to the Administrator to select the remedy at federal facilities when that remedy will cost more than \$50 million. The revised delegations do not, however, disturb the interagency process provided at federal facilities under CERCLA and Executive Order 12580, Section 10. Those authorities give the agency that owns or operates the facility a role in selecting the remedy, but EPA retains a role as well, including the authority to select a remedy when no agreement with the other federal agency can be reached. Last week's change in delegations only affects EPA's role in that process, centralizing it in the Administrator's Office for cleanups of greater magnitude. CERCLA Section 120(e) will continue to require the owner or operator agency to enter into an agreement with EPA within 180 days after the conclusion of a remedial investigation and feasibility study at the site. That agreement must provide for the "expeditious completion . . . of all necessary remedial action at [the] facility." It is not clear what, if any, additional efficiencies EPA can create with last week's change in delegations.

For those facilities requiring a cleanup costing more than \$50 million, the Administrator will now be an important decision maker and therefore an important point of contact for PRPs, along with the agency that owns or operates the federal facility and, in some cases, local EPA personnel. This is a significant development for government contractors and companies with historic government contractor liabilities at federal facilities. After they receive a demand from the federal owner or operator, coordination with the Administrator may help those companies shape the ultimate remedy to which they contribute. In addition, the direct involvement of the Administrator may prompt earlier coordination between PRPs and the owner or operator agency regarding remedial alternatives and the scope of the remedy, providing an opportunity to the private parties to shape the remedy even before addressing allocation questions.

Conclusion

Based on the May 9 revised delegation, PRPs at the country's most significant Superfund sites have a new way to shape the remedy and influence the costs of hazardous waste cleanup. The Administrator will now play a more prominent role in any CERCLA cleanup that will cost more than \$50 million, both at private facilities and sites and at federal facilities. Accordingly, PRPs should

remain vigilant for opportunities to engage with the Administrator's Office in developing the remedies at these sites.

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