

Guidance for Voluntary Cleanups and Preserving Potential Contribution Rights

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The benefits of cleaning up and reusing contaminated properties are difficult to overstate—these voluntary cleanups promote reuse of existing infrastructure, protect human health, provide economic benefits to the surrounding area and assist in the preservation of undeveloped green spaces.

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State voluntary cleanup programs have facilitated the cleanup and reuse of contaminated commercial and industrial properties throughout the country. The benefits of cleaning up and reusing contaminated properties are difficult to overstate—these voluntary cleanups promote reuse of existing infrastructure, protect human health, provide economic benefits to the surrounding area and assist in the preservation of undeveloped green spaces. Pennsylvania environmental lawyers frequently advise clients on voluntary cleanups under the land recycling program (Act 2). A party voluntarily cleaning up a property likely should consider at the onset whether the party intends to seek contribution from potentially responsible parties for the cleanup costs. In the U.S. Court of Appeals for the Third Circuit, there is a question whether a party completing a voluntary cleanup must take steps beyond the actions required by the state program in order to seek contribution from potentially responsible parties under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 et seq (CERCLA). When in doubt, parties may wish to take steps to comply with the requirements of CERCLA.

CERCLA provides that a private party seeking to recover costs under CERCLA must establish the costs were incurred consistent with the national contingency plan (NCP), 42 U.S.C. Section 9607(a)(4)(B). The Third Circuit has largely followed this NCP consistency requirement for private party contribution actions, even for a party who resolved its liability to the United States or a state pursuant to an administrative or judicially

approved settlement, see 42 U.S.C. Section 9613(f)(3)(B). The NCP sets forth a rigorous process for remedy selection.

State voluntary cleanup programs like Act 2 seek to reduce some of the burdens imposed on parties conducting remediation to encourage voluntary cleanups. For example, under the NCP, a remedial action—a permanent cleanup—requires a remedial investigation to assess site conditions and then a feasibility study to evaluate alternative remedial actions, 40 C.F.R. Section 300.430. The NCP sets forth nine criteria for evaluation of the alternatives, including consideration of protectiveness and compliance with federal and state environmental laws as well as the ability to implement, cost and state acceptance, among other factors. The public must be provided the opportunity to comment on the selected remedy. Then the U.S. Environmental Protection Agency (EPA) must identify the selected remedy in a record of decision (ROD). This is a time-intensive and costly process.

In comparison, Act 2 establishes the remedial action objectives—cleanup standards. Although the initial notice of intent to remediate is published, there is no further required public participation unless the cleanup standard is site-specific. Looking at these voluntary steps in the abstract, complying with Act 2 standards may not necessarily assure consistency with the NCP. Voluntary cleanup programs are intended to reduce the burdens on the remediating party while ensuring protectiveness of human health and the environment. Cleanup standards like those established under Act 2 provide for predictability and promote the reuse of properties that may otherwise remain stagnant and contaminated due to the unknown liability risks.

The EPA and the Pennsylvania Department of Environmental Protection (PADEP) entered into the one cleanup memorandum to facilitate the DEP's implementation of Act 2, confirming that Act 2 meets the requirements of a state response program pursuant to Section 128(a)(2) of CERCLA. There will only be one cleanup. Because compliance with Act 2 implicates the enforcement bar of Section 128, there is an argument that compliance with Act 2 resolves a party's liability to the United States, thereby providing that party with a right of action in contribution pursuant to Section 113(f)(3)(B) of CERCLA. Section 128 of CERCLA does not expressly require a voluntary remediator to comply with the NCP. One could argue that the statute's silence means Section 113(f)(3)(B) allows for a voluntary remediator to seek contribution from potentially responsible parties even if the cleanup party's costs were not incurred consistent with the NCP. The Third Circuit's decision in *Trinity Industries v. Greenlease Holdings*, 903 F.3d 333 (3d Cir. 2018), may support that reading.

In *Trinity Industries*, the court held that a party's response costs incurred under a Pennsylvania Hazardous Sites Clean Up Act (HSCA) consent decree were consistent with the NCP and recoverable under Section 113(f)(3)(B) of CERCLA because the costs were incurred in compliance with Act 2 and under the supervision of the PADEP. The court declined to address whether response costs undertaken in compliance with a state consent decree were presumed reasonable, but the court noted that "similar costs incurred by a government party are presumed reasonable." Notably, a government party's costs are presumed consistent with the NCP absent a showing by a responsible party that the costs are inconsistent. In contrast, a private party seeking recovery bears the burden of proving consistency. Footnote 13 suggests the court may be willing to find that compliance with a state consent decree is enough under CERCLA to entitle a party to a contribution action. Prior decisions in the Third Circuit, however, have suggested that even a voluntary cleanup party must comply with the NCP.

Do the Third Circuit's findings in *Trinity Industries* suggest a departure from strict adherence to the requirements of the NCP for voluntary cleanups? Although some may argue this decision should be applied broadly to mean the PADEP supervision and compliance with Act 2 satisfies the NCP, others may contend Act 2 compliance is merely a substitute. As a practical matter, until the Third Circuit provides further

clarification, lawyers advising clients on voluntary cleanups should flag the potential risk that cleanup costs may not be recoverable—even if conducted pursuant to PADEP supervision under Act 2—unless the client can prove the costs were consistent with the NCP. For those clients who do not intend to seek contribution, compliance with the state program is likely enough. After all, there are many factors that motivate voluntary cleanup, which are not dependent on any potential future contribution claim. But, for those clients who want to reserve this potential contribution right, additional steps should be taken to ensure consistency with the NCP throughout the voluntary cleanup.

About the Author:

Kaitlyn R. Maxwell practices in the environmental group of Greenberg Traurig, with a focus on environmental litigation. Contact her at maxwellk@gtlaw.com