Memorandum

TO:	Office of Site Remediation Enforcement
FROM:	Lawrence P. Schnapf
DATE:	June 5, 2018
SUBJECT:	New Tools to Encourage Private Investment in Cleaning Up and Reusing Superfund Sites (OSRE SFTF Listening Session #27)

Following are written comments to supplement my verbal comments that I shared for OSRE SFTF Listening Session #27.

I first want to commend Administrator Pruitt for making the Superfund program a priority for EPA. I also want to congratulate the Superfund Task Force on issuing its comprehensive report which contains many important and promising ideas

I. Response to Questions About Barriers to Redevelopment-

The first three questions can be summed up in one word: uncertainty.

- Uncertainty about the scope of liability.
    - Uncertainty about the extent of the cleanup.
    - Uncertainty about cleanup costs and
    - uncertainty about the length of time between the start and completion of the cleanup.

Redevelopment projects at NPL and large Brownfield sites are considered high-risk projects that require high-risk capital which, in turn, requires a high rate of return. Cleanup delays can significantly impact the rate of return and make these projects less attractive to investors.

Many redevelopment projects use short-term loans and equity contributions to finance cleanup. It is usually only after clean is completed that the project can obtain construction financing or permanent financing. As a result, cleanup delays can substantially increase the costs of these loans or require developers to draw on equity contributions from partners/investors.

II. Response to Question About Tools to Enhance Redevelopment

- Before turning to the EPA tools, I do have to say that the presentations we just heard suggests that EPA does not truly appreciate how much case law has undermined the value of the bona fide prospective purchaser (BFPP) liability protection. It is certainly true that when Congress enacted the 2002 amendments, it was anticipated that the BFPP would be largely self-implementing. However, in the wake of cases like *PCS Nitrogen Inc. v. Ashley II of Charleston LLC.*[1] and *Voggenthaler v Maryland Square LLC*[2], many developers and their lenders feel they can no longer rely with any assurance on the self-implementing nature of the BFPP protections due to questions over what constitutes appropriate care. Because of this line of cases, the BFPP more resembles the car reservation scenario in the famous Seinfeld episode "The Alternate Side:" [3] The BFPP may be easy to achieve but hard to maintain because of the uncertainty over what steps need to be taken to satisfy the appropriate care requirement.

- **More Robust Use of Existing Tools by Regions**-EPA has indeed developed several helpful guidance documents and useful tools such as comfort letters and various PPAs/PLAs, BFPP Work Agreements, PT and even 122(h) removal agreements. However, the problem is that many regional offices are very reluctant to use these tools. I'd like to take this time to give a shout out

[1] 714 F.3d 161 (4th Cir. 2013)

[2] , 724 F.3d 1050 (9th Cir. 2013)

[3] In this episode, Jerry Seinfeld walks up to a car rental counter to and is informed by the rental car agent that the mid-sized car he reserved is not available:

Jerry: "I don't understand. Do you have my reservation?"

Rental Car Agent: "We have your reservation, we just ran out of cars."

Jerry: "But the reservation keeps the car here. That's why you have the reservation."

Rental Car Agent: "I think I know why we have reservations."

Jerry: "I don't think you do. You see, you know how to take the reservation, you just don't know how to hold the reservation. And that's really the most important part of the reservation: the holding. Anybody can just take them."

to Region 9 which appears to be one of the few regional offices willing to make frequent use of the various model agreements EPA has developed. Region 2 has also entered into a number of 122(h) orders with prospective purchasers along the Gowanus Canal. The Gowanus Canal is a particularly good example of how much property owners value these EPA agreements. Most of the property owners have asked EPA region 2 office to enter into122(h) orders even though the owners were already enrolled in the state brownfield cleanup program where compliance with the state requirements would presumably allow the owners to assert that they have exercised appropriate care. The property owners and their lenders have sought the additional assurance afforded by the 122(h) orders.

- **Reasonable Steps Letters-**Because of concerns about ability to establish the BFPP appropriate care requirements, EPA should make greater use of reasonable steps letters which identify the steps that EPA determines would constitute reasonable steps an owner or operator should follow to maintain its BFPP status. Michigan has a due care plan program whereby an owner or operator may request the state to review and approve a plan that documents the actions that must be taken to ensure that the contamination does not cause unacceptable exposures, and the contamination is not exacerbated or worsened. These due care plans have been very helpful in deals I have been involved with in Michigan when representing lenders. The plans not only inform property owners or operators what steps they must follow to preserve their liability protections but also help demonstrate to lenders the nature and costs of the future obligations that their borrower will have to follow. Lenders typically require borrowers to covenant to comply with these due care requirements. EPA headquarters should strongly encourage regions to use reasonable steps letters.

- **Fractional Property Interests-** This issue might be more appropriate for the Common Elements listening session but I wanted to share liability concerns involving fractional property interests. CERCLA liability established liability for owners and operators but modern property ownership and financing is much more complicated. Modern mixed use real estate projects frequently use condominium ownership with corporate and individual commercial and residential condo owners holding undivided property ownership and condo association that is responsible for common area management. Often times, there may be a separate condominium owner for a subgrade garage that may serve as an engineering control for sub-surface contamination, ground-level commercial condo owners and then upper level residential condo unit owners.

In theory, each condo unit owner could be considered an owner who is responsible for exercising appropriate care. It is also unclear who might be an operator- is it the subgrade garage who controls the concrete slab, the condo association who might be responsible for maintaining exterior surfaces that might be serving as engineering cap.

- **Delisting Operable Units-** To encourage redevelopment, EPA should consider delisting geographic areas of NPL sites that have remedial actions similar to the RCRA parceling concept.

III. Revise the National Contingency Plan

The Hazardous Substance Response subpart of the NCP was last revised in 1990. In the ensuing thirty years, EPA and the states have learned much about remediating contaminated sites. EPA should consider the following amendments to the NCP.

- **Revise Subpart H to Allow for Streamlined RI/FS Process** - EPA adopted the RI/FS approach when it added the Hazardous Substance Response Subpart F to the NCP. The purpose of this addition was to provide a reasoned decision-making process for remedy selection in the absence of media cleanup standards and limited agency experience with remedial technologies. Another rationale for adopting the rigid stepwise approach was to ensure that the federal government could recover its response costs. It may have made sense to require the evaluation of five alternative remedies in 1982 and 1985, but this is a wasteful and time-consuming exercise in 2018 especially for redevelopment projects that plan to excavate soil or otherwise address contamination during construction activities.

  The states now have mature remedial programs that use risk-based cleanup criteria, and many have adopted streamlined site investigation and remedial procedures. The NCP also does not seem to contemplate voluntary cleanups with state oversight.

  EPA consider revising NCP Subpart H to allow responsible party- and BFPP-funded cleanups to proceed under these state superfund, RCRA and voluntary/brownfield cleanup programs without having to comply with the more rigid Subpart F requirements.

  For example, dozens of NPL-caliber sites have been remediated under the New York State Brownfield Cleanup Program (BCP), which does not require an assessment of five alternatives. The BCP requires applicants to select a proposed remedy and evaluate an unrestricted cleanup alternative. The

New Jersey Technical Requirements for Site Remediation (Tech Regs)[4] do not require an alternatives analysis, but instead rely on the state minimum Remediation Standards.[5] Indeed, in responding to comments to its Tech Regs, the New Jersey Department of Environmental Protection (NJDEP) stated in 1993:

> *The Department, however, does not advocate the specific stepwise approach used by the Environmental Protection Agency used in the CERCLA RI/FS process because the Department does not believe it is necessary or appropriate for all sites.*[6]

The EPA can enter into State Memoranda of Understanding (SMOUs) with states with remedial programs that satisfy the requirements of Section 128 (State Response Programs) that would allow the states to implement CERCLA in lieu of EPA. Indeed, it may be that EPA's resources may be best focused on performing removal actions to eliminate imminent risks and issuing unilateral administrative orders with the long-term remedial actions performed by or under state oversight.

- **Amend ARARs** - The NCP requires remedial actions to comply with applicable or relevant and appropriate requirements (ARARs). [7] When the NCP was amended in 1982 to incorporate CERCLA, states had not yet established soil or groundwater cleanup standards or guidance.[8] The principal cleanup criteria that were then available were federal and state water quality criteria that EPA concluded were too rigid and would require the use of potentially inappropriate levels of cleanup that would not allow consideration of individual circumstances at each release.[9]

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[4] N.J.A.C. 7:26E.

[5] N.J.A.C. 7:26D.

[6] 25 N.J.R. 2412 (June 7, 1993) (response to comment 1193).

[7] Generally, "applicable"' standards are those that would otherwise be legally applicable if the actions were not undertaken pursuant to CERCLA section 104 or section 106. "Relevant" standards are those designed to apply to problems sufficiently similar to those encountered at CERCLA sites that their application is appropriate, although not legally required. Standards are also relevant if they would be legally applicable to the CERCLA cleanup but for jurisdictional restrictions associated with the requirement. See 50 Fed. Reg. at 5861, 47917 (Feb. 12 and Nov. 20, 1885). The 1986 Superfund Amendments and Reauthorization Act (SARA) codified EPA's definition of ARARs with some variations. See 42 U.S.C. 9621(d).

[8] The NCP was originally developed to provide a framework for emergency responses to oil spills. The passage of CERCLA required revision of the NCP because CERCLA provided that the NCP would become the national roadmap for responding to releases of hazardous substances, pollutants, and contaminants.

[9] See 47 Fed. Reg. 10972, 10978 (Mar. 12, 1982) "Most of the comment focused on the provisions for determining the appropriate extent of remedy. While some commenters supported the process established in § 300.68 for selecting a remedy, many commenters criticized the Plan for not explicitly requiring consideration of State and Federal health

So, instead of establishing cleanup standards, EPA developed "a system for decision-making which has as its primary feature a reasoned process that contains a series of checks throughout to ensure that the decision-making process produces an effective remedy. The methodology emphasizes cost-effective, environmentally sound remedies which are feasible and reliable from an engineering standpoint." [10]

The State of New Jersey and the Environmental Defense Fund challenged the 1982 NCP revisions for not including cleanup standards.[11] EPA settled this litigation by agreeing to amend the NCP to include the concept of ARARs. In the preamble to the 1985 revisions to the NCP, EPA stated that ARARs could only be determined on a site-by-site basis.[12]

The process of establishing ARARs can be time-consuming, confusing and often results in disputes among EPA, responsible parties and states. According to a position paper by the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), the problems with ARARs have included:

- Inconsistencies in ARAR determinations;
- Inconsistent application of State requirements by EPA;
- EPA inappropriately determining that a State requirement is procedural rather than substantive when the State believes it is an ARAR critical to implementation of the chosen remedy;
- Reluctance of other federal entities to recognize State environmental laws and regulations as ARARs;
- Lack of written documentation when EPA finds that a State cleanup requirement was not an ARAR; and
- Inadequate time for states to challenge EPA's determination that a State requirement is not an ARAR.[13]

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and environmental standards in development of remedies. Similar comments stated that the Plan should include specific levels of clean-up that must be attained with any remedy…. It must be noted, however, that circumstances will frequently arise in which there are no clearly applicable standards. For instance, acceptable levels of hazardous substances in soil are not established, and there are no generally accepted levels for many other hazardous substances in other media."

[10] 47 FR 31180 (July 16, 1982). The 1982 NCP placed heavy emphasis on cost-effectiveness (§ 300.68(j)), and Fund-balancing (§ 300.68(k)).

[11] Environmental Defense Fund v. EPA, No. 82-2234; New Jersey v. EPA, No. 82-2238 (D.C. Cir. February 1, 1984). See 50 FR 5862 (Feb. 12, 1985).

[12] EPA was again sued over the 1985 NCP amendments, with some litigants complaining that ARARs were too vague. The ARARs were upheld in Ohio v. EPA, 997 F.2d 1520, 1525 n.1 (D.C. Cir. 1993).

[13] "State Concerns with the Process of Identifying Comprehensive Environmental Response,

Compensation and Liability Act (CERCLA) Applicable, or Relevant and Appropriate Requirements" (February 28, 2018) (available at http://astswmo.org//files/policies/Position_Papers/ARARs-Position-Paper-Feb-2018.pdf). The

As previously explained, the ARAR concept was developed when state soil and cleanup standards and criteria did not exist. Now that virtually every state has adopted risk-based cleanup criteria, EPA should redefine ARARs so that there is a rebuttable presumption that state cleanup standards should be used to establish the remedial goals. If a state has established a risk-based cleanup standard for a particular contaminant, the process for searching for a remedial goal should stop there.

The cumbersome process of identifying other cleanup criteria should only be used when a state has not adopted a cleanup criterion for a particular contaminant or a specific exposure pathway such as vapor intrusion. While some will argue this could result in different cleanups standards at different sites depending on state cleanup criteria, such a critique is really a Trojan Horse since inconsistent cleanups among the region offices have long plagued the Superfund program.

- **Incorporate Land Use and Groundwater Policy in the NCP -** When one reads the preamble to the 1988 proposed NCP amendments and the 1990 final regulation, the dearth of any discussion on considering land use or redevelopment in the remedy selection process is striking. EPA first issued guidance and policy in the 1990s to incorporate land use considerations in remedy selection and has also adopted several groundwater protection/restoration policies as well as institutional/engineering controls guidance. Given increasing criticism of agency use of guidance, EPA should incorporate these principles into the NCP.[14]

IV. STATUTORY CHANGES

- **Amend 122(a**)- The Administration should pursue the proposal in its infrastructure plan to amend 122(a) so that EPA may enter into BFPP or PPA agreements without having to obtain DOJ approval-. On several occasions, I have asked regional counsel if a potential purchaser could enter into a BFPP agreement but been told need to involve DOJ adds delays and costs so instead have entered into 122(H) agreements. However, some parties prefer to have

position paper was prepared in response to a recent EPA memorandum "Best Practice Process for Identifying and Determining State Applicable or Relevant and Appropriate Requirements Status Pilot" OLEM Directive 9200.2-187 (October 20, 2017).

[14] For example, see "Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration," OSWER Directive 9283.1-33 (June 26, 2009) listing various policies.

statements that they qualify as a BFPP. Amending section 122(a) would enable this to be possible.

V. RCRA

- **Require States to Use Parceling to Encourage RCRA Brownfields-** EPA RCRA Brownfield Reforms urged states to allow owners or operators of TSDF to sell off clean parcels of their facilities (e.g., portions never used for any waste management) while the HWMUs or SWMUs were undergoing corrective action. Congress could amend RCRA to specifically allow parceling of TSDF.

- **Clarify RCRA liability for Generator-only sites-** There is much confusion if closure obligations for a generator site run with the land. In other words, a site may have been owned or operated by a defunct generator. A prospective purchaser is interested in redevelopment but is concerned it will become subject to closure obligations for the areas where wastes were managed. Presumably, generator sites could be treated as any brownfield site without the need to undergo formal RCRA closure.

VI. TSCA PCB Program

- **Add Landowner Liability Protections to TSCA for PCB Cleanups-** Purchasers often take steps to qualify for CERCLA BFPP only to learn after taking title that the property has been impacted with PCBs and they are subject to TSCA cleanup. This might require Congressional action but I do not see any reason why TSCA should not have a BFPP defense. After all, Congress added AAI and BFPP to OPA in 2004 with little controversy.

- **PCB Cleanup - T**he PCB cleanup and disposal rules are a bit RCRA-like, a bit CERCLA-like and not well integrated. The cleanup should also not depend on the original spill concentration but on current concentrations and media. I'd like to see the entire Subpart D to 40 CFR 761 repealed, and disposal of PCB-containing material handled entirely within RCRA via the listed-waste and LDR route.