Superfund Task Force Listening Session Recommendation 22: The Use of "Look First" Provisions in CERCLA Settlement Agreements

Office of Site Remediation Enforcement

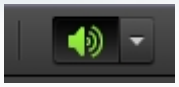
Office of Enforcement and Compliance Assurance

June 4, 2019

Housekeeping

- Entire broadcast offered live via Adobe Connect
  - You will be able to see the materials posted on the screen and listen to the presenters
- Audio is available online by default
  - Please check your local volume settings to adjust audio
  - Use Q&A to privately report technical difficulties
- Live public remarks will be delivered by telephone
  - All lines will be globally muted
  - Press #6 to unmute ONLY when your name is called to remark
- Use the Q&A pod to privately submit remarks, questions and report technical problems

Control online audio



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Information about Sponsors & Speakers

Submit private questions, remarks or report technical problems

Live Closed Captioning

Disclaimer

Case examples contained in this presentation are for illustration purposes only. EPA is not endorsing any of the referenced parties. The examples provided are based on the facts specific to each site and contain tools that may be appropriate for use at other sites.

Agenda

- Introduction
- Presentation on Recommendation 22
- Live remarks by session participants
- Resources
- Closing remarks

Superfund Task Force Report

- **Create:** May 2017, Task Force comprised of senior representatives from Superfund program and enforcement offices, EPA's General Counsel, Regions, and other offices
- **Charge:** propose recommendations to streamline and strengthen the Superfund program
- **Report:** July 2017, 5 goals with 42 recommendations
- **2018 Update:** Highlights accomplishments and next steps for ongoing recommendations

Superfund Task Force Recommendations

Five Goals:

1. Expediting cleanup and remediation process
2. Reinvigorating responsible party cleanup and reuse
3. Encouraging private investment
4. Promoting redevelopment and community revitalization
5. Engaging partners and stakeholders

Download the report at https://www.epa.gov/superfund/superfund-task-force-recommendations

Superfund Task Force Listening Sessions

- Eight sessions held May-June 2018
- Today's presentation is the second session on SFTF rec. #22
  - Seeking input from stakeholders and the public
  - Increase transparency, awareness, and improve communications

More information at:

http://www.epa.gov/superfund/superfund-task-force

Office of Site Remediation Enforcement Presenters

- Greg Wall
  - Regional Support Division
- Erik Hanselman
  - Policy and Program Evaluation Division

Task Force Report, Goal 3

- Facilitate use of alternative and non-traditional approaches for financing site cleanups
- Encourage private investment and help promote third-party participation
- Expedite redevelopment and reuse of sites consistent with CERCLA authority

Task Force Report, Rec. 22

- Explore environmental liability transfer approaches and other risk management tools at PRP cleanups
- The first listening session, “Exploring Environmental Liability Transfer Approaches at CERCLA Sites” was held on June 5, 2018
- The slides, recording and more information about the first listening session are available at: https://www.epa.gov/enforcement/listening-sessions-superfund-task-force-recommendations

CERCLA Liability Principles

- Section 107(a), 42 U.S.C. § 9607(a)
  - PRPs include: current owners and operators; past owners and operators at the time of disposal; arrangers for disposal or treatment; and transporters
  - Liability is strict, retroactive, joint and several

CERCLA Liability Principles

- Section 107(e), 42 U.S.C. § 9607(e)

  (1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

CERCLA Settlement Principles

- Section 122, 42 U.S.C. § 9622, provides EPA with CERCLA settlement authority
- Settlements do not require an admission of liability by the settling party
- Settlements conserve Fund resources, reduce transaction costs, help expedite cleanups, and are consistent with overall CERCLA enforcement goals

Settlement: Advantages to PRPs

- Negotiated terms, certainty
- Avoids litigation costs
- Covenant not to sue
- Contribution rights against non-settlors
- Contribution protection from other parties
- Potential for funding as appropriate under existing EPA policy (special account disbursement, orphan share, mixed funding)

"Look First" Provisions in CERCLA Settlements

- May be used in CERCLA settlement agreements involving PRP(s) and a third (work) party assuming cleanup obligations on behalf of the settling PRP(s)
- EPA agrees to exercise its enforcement discretion to initially seek corrective measures only from the work party
- If those efforts are unsuccessful, EPA reserves its right to seek corrective measures from the settling PRP(s)
- Work party and settling PRP(s) receive covenant not to sue, conditioned on satisfactory performance and subject to typical U.S. reservations and reopeners

Case Study #1: St. Maries Creosote

Site Background

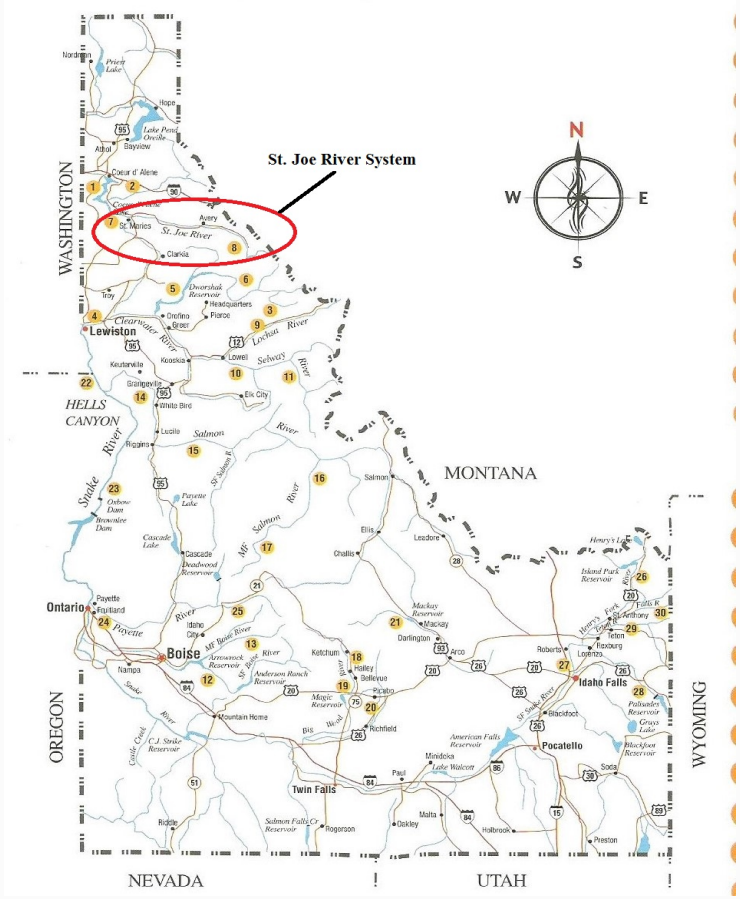
- The St. Maries Creosote site lies along the south bank of the St. Joe River, near St. Maries, Idaho.
- The site lies within the boundary of the Coeur d'Alene Tribe Reservation.
- Site owners used the area from 1939 through 1964 to store and treat logs and poles with creosote.

Contamination

- These operations resulted in creosote contamination in the upland soils, groundwater, riverbank soils and sediments in the St. Joe River, including the shoreline, nearshore and offshore areas.

Cleanup Actions

- Cleanup is ongoing



Case Study #1: St. Maries Creosote

- The PRPs procured an environmental contractor to perform the cleanup at the site
- The PRPs and the contractor entered into a consent decree with the U.S. and Coeur d'Alene Tribe in 2009
  - Settling PRPs and the environmental contractor were jointly and severally responsible for cleanup at the site
  - The contractor assumed implementation of the remedial action
  - Financial assurance was required
  - EPA included a "look first" provision in the settlement whereby EPA agreed to initially seek corrective measures from the contractor
  - EPA provided the settling PRP and the environmental contractor CERCLA covenants not to sue

Case Study #2: Sheboygan

Site Background

- The Sheboygan River and Harbor site in Wisconsin includes the lower 14 miles of the river to Lake Michigan.
- The former Tecumseh Products Co. plant in Sheboygan Falls is located on the upper river and is considered the primary source of PCB contamination in river sediment.

Contamination

- In 1977, the State of Wisconsin detected PCBs during routine sampling of fish.
- PCBs have been detected in fish, wildlife, surface water, sediments in the harbor and river, and in floodplain soils.
- EPA added the site to its National Priorities List in 1986.

Cleanup Status

- Cleanup of the site is complete and EPA is conducting a Five-Year Review.

Case Study #2: Sheboygan

- PRP procured an environmental contractor to perform the cleanup at the site
- U.S. entered into a consent decree with a settling PRP and the contractor
- Under the agreement:
  - PRP and contractor were responsible for financing and performing the work
  - Environmental contractor assumed the performance obligations of the PRP and became a jointly and severally responsible party
  - Financial assurance was required
  - Consent decree included a “look first” provision whereby EPA agreed to initially seek corrective measures only from the environmental contractor for noncompliance
  - EPA provided the PRP and the environmental contractor CERCLA covenants not to sue

Case Study #3: Mattiace

Site Background

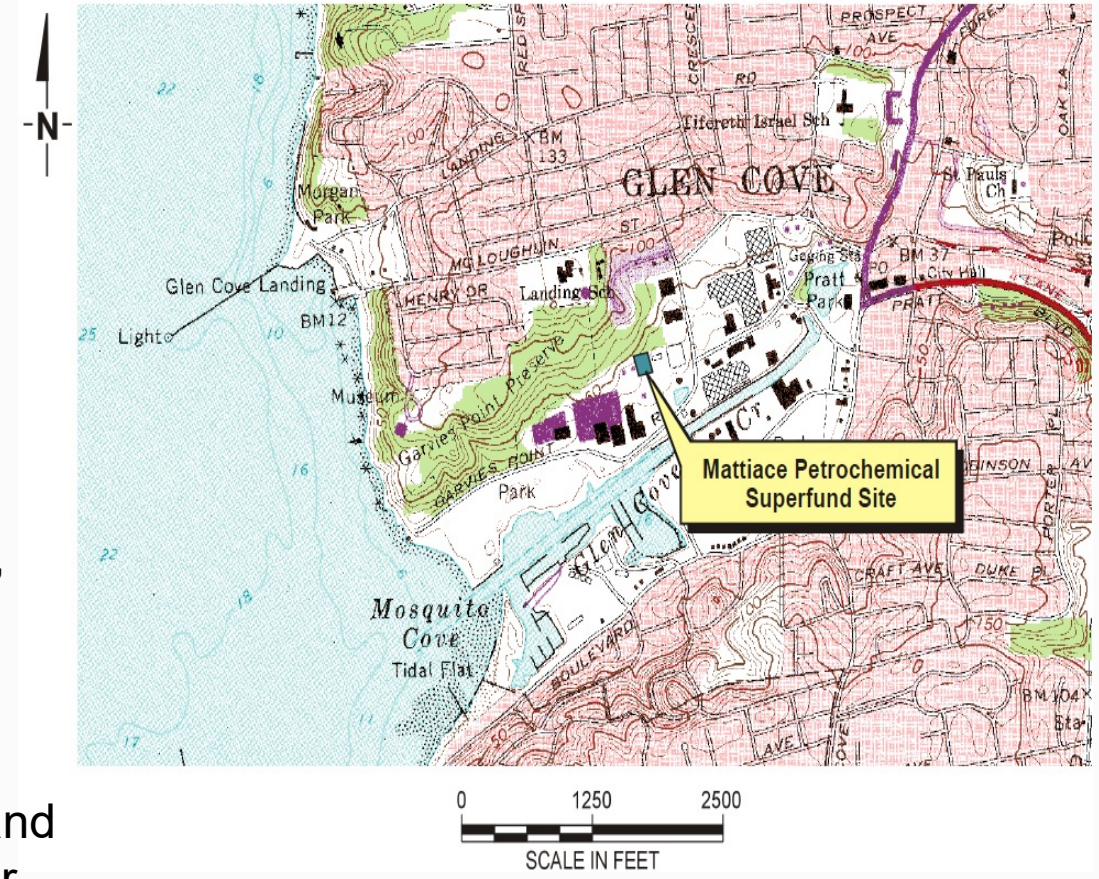
- 1.9 acres located in Nassau County, New York
- Mattiace Petrochemical Company began operating in the mid 1960s

Contamination

- Soil, groundwater, and sediment contamination of mainly VOCs, including PCE, TCE, and xylenes

Cleanup Actions

- Removals in 1989 and 1990
- EPA issued a ROD in 1990 and 1991 for soil and groundwater



Case Study #3: Mattiace

- In 2003, the U.S. entered into a consent decree with the PRPs and the contractor
- PRPs procured an environmental contractor to perform the cleanup at the site
- PRPs and the contractor are jointly and severally obligated to implement the requirements of the consent decree
- The contractor assumed implementation of the remedial action
  - Contractor jointly and severally obligated under the CD to perform the work
  - Contractor required to provide financial assurance
  - Under “look first” provision EPA agreed to initially seek corrective measures only from the environmental contractor for noncompliance
- EPA provided PRPs and the environmental contractor CERCLA covenants not to sue

What we would like to hear from you

Please focus your remarks on the following questions and topics:

- Do you know of past instances in which a “look first” provision would have facilitated cleanup and redevelopment of a site?
- What kind of sites or settlement agreements are particularly amenable to the “look first” approach?
- What factors make a “look first” provision more, or less, useful at a site?
- Based on your experience, should EPA encourage the use of “look first” provisions as a tool to facilitate Superfund cleanups, and if so, how?

Written remarks can be emailed to osre-sftf-listeningsession@epa.gov until June 11, 2019.

Next Steps

- Analyze feedback from what we hear today and in written remarks
- Memo to Regions

How to share remarks

- Live during online broadcast
  - Pre-registered participants may share remarks by phone
  - Attendees may also type remarks into the Q&A window in the lower left
- After today's online broadcast
  - Interested parties may submit remarks in writing at any time to OSRE-SFTF-listeningsession@epa.gov with the following subject: LS22-2. Deadline for written remarks is June 11, 2019

Public Remarks

- Larry Schnapf, Schnapf LLC
- Scott Sherman, Surplus Property Roundtable

Press #6 to unmute when your name is called to share remarks.

Interested parties may submit written remarks by June 11, 2019 to OSRE-SFTF-listeningsession@epa.gov with the following subject: LS 22-2

Reference Materials

- Superfund Task Force website
- Superfund enforcement website
- Top 10 Questions to Ask When Buying a Superfund Site (May 2008)
- The Revitalization Handbook – Revitalizing Contaminated Lands: Addressing Liability Concerns (2014 edition)

For More Information

- Visit the Superfund Task Force website at https://www.epa.gov/superfund/superfund-task-force, and the Information page for the OSRE-sponsored listening session series at https://www.epa.gov/enforcement/listening-sessions-superfund-task-force-recommendations
- Email
  - OSRE-SFTF-listeningsession@epa.gov with the following subject: LS 22-2. Deadline for written remarks is June 11, 2019.