
ALTERNATIVE FINANCING OFFERS ADVANTAGES FOR SUPERFUND REMEDATION

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Of the Superfund Task Force's many recommendations, perhaps the greatest opportunity for expediting the remediation, reducing expense, and encouraging redevelopment lies in encouraging non-traditional approaches to financing site cleanups. The Task Force identifies employing nontraditional financing as its first strategy to promote its goal of "Encouraging Private Investment."¹ According to the Task Force, third-party investment is a way "for the Agency to accelerate cleanups and promote reuse of NPL sites." To achieve this goal of increased third-party investment, the Environmental Protection Agency (EPA) proposes to consider "alternative approaches to financing site cleanups, including environmental liability transfer approaches."

If the Task Force recommends increasing use of "non-traditional financing," what is wrong with "traditional" financing? Contracting mechanisms impact both cost and efficiency. For example, according to a 2013 report by the EPA Office of the Inspector General (OIG), EPA's continued reliance on "high risk cost-reimbursement and time-and-materials task orders" in its own Superfund contracts lead to dramatically increased expenses.² As described in the report:

One contract was a T&M contract, and the other contract was awarded by paying the contractor a fixed price per ton of remediated land. Tasks performed for each contract were similar. We used a conversion rate to convert tons to cubic yards and found the cost per cubic yard for the T&M contract was \$80.16, while the cost per cubic yard for fixed price type contract was \$32.74. EPA awarded the first contract using a high risk T&M contract. It later awarded the second contract using a

fixed price per ton because of several concerns, one of which was the cost being incurred to clean up the yards using the T&M contract. By moving to the fixed-price type contract, Region 7 saved \$13,828,003 for the 261,607 cubic yards removed by the fixed-price contractor.

According to the OIG, "[r]educing the reliance on these [T&M] contracts can result in numerous benefits, including cost savings, increased competition, and achievement of socio-economic goals."

When considering the financing of cleanup and redevelopment, the type of funding matters as well. While there are certainly benefits in holding property owners and Potentially Responsible Parties (PRPs) accountable, mere accountability is not a predictor of creativity, efficiency, and vision in returning a property to beneficial use. Ultimately, the best solution will find a way to get contaminated properties into the hands best suited and incentivized to complete the remediation in a timely and cost-efficient manner. Communities do not want to see a vast swath of property labeled "Superfund" and kept from beneficial use for decades. Ideally, a cleanup would quickly return a property to a condition in which the property is not just safe, but also a potentially attractive property for local investment. However, the fundamental question is why would an investor decide to invest in a Superfund cleanup?

Historically, EPA has sought to encourage the transfer and reuse of a property through developments such as Bona Fide Prospective Purchaser status, comfort/status letters, and Ready for Reuse Determinations. At the same time, PRPs have sought to transfer liability and achieve cost certainty through combinations of indemnities, hold harmless clauses, fixed price contracts, and insurance agreements. Large and uncertain environmental remediation costs can pose a risk for not just a company's value, but its viability.

While EPA's traditional tools to encourage reuse are certainly helpful, the Task Force recommends

exploration of additional approaches to risk management to improve efficiency and encourage the reuse of CERCLA sites. In particular, the Task Force recommends review of environmental liability transfer (ELT) approaches at PRP cleanups. In addition to exploring the expanded use of ELTs, the Task Force recommends establishing a national working group to identify “[c]reative uses of insurance, annuities, indemnification and other tools for third parties interested in buying/selling the risk of cleanup.”

An ELT has advantages over traditional funding mechanisms. In an ELT, a contractor normally agrees to accept title for the contaminated property and agrees to accept liability for the remediation. The contractor assumes this liability for a fixed price and accounts for possible overruns through insurance. This approach allows the property owner to transfer a potentially large and uncertain liability for a fixed price. In theory, the contractor assuming liability for the property would be sufficiently motivated to complete the remediation in an efficient manner and redevelop the site for a profit. As expenses increase with time, a fixed price approach should incentivize speed in completing the remediation.

The ELT approach is not without risk. In 2017, an ELT contractor sued a PRP for rescission of the agreement based on alleged failure by the PRP to disclose the extent of contamination on the property. While the case settled, it does demonstrate that an erroneous calculation of remediation costs could pose a threat to the viability of an ELT. Ultimately, a default on cleanup obligations by a contractor, for whatever reason, negates the advantages of a private fixed price solution. For this reason, it would be difficult, if not impossible, to enter into an ELT without a clear picture of the nature and extent of the contamination at a site.

Fundamentally, an investor will only take on the obligation of cleaning up and redeveloping a Superfund property if it has a level of certainty in a profitable outcome. As stated by Stephen A. Cobb,

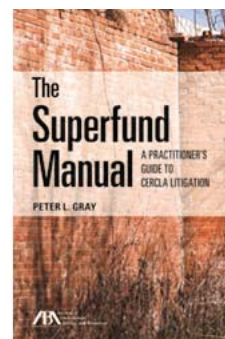
on behalf of the Association of State and Territorial Solid Waste Management Officials³ at a hearing on the Superfund Task Force’s recommendations, “Investors require a level of certainty not typically found in the Superfund program.” Prospective purchasers of a Superfund property must negotiate a confusing array of statutory protections, liens, and representations that can make financing difficult.

While it remains to be seen what specific actions the Task Force will recommend to promote alternative financing at site cleanups, it is worth exploring fixed price solutions in the interest of speeding up and reducing the cost of remediation.

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Endnotes

- 1 Superfund Task Force Recommendations, U.S. Environmental Protection Agency, July 25, 2017.
- 2 EPA Should Increase Fixed-Price Contracting for Remedial Actions, U.S. Environmental Protection Agency, Report No. 13-P-0208, Mar. 28, 2013.
- 3 U.S. House of Representatives Committee on Energy and Commerce Subcommittee on the Environment, Jan. 18, 2018.



The Superfund Manual: A Practitioner's Guide to CERCLA Litigation Peter L. Gray

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