EPA In The Trump Era: The Superfund Enforcement Initiative

By **Donald Elliott** February 21, 2018, 2:08 PM EST

*Since President Donald Trump took office just over one year ago, much has changed at the U.S. Environmental Protection Agency. In this **Expert Analysis series**, former EPA general counsels discuss some of the most significant developments and what they mean for the future of environmental law in the U.S.*

Donald Elliott

The popular narrative about the Trump administration and the environment has emphasized climate change, on which the U.S. Environmental Protection Agency under Administrator Scott Pruitt is undeniably less aggressive than under its immediate predecessor. One area that sharply conflicts with this pattern, however, is Superfund, where the Pruitt EPA is much more aggressive than all of its recent predecessors, especially when it comes to issuing unilateral administrative orders, or UAOs. Some speculate this may be to try to counteract the bad press it has received for being weak on the environment in other areas.

The Comprehensive Environmental Remediation Compensation and Liability Act[1] aka "Superfund" was enacted in 1980 in the wake of the Love Canal incident when the media was all abuzz with stories about improper disposal of hazardous waste. The statute was amended in 1986,

and provides some of the strongest legal tools ever invented. The liability provisions in CERCLA §107 are particularly strong and make companies liable for the costs of cleaning up sites at which hazardous substances are released, or even "threatened" to be released, without fault or even causation if they fall into one of four categories: current owners, former owners at the time of disposal, arrangers for disposal, or transporters. This scheme is sometimes called "status liability," because companies are liable without fault if they fall into one of the categories.

Originally the statute was administered with a vengeance. Early on the EPA routinely required 30 years of pumping and treatment for groundwater even if it was technologically infeasible to return groundwater to its pristine state. The EPA also persuaded the lower courts to impose joint and several liability against deep pockets even if they did little or nothing to contribute to the actual problems at a site. When I left as EPA general counsel in 1991, we were estimating the total cost for cleaning up all the remaining Superfund sites we already knew about at the time was over $1 trillion (yes, with a T), or about one-seventh the total annual output of the U.S. economy as a whole. We knew that something had to change.

The change began with the EPA's "Unfinished Business" report in 1987, which assessed costs and benefits across EPA programs and showed that all of the other EPA programs produced much larger risk reductions at far lower costs than Superfund. Subsequently, all administrations, both Republican and Democrat, until President Donald Trump and Pruitt have gradually made Superfund implementation more reasonable. They understood that from a risk/benefit standpoint, "cleaning up" contaminated sites was very expensive but did relatively little to improve human health or the environment after the initial steps were taken to isolate the waste, stabilize the site and prevent exposure.

Superfund gradually became more practical but less punitive and wasteful through a series of administrative interpretations, court decisions and statutory amendments that began under EPA Administrator William K. Reilly but continued under the Clinton, George W. Bush and Obama

administrations. For example, the agency started to pay more attention to cost-effective risk reduction than to cleanup for cleanup's sake and stopped requiring continuing groundwater treatment where it was technologically infeasible to clean up groundwater. Congress added a defense for bona fide prospective purchasers of contaminated property in 2002. The U.S. Supreme Court rejected the EPA's theory that parent companies were automatically liable for disposal by their subsidiaries in Bestfoods in 1998,[2] and it made divisions of liability more reasonable in its 2009 Burlington Northern case by interpreting Superfund to track traditional common law principles for apportioning liability.[3]

By contrast, Pruitt has been a man on a mission when it comes to Superfund. In a July 25, 2017, memo to his inner circle of top political appointees and career staff, Pruitt wrote "the Superfund program is a cornerstone of the work that the EPA performs for citizens and communities across our country. My goal as Administrator is to restore the Superfund program to its rightful place at the center of the agency's core mission."

Pruitt has taken over remedy selection personally at all sites costing over $50 million, something no other EPA administrator has ever done. He appointed Albert "Kell" Kelly, an Oklahoma banker, to head up a Superfund reform task force. With the aid of the EPA's career staff, they have come up with an aggressive, but somewhat naive, policy to use lots of other people's money and management principles derived from their business experience to "clean up" 21 high-priority sites as fast as possible, regardless of whether doing so actually creates benefits to the environment in excess of the costs.

According to Pruitt's memo, the new policy has "five overarching goals: expediting cleanup and remediation, reinvigorating cleanup and reuse efforts by potentially responsible parties [PRPs], encouraging private investment to facilitate cleanup and reuse, promoting redevelopment and community and revitalization, and engaging with partners and stakeholders." To achieve these goals, Pruitt's memo laid out 11 specific action steps, including using:

> "enforcement authorities, including unilateral orders to recalcitrant PRPs, more actively in order to discourage protracted negotiations over response actions."

Perhaps this is the most controversial aspect of the Pruitt EPA's Superfund enforcement initiative: the expanded use of unilateral administrative orders to a point that stretches the bounds of statutory and perhaps even constitutional limits. UAOs were intended by Congress to deal with relatively clear situations that pose an immediate "imminent and substantial endangerment" to public health, not merely situations in which the EPA has become frustrated by "protracted" delays in its own administrative processes. A UAO is an order issued without a hearing commanding a potentially responsible party to take immediate remedial or removal action to clean up a site under the threat of Draconian treble damages and daily penalties if they refuse to comply without sufficient cause. The EPA maintains that no judicial review is permitted of such orders, but rather one may only petition the government for reimbursement years later after the remedy is complete.

Beginning in 2000, General Electric mounted a facial challenge to the CERCLA UAO process on due process grounds, losing in both the Washington, D.C., district court and the D.C. Circuit.[4] GE's cert petition to the U.S. Supreme Court was denied in 2011 in the same term that the court granted cert instead in the Sackett v. EPA case involving UAOs under the Clean Water Act. In its Sackett opinion,[5] the Supreme Court avoided the constitutional due process issue by interpreting the statute to permit preenforcement review of the orders under the Clean Water Act. The courts may eventually interpret CERCLA as also permitting immediate judicial review of UAOs, as in Sackett, although that is more difficult to do because CERCLA §113(h) purports to limit judicial review of any order properly issued under Section 106(a), the section that authorizes UAOs. Thus, the courts may eventually have to face the constitutional issues that they ducked in Sackett.

If the EPA stays on its current course of using UAOs to direct private parties to implement final remedies that have been long-delayed but that don't really present imminent and substantial threats to human health or the environment, they are likely to suffer setbacks in the courts that restrict the availability of the UAO tool,[6] which is useful in appropriate situations but can become abusive if misapplied.

E. Donald Elliott is chairman of the environmental practice group at Covington & Burling LLP in Washington, D.C., and an adjunct professor of law at Yale Law School. He previously served as EPA general counsel. Elliott advises two clients regarding the enhanced use of Superfund UAOs under the Trump administration.

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[1] 42 U.S.C. § 9601, et seq.

[2] United States v. Bestfoods, 524 U.S. 51 (1998).

[3] Burlington Northern and Sante Fe Railway Co. v. United States, 556 U.S. 599 (2009).

[4] Gen. Elec. Co. v. Johnson, 362 F. Supp. 2d 327 (D.D.C. 2005), aff'd, Gen. Elec. Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010).

[5] Sackett v. EPA, 566 U.S. 120 (2012).

[6] The only purported authority for the EPA to issue UAOs without a finding of imminent and substantial endangerment is Pruitt's memo, which is merely a guidance document. But the U.S. Department of Justice has recently emphasized that agencies cannot use guidance documents as the sole basis for civil enforcement. See Memo from the

Associate Attorney General, U.S. Department of Justice Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases, Jan., 25, 2018, https://www.justice.gov/file/1028756/download

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