



insights

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Expedited Cleanups under CERCLA—Could It Be True?

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Since the enactment of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980, seemingly continual efforts have been undertaken to streamline and accelerate cleanup actions subject to CERCLA. Several of the prior administrations have taken a shot at this. For example, we have seen the Superfund Accelerated Cleanup Model (SACM) created in 1992, which was designed to streamline site investigations; the Superfund Alternative Approach formally adopted by the U.S. Environmental Protection Agency (EPA) in 2002 and based on a similar approach that was formally described as the “NPL-equivalent” approach in 2000; development of the Superfund Task Force established May 22, 2017; and reconfiguration of the National Remedy Review Board and its charter in 2020—all measures seeking to speed up selection of a remedy and expedite cleanups. The current Biden administration is no

exception, and on July 1, 2021, the EPA Office of Enforcement and Compliance Assurance (OECA) issued a memorandum the subject of which was Strengthening Environmental Justice Through Cleanup Enforcement Actions (Memorandum). The Memorandum indicates that it “sets out steps to advance these environmental justice goals through cleanup enforcement at private and federal facility sites, primarily through the [CERCLA] and the Resource Conservation and Recovery Act.”

The Memorandum sets out various initiatives designed to require responsible parties to take early cleanup actions, ensure prompt cleanup actions by responsible parties, enhance enforcement instruments, increase enforcement oversight, and build trust. Functionally, the focus of the Memorandum is to expedite cleanups where overburdened communities are impacted.

The trend toward a more efficient process under CERCLA that is designed to get the actual work completed is a good one. It would be difficult to find an EPA region, private responsible party, nongovernmental organization, private citizen, or other stakeholder that would not agree that quicker response actions are a good thing. While the objectives laid out in the Memorandum establish the right trend, their effectiveness may be limited due to the timing in the CERCLA process of enforcement engagement and department compartmentalization at EPA. More coordination seems appropriate between OECA and other offices such as the Office of Land and Emergency Management.

The *basic* CERCLA process starts with a preliminary assessment, followed by either a remedial investigation/feasibility study (RI/FS) or an environmental evaluation/cost analysis (EE/CA). Next will come publication of a proposed plan or action memorandum, followed in a remedial action by a record of decision (selecting a preferred remedy). Once the remedy is selected, if a private party is involved, that party negotiates a consent decree with the United States (i.e., the EPA and the Department of Justice) to perform the remedy, and after execution and entry of the consent decree (or unilateral administrative order) with the court, a remedial design/remedial action (RD/RA) is developed. Finally work begins. Collectively this is a long process and usually takes many years.

The Memorandum and the measures it outlines relate only to CERCLA enforcement, which most often does not begin until the negotiation of the consent decree and subsequently the RD/RA. By this point in the CERCLA process, the site has been identified and defined, the remedy has been selected, and the parties are ready to design and implement action. Expediting the negotiations of the RD/RA is valuable and would likely be welcome by all parties involved, but to really expedite cleanups, EPA will need to build on the OECA direction and focus on alternatives to streamline the RI/FS-EE/CA stage. It is the investigation stage where CERCLA languishes the most. It is not unusual for this stage to take 10 to 20 years or even longer.

After decades of working under CERCLA and the remediation of sites where the principal contaminants are elemental metals, experience suggests that at these sites in particular, the current process could be streamlined and expedited. Remediation of elemental metal contamination will take a familiar form largely because the contaminants are elements that cannot be

broken down or destroyed. For example, at elemental metal site remediations, the remedy almost certainly will be to (i) do nothing and utilize institutional controls to restrict use of or access to the site or minimize exposure to the contaminants, (ii) cover the material in place, (iii) consolidate and cover the material in place, (iv) excavate the material and dispose of it offsite, and maybe (v) potentially incorporate a water treatment component. Yet the current process requires years of study and data collection, costing millions of dollars, all to make a remedy selection that will consist of one or a combination of these alternatives.

Recognizing that CERCLA has a prohibition against pre-selecting a remedy until the investigation stage and remedy selection has been completed, working within this concept EPA has experimented with options used to efficiently evaluate remedial remedies. One example includes the use of presumptive remedies. Presumptive remedies are preferred technologies or remediation strategies for common categories of sites. The preferred remedy is based on historical patterns of remedy selection, aggregated engineering evaluations, and multiple periods of data collection. The presumptive remedy approach grew out of the SACM to streamline site investigations and speed up selection of a remedy, particularly in the RI/FS and RD/RA stages of the CERCLA process. For example, EPA developed presumptive remedies for contaminated sites involving, among others, metals-in-soils, volatile organic compounds in soil and groundwater, municipal landfills, and groundwater, and to some degree with manufactured gas sites. The concept was a sound idea. For some reason, presumptive remedies were not heavily used (the term “presumptive” fell under some criticism) and lost momentum in the late 1990s but were never wholly disclaimed by EPA.

EPA has also used a concept known as a focused feasibility study (FFS) designed to streamline the creation of the feasibility study that is used to make a remedy selection. This process may have merit to accelerate the process if it could be better defined and more “focused.” There may be other creative ways to expedite the investigatory process. While the current regulatory structure may not support it, many have suggested that efficiencies could be gained with a simultaneous RI/FS. If the RI and FS were prepared together for sites with limited remedial options, data could be designed, focused, and collected to support gathering the information necessary to complete the screening and selection of known remedial alternatives, rather than using the RI to develop alternatives that are already

apparent. Under this approach, the actual remedy selection would be preserved and adopted through a record of decision, but the data collection would be focused.

The concept of expedited actions and focused investigations is ripe to merge. For many categories of sites there exists a mature pattern of remedy selection, as well as experienced and sound engineering designs. The existence of this empirical information is exactly what was intended as the basis for establishing a set of remedy options and streamlining the CERCLA RI/FS-EE/CA process. For reason of due process, it is important to note that for all the parties involved, there is still a remedy selection process. What the procedure would do is focus the investigation on gathering additional information and an analysis to choose one of the preferred options, with a goal of getting the remedial work done sooner.

It is clearly inefficient to spend millions of dollars and years of data collection and analysis when a remedy is apparent. It may not be appropriate at all sites, but for a significant segment of them, it makes sense to use the information collected over decades of CERCLA actions to assist in remedy selection. Whether the solution is presumptive remedies, FFS, or some other methodology, the creative minds in the private sector and within EPA must address the investigation element of CERCLA if the goals of expedited cleanups are to be realized. Reaching the objective of expedited cleanups will be heightened if the agency direction is collective rather than compartmentalized and efficiencies are built into the entire process and not left to enforcement. The discussion of expediting remediation in overburdened communities is dynamic, and we may see additional direction from EPA between the date of writing and publication. For now, the Memorandum is helpful, but procedural obstacles to expedited remediation remain. What is clear is that techniques and program procedures that will support quicker remedial resolution would likely lead to a greater willingness on the part of potentially responsible parties to undertake actions and see the productive repurposing and restoration of hundreds of thousands of acres of property including specifically overburdened communities. [↗](#)

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