

D I A L O G U E

CERCLA Regulatory Challenges and Changes—What to Expect in 2018

Summary

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, requires responsible parties to clean up and remediate contaminated sites. Many states have similar local requirements. In the 35 years since the law was passed, there has been much discussion of reforming CERCLA, but has anything yet changed, and how might it change under the new presidential administration? On October 12, 2017, ELI convened a panel in Newark, New Jersey, to discuss these questions, current regulatory developments, and approaches to working with regulatory agencies on site cleanup issues. Below, we present a transcript of the panel, which has been edited for style, clarity, and space considerations.

Scott Fulton (moderator) is the President of the Environmental Law Institute.

William H. Hyatt Jr. is a Partner at K&L Gates LLP.

Irene Kropp is a senior environmental consultant with Langan Engineering and Environmental Services.

William H. Hyatt Jr.: Let me introduce our panel. Scott Fulton is the president of the Environmental Law Institute (ELI). Irene Kropp is at Langan, and was with the New Jersey Department of Environmental Protection (DEP) for many years. Let me turn this over to Scott.

Scott Fulton: Thanks very much, Bill. Bill hasn't been introduced, so I'll mention that he is one of the giants in the Superfund practice area and has been for quite a number of years. He's worked on the Superfund project within a stone's throw from here—the Passaic River. He's also played a leadership role in terms of the forward movement of this program as a pilot allocator, and served as a mediator for the U.S. Environmental Protection Agency's (EPA's) Superfund administrative reform.

Let's talk about Superfund, a program that a lot of us grew up with. Today, we're going to take stock of where we're going with this program, a program that really has served in a lot of ways as the cutting edge for environmental consciousness in this country. Whether you hate the Com-

prehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ or admire it, this tough, exacting law has very much transformed how we approach decision-making, from waste management, to land use planning, to real estate practice and beyond. It's been remarkably transformative. It's also been a building block made for interesting careers for quite a number of us. With that, we'll move into our presentations.

William H. Hyatt Jr.: CERCLA was passed in December 1980. In fact, President Jimmy Carter signed it and the story was that he turned off the light switch after he signed it, so it was literally the end of his Administration. But the development of the statute was a war. There were different versions in the U.S. House of Representatives and the U.S. Senate. There was no conference committee to try to put them together, and the statute sort of came out of nowhere and barely got passed by the skin of its teeth. If you've been reading the cases interpreting CERCLA, the courts have not been friendly to it. It's been described in all sorts of negative ways, including by the U.S. Supreme Court for its lack of clarity—and we're stuck with it.

In 1986, when they realized how bad the statute was and after EPA had gone through a very serious scandal involving Superfund, in which the assistant administrator who ran the Superfund program wound up in prison, they amended the statute very considerably with the 1986 Superfund Amendments and Reauthorization Act (SARA). I'm not sure it made it any better; there's been just as much litigation of SARA as there was about the original statute. There had been one after another reform, reports to Congress, new initiatives, and different ways of trying to make the program work, and the themes are all the same with these attempted changes: let's get the sites cleaned up faster. If you read this EPA report,² which is the latest of those reforms or initiatives, you'll see that the same things are still in play. It's interesting reading, especially for those of us who toil with this all the time.

One of EPA Administrator Scott Pruitt's first acts when he took office in January was to establish a task force, and its charge sounds exactly like the charge of the first reformers of the statute. It sounds like the debate that went on when the statute was passed; things have not changed much and we still have many of the same problems, some

1. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405 (1980).

2. See https://www.epa.gov/sites/production/files/2017-07/documents/superfund_task_force_report.pdf.

of which I'm going to talk about a little bit later. But this is another attempt to attack those problems and to do it in a systematic way.

EPA assembled a group of 80 professionals from its staff, organized them into five groups, and each group took a particular goal that is described in the report and worked it out. Pruitt said, you've got to do this very quickly; you've got to produce this report in 30 days. Well, when you read it, I think you'll appreciate that it probably should have taken more than 30 days, but they got it done in 30 days or thereabouts. In EPA time, 30 days is probably more like 60 or 90 days. But it came out in June and it's very different from some of the other initiatives, some of the other reforms that we've had in the past, in that it has very specific goals, recommendations, and strategies.

The five goals include the following: expediting cleanup and remediation; reinvigorating responsible party cleanup and reuse; encouraging private investment; promoting redevelopment and community revitalization; and engaging partners and stakeholders.³ Do they look familiar? They are the same goals that Congress had in mind. In fact, you'll find it in the debate in Congress when CERCLA was first passed, and you'll find it again in the reports, including the conference report when SARA was passed.

Every time a new reform or a new initiative has been announced, this same set of goals comes up over and over again. The reason it does is because this is not easy. I mean, doing these things is very, very complex, involving a lot of conflicting interests that have to be reconciled, and we haven't yet found the formula to make it easy to reconcile them.

The report has lots and lots of content, like 42 recommendations, 12 strategies, and more than 100 specific actions. One thing that's interesting about the report is that there are a lot of deliverables that EPA owes under those specific actions—reports, recommendations, lists of things. The first list was supposed to have been a list of the 10 priority Superfund sites that the Administrator was going to pay special attention to and that he was going to receive reports on every 30 days. That list was supposed to come out 30 days after the task force report was issued. So, that would've meant that it was due in July.

It hasn't yet come out.⁴ We were told first of all it was going to come out in September and then it became October and now we don't know really when it's going to come out. And why is that? Well, because everything you do in Superfund creates controversy. The way EPA apparently went about trying to compile this list was to get each of the regions to nominate sites for the list. So, automatically, you have a contest going on, with who is going to get their favorite site that they're struggling with on this list, so that the Administrator looks at it every 30 days. You can imagine there were dozens and dozens of sites that were proposed. We understand that EPA is trying to sort that

out. It's not going to be easy. That's just an example of the specific actions that are listed in the report that are going to be very difficult to achieve.

The recommendations are also very comprehensive. I would like to pick one and run through it to show the problems that are presented by the recommendations and the challenges that we face going forward. I started off with strategy number one, recommendation number one. The idea is to pick out sites that have lagged in the process and figure out ways to accelerate them. And the top 10 list that I mentioned is one of the methods that was to be used to do that.

Everybody recognizes that the cleanups are slower than we would like. We'd like to get them all done yesterday, but that's not going to happen. What is going to happen, I think, is that you're going to get a little more discipline applied to the management of these sites and a little more uniformity. If you are in New Jersey in Region 2, you get one set of management people. If you're in Region 3 over in Philadelphia, you get another set of regional people. And sometimes the approaches are quite different. It does cause consternation and I guess EPA recognizes that if they can increase the degree of uniformity, then that would probably speed things along.

So, there's a list of specific actions that are proposed to achieve this first goal and the first recommendation. One of them is to promote the application of adaptive management. Those of you who have been working on the Lower Passaic, my condolences, first of all. Oh, and by the way, we've been working on the Lower Passaic so long that we now have six children who have been born during the period of our work on it, including one yesterday morning. One of the strategies for achieving quicker cleanups is to promote the application of adaptive management. What is it? Well, this report defines it—similar though not exact to previous Superfund reports: adaptive management is an approach used at large or complex sites that focuses limited resources on making informal decisions throughout the remedial process.

Uncertainty is present all through the Superfund process, but present in spades in the sediment sites. If you think of Superfund and hazardous waste cleanups, they're all based on sampling. Well right away, you're dealing with something that isn't the whole, and the sampling introduces a range of potential errors based upon the inadequacy of the sampling. But in sediment sites, you also have modeling, which is notoriously inaccurate or controversial, and you put those two things together, you have a lot of uncertainty. Therefore, the question is: how do you manage that uncertainty?

EPA's traditional means of managing uncertainty is to overkill, to do more than they think is the maximum amount necessary to achieve their goal. That's why the lower eight miles of the Lower Passaic River have a remedy that is estimated to cost \$1.5 billion. That's EPA's method of managing uncertainty. And I don't think what I'm saying is controversial. I think if you ask the Region 2 people

3. *Id.*

4. List released Dec. 8, 2017, available at <https://www.epa.gov/superfund/superfund-sites-targeted-immediate-intense-action>.

how they manage uncertainty, they'd say exactly what I just said.

Adaptive management is an alternative way of managing uncertainty. You do something, you see how it works, you learn from what you've done, and then you do something else. And you keep doing that process over and over again until you find that you've reached your goals. Now, we found on the Lower Passaic, and I think that this is probably true of others who are advocating for adaptive management, that there are very different views of what it means.

First, we were told that adaptive management can't be used for the selection of a remedy. This report is contrary to that, but that's what we've been told. Then, we were told, well, you can have adaptive management, but your first step has to be pretty much your last step. In other words, you have to do enough in your first step so that you're pretty much done. We call that "one and done." The question is whether you can do an iterative process where you learn from each step you do or you have to do one and done. So, it's very easy to write in a report, "Let's use adaptive management, control the uncertainty in these sites, and speed up the completions." But when you get down to actually applying it in practice, it's not that easy.

Let's look at the progress so far. That's a blank slide. And I don't mean to be facetious, but the things that are written in this report as recommendations and strategies are not easy. The idea is that you could crack these things out, and the time frames that are set forth in the report would have all of these things done in the first two years. By the end of 2018, they would all be done. Well, at the current rate of progress it just simply isn't going to happen. And I don't think that's really anybody's fault. It's just that these are very difficult concepts to try to implement.

People are wondering, should I be on the top 10 list or not? I mean, if I'm on the top 10 list, the Administrator's going to be looking at me every 30 days. Well, maybe that's good if you're trying to get things moving fast. Maybe it's bad if you're not. Maybe people will look at that top 10 list and say, "You're the worst people in the country." Maybe others will look at it and say, "This is really good because we're going to get some action for a change." So, the top 10 list is still a work in progress.

Even after you implement all of these management challenges and all the specific actions that are listed in this report, I think there's a serious question that remains: will Superfund still work? There are lots of fundamental structural issues with the statute and with the program that aren't addressed by this report, and I don't know that the crisper management is going to help resolve those questions. I will tear off a list of a few of these and you can wait and see whether they get resolved.

First, is whether the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) is too prescriptive. I think there's really very little flexibility in the NCP, and you butt up against this over and over again. We're currently facing a situation where we have a model that

has been peer-reviewed by another region and approved for use in the same way that we want to use it, and EPA is saying no, under the NCP, you've got to run it through peer review. That's probably going to delay our progress by at least one year and cost us a fortune. Is that sensible?

Second, can remedies be selected with less study? Right now, we are in, I think, our 12th year of a remedial investigation/feasibility study (RIFS) on the Lower Passaic River and at a cost of more than \$150 million. We used to think that \$150 million was the biggest Superfund site in the country. Now, we have an RIFS that's \$150 million and we aren't done yet. In the meantime, EPA did a focused feasibility study that probably cost another \$30 million. How can we get rid of all this studying and get things cleaned up? The only thing that's actually been done on the river is a removal that we did at a cost of about \$25 million that took out some heavily contaminated matter that was right near a park and that was an obvious risk. It was obviously something that we needed to do right away and we did it.

And then, the big one: how to measure success? EPA has debated for 40 years how to measure success of the Superfund program. Do you look at construction complete, which is one of the metrics EPA uses now? They can look at the total array of sites and say, we're construction complete on x percentage, and that tells them whether they're doing a good job or not. In fact, that's probably not very meaningful. They can look at deletions from the national priorities list (NPL), that's another measurement that they use, but that also isn't really very helpful because it takes forever to get something deleted from the NPL. I've been doing this now since 1980, and I have one site that I've gotten deleted from the NPL, one site where I've gotten a certificate of completion. And you know, that's pretty incredible. That's an indictment all by itself.

How clean is clean? Do you chase every molecule until you get to super-low cleanup standards or do you try to reduce risk quickly? I think there's a tension there and the tension is really, really apparent in sites like the Lower Passaic where you are chasing the last molecule and that's going to cost you more than \$1 billion while still the risks are debated. In my view, and I've said this to EPA, I'd rather be out there doing removals and getting the risk reduced very quickly. Again, that also ties in with the prescriptiveness of the NCP, which drives you away from those kinds of practical approaches.

I think there's a serious question about whether the roles of EPA and the states are properly defined in the statute and in the NCP. We constantly have fights between EPA and the states. This was an extremely contentious issue when CERCLA was first enacted and it's never gone away. Obviously, the states have a huge interest in what goes on in their territories and they're not willing to cede responsibility completely to EPA. So, you always have that tension. It's been there for 40 years, and I predict it'll be there for another 40 years.

That's a report card on Superfund. It's alive and well. At least alive.

Irene Kropp: I want to bypass my entire discussion and jump into a huge debate right now on all of the issues that you just raised! But I won't do that. Everything that you're saying rings true to the passions that I've had over the years working in site remediation and working in the environment. I'm speaking now as an employee of Langan Engineering, but I want to give you an update on the other things that I'm doing, not speaking for any one group, but putting out for discussion and debate some of the things we are talking about within the state of New Jersey on changing how we handle remediation and some other issues going forward, including things like stormwater.

First of all, I'm on the Licensed Site Remediation Professionals Association's (LSRPA's) steering committee, and all of the issues that Bill just went through were issues that we dealt with when we went through the Site Remediation Reform Act (SRRA),⁵ stakeholder sessions, and the legislative sessions. This whole concept of EPA's tight control, prescriptive remedial standard and guidance document, and rules and regulations is what we try to get away from following Massachusetts' licensed site professional program and saying the state can't do it all, hence we need licensed professionals to take on the work of what the state couldn't get to and couldn't get to fast enough.

Also, there's letting professionals use professional judgment. If you're out there and you're working and you've been doing this for 20 or 30 years, you know what you're supposed to be doing. You do have it in your heart even before your license to do the right thing. We were trying to break that connection between a client telling you what to do and you doing the right thing as an environmental consultant. That's sort of the background and what broke our will to being in total control of everything going forward in the remediation world.

I'm working with the LSRPA to come up with amendments to SRRA—SRRA 2.0 is what we're calling it. And we're talking at the LSRP world about what we think are impediments to being able to again deal with things more effectively, efficiently, quickly, and to get them done, and where the DEP is now trying to pull back and keep a greater role for itself that we think is not necessary.

I'm also working with a smart growth coalition that is putting together recommendations for the next administration. The coalition is putting together recommendations for incentives for redevelopment as well as how to change land use, which is very much tied into what's going on in remediation, not just in the environmental forum, but at the municipal level, again getting back to that issue of who should be viewing what, and at what level of government. How do we make more land? There's a lot of land out there that probably could be put into better use, especially in the area of Newark, Linden, and the Port Authority area. How do you free up that land that people are holding onto and that maybe can be put back into better use? Also, I am the chairperson of the committee that's dealing with

environmental regulation reform. There are four different committees under the smart growth coalition.

In both the LSRP world and the smart growth coalition world, we're working with all the associations you would normally think we would work with, from NAIOP (the Commercial Real Estate Development Association) to the builders, Chamber, labor organizations, and the New Jersey Apartment Association. We're all trying to work together in both of those different forums that I'm involved in as well as working with Senator Bob Smith. Since he was the father of SRRA, he's very interested in hearing from the DEP as well as these other two groups about what changes we should make going forward. That being said, the DEP is definitely working with him as well.

It's not going to be easy—getting back to Bill's comments—because once we start having hearings or stakeholder group meetings, people will be coming out of the woodwork, complaining about some of the things that we're doing, some things the environmentalists will not like, some things insurance and banking will not like, some things you as attorneys or consultants will not like. But this is a really vibrant discussion that needs to happen. And I don't think it can just be a task force report that's handed off to an administration. It has to be a very, very lively debate after what we're going through.

I'll give you some of the top issues that we have been talking about in these two different groups. The first one is change in the entire perception and policies on the use of alternative fill and dredge material. So, if you're doing redevelopment in the state of New Jersey and you're digging out contaminated materials, clearly you need to replace it with something. And clean soil is not really out there—we should preserve clean soil for parks, daycare centers, that type of thing, for the upper six inches. But if you've got alternative fill—and in the state of New Jersey we have that like/unlike policy and we have a lot of issues revolving around dredge—we need to change the mindset that this is not contaminated material that's bad to bring into a brownfield site, that this is a commodity that people want to sell to someone to bring it to a site to develop, to bring it out of flood hazard zones, and so on, and be able to build on it.

Nine times out of ten, you have institutional and engineering controls; you're capping the site anyway. You've got permits. You've got financial assurances. You've got all these protections in place, so why does it matter if you're this much over a certain limit or you're bringing in a contaminant that's not mobile and won't impact a receptor? Why can't we change the entire perspective on the alternative fill and dredge to make it easier to use those materials for remediation and redevelopment?

One of the themes that you're going to hear me talk about is environmental justice and equal protection, because if you're regulated under the site remediation program, you're heavily regulated. But you could have five other developers right near you doing work who are not in the site remediation program and who have virtually none of the same regulation requirements that that one developer has.

5. N.J. STAT. ANN. §58:10C-1 to C-29 (2009).

In Philadelphia, they're finding that in general, children in certain areas have higher lead levels in their blood. Obviously there's lead in paint in older houses, but they're finding out that development in general is kicking up dust that's contaminated. That dust is hitting on playgrounds, in people's backyards, and so forth. Kids are being exposed to that, breathing it in, and touching it. Philadelphia actually has air quality best management practices that say, in general, in construction, you should be spraying and hosing down dust so it's not adversely impacting children. We don't have that in New Jersey.

You're really restricted if you're under the site remediation program, but if you're developing right next door and there could be contamination on that site, it's very different equal protection. Think about children in Newark; the Ironbound section is a great example of children being exposed to risks that are not regulated. So, how do we make any development deals with all those risks that could impact a community? It's highly controversial. If we say that everybody has to be subjected to the same type of local codes or site remediation type of practices, whether they're regulated or nonregulated, that's great for children, great for the communities, great for environmental protection, and great for human health—but then there are added costs to clients.

Historic fill is another really big issue. How much of New Jersey is based on historic fill that is not specifically related to a Spill Act discharge? When the Spill Act was first put in CERCLA, it was really talking about discharges, not historic fill material that was brought in to build up communities over time.

The other issue is that we were not talking about non-discharge conditions. Every single parking lot has runoff. There is polycyclic aromatic hydrocarbon pollution. We have air deposition, we have historic pesticides, historic herbicides, point source discharges. The Passaic River got really ugly when people started to sue over every municipality's permitted discharge. There are always different sources of contamination that are not specific to a discharge from a facility that probably should be handled so there's protection of human health. Whether an ecological risk assessment should be associated with historic fill or some of these things is a big question. But how do you handle it going forward? Do people really have to spend money on institutional and engineering controls and financial assurances if they're going to cap a site that has historic fill? That's a huge debate that should be had.

Remedial action permits is another really big issue, where the DEP is trying to improve how they are getting those permits out. However, they are the last bite of the apple for the DEP. So, the DEP has to issue these remedial action permits when there's engineering or institutional control. They're really asking for resubmittals of loss of documents, they're re-reviewing documents that have gone through the process. They're questioning LSRPs' professional judgment and they're taking 120, 160 days to get those permits out the door.

Even though we've done a lot of education courses, the LRSPA with the DEP, and we've started to whittle that down a little bit, it hasn't quite gotten there yet. And we are thinking that there should be some language that could allow an LSRP to issue the permit or that there are certain permits by rule if it's soil only, or general permits if it's some contamination but it's not necessarily in an aquifer area or near an aquifer area. And then, also, there could be individual permits if there really is some serious contamination. So, how do you change that whole paradigm to get the DEP out of judging LSRPs' professional judgment? These are big issues that need to be addressed.

Another big one that attorneys really don't want to talk about is that when we first set up the LSRP program, we were thinking that anytime there was work that was done in the course of remediation—which starts with due diligence and all appropriate inquiry, the preliminary assessment/site investigation (PASI), all the way through—the remediation was going to be done by an LSRP. But contractually, it's been a really big issue between buyers and sellers. Now, when somebody is coming onto a piece of property in order to do some initial sampling, people will not hire or not permit LSRPs to be on the site because LSRPs have a mandatory reporting requirement to the DEP.

Therefore, we chose the people that are licensed and they happen to have credits that they need to obtain, and we're giving that work from the PASI to people who are not licensed LSRPs. How do you build equity there? How do you allow the LSRP to be part of that world and get that work? The question is: should everybody who finds contamination when sampling be required to either report it to the property owner or report it to the DEP?

How do you make sure there's equity if one of our goals is to take contaminated property, large pieces of property, that can be redeveloped and get it back into use, and folks are afraid of stepping into the world of site remediation? How do we push them into the world of site remediation so that property can be in better use, which is good for the state, good for smart growth, and good for the economy? There's a real juxtaposition there about reporting it for environmental purposes, reporting it so that it can be cleaned up, and making sure that property can be put into better use while not losing all of your clients.

That leads us into the whole world of voluntary cleanup. There are a lot of people who are innocent purchasers—there are municipalities out there, there are lenders out there, there are folks that should receive some relief, I'll say, from current remediation requirements. We have statutory/mandatory regulations, and then we have regulatory, mandatory time frames where people once they start to find contamination have to act and do certain things.

But if you're an innocent purchaser or if you're a municipality, if you're somebody who's truly a volunteer, is there a way to get you out of that world of having to meet all those deadlines, having to put up all that financial assurance money? Can we extend deadlines? How can we promote volunteers? And how can they get out of the system? How

can they transfer responsibility, terminate responsibility, and get off of long-term remedial action permits going forward? There's a lot of language that is in CERCLA on bona fide prospective purchasers, protections that maybe we steal and put into the Spill Act—again, we want to always protect clean and healthy environments, but we really want to encourage these sites to get cleaned up and have people step up to the plate to do so.

Under the Industrial Site Recovery Act (ISRA)⁶ and the Brownfield Act,⁷ we have remediation funding source requirements. Under the SSRA, we have a financial assurance requirement. With those requirements, especially when you're getting a permit, one of those things that you're signed onto, your name's on the permit, you're paying a certain financial assurance, you're having to hold financial assurance. How do we clean that up? How do we extend self-guarantees? How do we get rid of the 1% surcharge for permits perhaps, or no financial assurance for permits but put the 1% surcharge on every self-guarantee, which is not on now.

The department has lost a lot of money over the years through that—notwithstanding any language to the contrary, the budget can do whatever it wants, so money is always diverted and the publicly funded program doesn't have a lot of money. Even though they're trying to focus strictly on immediate environmental concern, there's a way to maybe take some of this 1% surcharge money, put it back into the department, if you can dedicate it, and give it to the department for at least immediate environmental concerns situations or where volunteers are trying to clean up and can't get the funding that they deserve.

Lastly, is direct oversight. The process for how the department can put you into direct oversight is not spelled out in statute and not spelled out in regulation. My friend, Mark Peterson, Assistant Commissioner of the Site Remediation Program, basically says, "When you know you're in direct oversight, you know you're in direct oversight. So, cough up your remedial funding source money or your financial assurance money and start to take the actions that you need to take to meet all your time frames and get things done." But there are a lot of people out there who are not maybe the well-represented clients, the smaller businesses, the moms and pops, that have no clue that they're in direct oversight or not getting any sort of message from their consultants or from attorneys or from the DEP that they are in direct oversight.

There should be a process wherein the department says, you are now in direct oversight, and there should also be a process by which you can get out of direct oversight. We call them off-ramps, if you're talking to folks in the Chemical Council of NJ world—you're there, you're complying, you get some heads up: "Here is what's going to put you in direct oversight. You have a certain window to fix that issue. If you don't fix it, you're in direct oversight. But if you do the following two to three things, you can get back

out of direct oversight." That's another really big discussion that's ongoing.

I'm not going to go through risk-based corrective action, but that's been an ongoing debate, kind of going back to cleaning up every molecule as opposed to really addressing risks. The federal program and a lot of other states allow for a lot more flexibility with regard to what your final corrective action is without having the "center of the earth" policy for every molecule of contamination in soil or in groundwater, especially in groundwater that is never going to be used for potable purposes. So, if you eliminate true receptor evaluation problems like vapor intrusion, drinking water, and children eating dirt, do you really have to clean down to the lowest levels of contamination all the way across, down, and off of the site?

Those are a lot of the site remediation discussions—really simple stuff that can be fixed probably in 80 days, 100 days. It took us about two years to get the SRRA passed, with a lot of hard work from the legislators for it, Senator Smith and Assemblyman John McCann, and a lot of discussion and debate and pain of course. The associations are talking, the department and the associations are talking, and the legislators are already talking, hoping that we can start to hold some stakeholder meetings or hearings this fall or winter.

Scott Fulton: Thank you, Irene. I'll offer a couple of additional observations, then we'll open things up for questions. Bill thought it might be useful if you all heard a few reflections on the circumstances in Washington, D.C., as they are right now.

Let's talk first about the legislative branch of government. You all see what's happening and can make this calculation as well as I, but when it comes to the question of legislatively retooling a program like Superfund, it really just doesn't look to be in the cards. Our legislative branch of government at the national level is virtually nonfunctioning at this point. We're no longer able to legislate around society's most pressing and important problems, and anything that's got some political payload to it—and Superfund amendment undoubtedly would—looks improbable, if not impossible, unless and until the filibuster rules in the Senate change, which itself seems improbable. So, the betting within the community in-the-know in Washington is that no significant environmental legislative retooling will be possible anytime in the near term.

Let's talk about the executive branch of government. The current state of play in the executive branch of our national government leaves that branch, at the moment, not very well positioned to lead. And here, I'm not talking so much about the policies of the Administration, but rather the preparedness of the Administration to assume the mantle of leadership. Exhibit A on this is really what's happening with the nominations process and the filling of political appointments in the Trump Administration. The easiest time to get appointments made is in the first year of the first term of an administration, and there has not been

6. N.J. STAT. ANN. §7:26B-1.1 to B-8.2 (2016).

7. N.J. STAT. ANN. §58:10B-1.1 to B-31 (2012).

a moment in time in the modern era where we've been in the position we are in now, where it looks like we will probably get through the first year of this Administration with less than 50% of the Senate-confirmed political appointees in place. I would submit to you that it really is impossible to run the national government of the United States with so much of the political team absent.

Nominations can be challenging to execute—anything that requires Senate confirmation is challenging—but still, every other time we've been through this cycle, it has proved possible to get it done, particularly, again, in the first year of an administration. At this point, at EPA, Pruitt is the only Senate-confirmed political appointee at the Agency, which is really kind of an unthinkable circumstance.

Some nominees are moving through the nominations process, albeit ever slowly. But, apropos of today's conversation, there is no nominee for the Office of Land and Emergency Management, and we don't know when there will be one. When that person's name does surface, it'll be behind all these other folks in the queue.

I think this White House has allowed itself to get trapped in the idea that nominations are a distraction for the Congress from the substantive legislative objectives for the Administration. So, if you're trying to get something done on health care or tax reform, you don't want to gum up the works of the legislative process by trying to push nominations through. But, in truth, you have to do just that; otherwise, nominations never occur and you're in a position of not being able to effectively lead.

Some of these nominations are much easier to do. The EPA regional administrator appointments can be done in a snap. They don't require Senate confirmation. And it is kind of unbelievable that even on this front things are positioned where they are right now. This is a big problem. It's not so much in the media coverage of what's going on in Washington, but as someone who's worked in government, seeing how transitions work, it's hugely problematic and the responsibility for where we are rests primarily with the Office of Presidential Personnel at the White House.

At EPA, it's a challenging time, I think, for the career staff partly because, with the nominations process that I just mentioned, things aren't really pulsing through the veins of the Agency the way they need to in order to get work done. That's challenging and problematic. There are some executive orders that have significantly complicated how the Agency does its work, in particular the "two-for-one" executive order⁸ that came out of the White House that says that for every new regulation that's brought forward, two would have to be taken down, and you have to net out from a regulatory cost standpoint.

Thus, the cost for a new regulation needs to be fully offset by the cost of regulations taken off the books. That is a complicated bit of work. There are new regulatory impact analyses that need to be done to support every one of those actions, including the rules being taken off the books. You can't rely on the earlier regulatory impact

analyses. The product of all that is that a significant new process dimension has been layered onto the already challenging work of EPA that is freezing the Agency in its steps to a significant degree.

An additional layer on top of that is what's happening in the budget process. The Administration rather famously proposed something on the order of a 33% reduction in the resources of EPA.⁹ You can imagine how that registered with the career institution there. Congress has said, basically, not so fast, it's not going to look anything like that, and, in all probability, it won't be like that. It might be more like an 8% or 10% reduction in the Agency's resources. But this uncertainty about what's happening with the budget is producing additional paralysis behaviors at EPA. There's a morale dimension that flows with all that, which of course also influences the pace and quality of the work.

There are some additional challenges I'll mention. First—and I think this is again partly a function of the difficulty in getting on track as an administration without your people in place—there are issues about transparency, and the degree to which the decisionmaking processes of the Administration are accessible for public review consistent with the so-called fishbowl memo¹⁰ that goes all the way back to Bill Ruckelshaus' period, which was intended to cure a nontransparency problem that emerged during the Ronald Reagan Administration. This is cause for concern. I'm very much hopeful that once the team is in place at EPA, things will start to normalize around this question and we'll see a return to the idea that EPA's most important thinking should be in public view.

Another challenge is that the Administrator of the Agency, Pruitt, is rumored to be considering a run for public office back home in Oklahoma. The suggestion that the sitting Administrator of EPA has aspirations for elected office presents something of a difficult navigation challenge, and is already creating some issues for Pruitt in terms of inquiries into his travel and activities to assess whether it's connected to a political objective that's separate from the interest of EPA. So, all of this makes for a challenging setting. My own view is that when the nominations are completed, and the president's team at EPA is in place, things will start to normalize, the setting will become more predictable and workable, including for the careerists at the Agency.

I'll start the questions now with one of my own. It seems like there's always been tension in the Superfund program between the objective of securing closure or resolution for responsible parties and the allowance for experimentation and some residual risk. When you talk about something like adaptive management and creating space for things to

9. Brady Dennis & Juliet Eilperin, *Trump's Budget Takes a Sledgehammer to the EPA*, WASH. POST, Mar. 16, 2017, available at https://www.washingtonpost.com/national/health-science/budget-reflects-trumps-vow-to-cut-epa-in-almost-every-form/2017/03/15/0611db20-09a5-11e7-a15f-a58d4a988474_story.html?utm_term=.3a972de50c21.

10. U.S. Environmental Protection Agency, Fishbowl Memo, May 19, 1983, available at <https://www.regulationwriters.com/downloads/EPA-Fishbowl-Memo-05-19-1983-Ruckelshaus.pdf>.

8. Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

get done more quickly, the question is, who bears the residual risk in those circumstances? And if it's the potentially responsible party, will they still be on the hook or is there a notion that they can get repose somehow? If they're getting repose, then what happens with the residual risk if we're not adhering to the bulletproofing tendencies of the past?

William H. Hyatt Jr.: I think the statute was written to stick us with the risk perpetually. And that's true whether we get closure from the Agency or not. If the Agency finds out later that there's something wrong, they're going to come back and see us. So, I don't think there's much comfort in the statute for repose.

But I'd like to make two observations in response to your comments. First, what do the NGOs do when they're faced with an administration like we have today? Normally, you see a spate of litigation, with the NGOs all trying to get the Agency to act to do things that the Agency is required to do but isn't doing. The NGOs may be taking a completely different view of the Trump Administration because if they force the Administration to do things, the results they get are not going to be good for them. So, you may wind up with less NGO litigation than you would normally expect because of the unpredictability of the Trump Administration.

Second, what do career people do when they have an absence of political appointees above them? The answer is they don't make waves. They are in career preservation mode. They keep a low profile until they get some direction from somebody who controls their fate. And I would guess that that's what's going on now in the Agency. I would also guess the fact that the Agency is under scrutiny to have its budget chopped up into pieces, it is another dynamic that feeds the same kind of reaction.

Irene Kropp: With regard to residual risk, I agree. The responsible party is the responsible party now and in perpetuity. But "bulletproofing the remediation" was a term that you used. All of the effort—and I'm not pro-Trump and I'm not anti-EPA—but all of the effort that EPA put into overseeing and overseeing and overseeing a site does not mean there's no residual risk. We had W.R. Grace, we've had the Ford site up in Ringwood. Just because they're taking 25, 30, 40, 50 years to get something cleaned up doesn't mean they're not missing things.

And the thing that I don't understand is why they don't go to states like New Jersey, Massachusetts, or Illinois that licensed Site Remediation Programs and say, you've got people whose livelihoods are on the line to make these cleanups happen. EPA staff are career employees who get a bonus if they meet certain milestones. Give clean-up projects to licensed professionals and take it off EPA staffers' plates, do not rely on a top 10 list in order to make anything move faster. EPA staff are nervous and not trusting licensed professional's decisions, they are second-guessing the professionals.

EPA won't give that up. Not under CERCLA and not under the Resource Conservation and Recovery Act (RCRA). And RCRA is the most problematic program in that it provides states with very little money but continues to make additional demands on states like New Jersey. But I also agree that with the NGOs, what battle are you going to fight and what battle are you going to win? If you open that door, if you crack that Pandora's box, you never know what's going to happen.

And you have a lot of career people who are nervous right now. I was talking to a Fortune 100 company yesterday about a site that they have in New Jersey that's on its 35th year and they're like, we're begging before this next administrator comes in that the person who's acting in the position is going to make a decision. Because they just keep sampling and sampling and sampling and sampling to death. And you're never going to get rid of everything that's in the Hudson River that's related to any single site, unless it's really specific like polychlorinated biphenyl (PCB) or dioxin or something like that.

William H. Hyatt Jr.: Walter Mugdan, a very intelligent thought leader, said that his favorite phrase is "the perfect is the enemy of good," and I think that nails it completely. I mean, what does it take to get good and how much more does it take to get perfect? And if you wait until you can get perfect before you get good, are you really serving the public interest?

Irene Kropp: Not at all. I don't think you're serving it at all.

Scott Fulton: Other thoughts, questions, or impressions? One [audience member] observation was that it's difficult to get EPA folks to come to events like this to be part of the dialogue right now. And I think the reticence actually has a formal kind of dimension to it in that there's an approval procedure that's needed to get permission to do it and then a clearance of remarks process and that sort of thing. I agree that we really need those folks to be in the conversation. Another question?

Audience Member: My question is this: so, if you have the sense that it's clear that going a more traditional route is going to be like banging your head against the wall and really going to be a dead end, where else are you putting your energy? For example, an article in the *Wall Street Journal* today indicated that a leading bank in Paris is cutting back its relationship with companies that it does business with, or else gives loans to or credit, that develop shale. So, it seems to be taking upon itself—I don't know what incentive it's being given or anything like that—to create a portfolio of businesses that are more in the sustainability field. My question then is: are you looking in that direction or what are you doing while this traditional avenue is so bleak?

Scott Fulton: If I seem to have suggested that I'd given up on the executive branch, let me correct that—I haven't. I'm rather waiting patiently for the opportunity for a more meaningful engagement. But I think your point is well-taken. As things have evolved in the environmental protection arena, there are other drivers for environmental performance. There are nongovernmental drivers that are now just as influential as the government in terms of environmental behaviors, in particular, these powerful trends that have been set up in the private sector around the idea of sustainability. The truth is that major businesses are at this point more influenced by the demands of shareholders, customers, and financiers—all of whom are bringing environmental expectations into these relationships—than they are by anything that's happening within government.

In recognition of that, we're seeing this area of private environmental governance as deserving of a significant level of attention in terms of how it can be catalyzed, optimized, and in some ways normalized so that it can be as meaningful as its potential suggests and can encourage the right kind of environmental behaviors. We started the Private Environmental Governance Initiative at ELI in recognition of this, and we've got somebody from industry to come in to run that initiative for us.

I'll mention another strand that is emerging—it's still not all that well-understood—the role of social media in pushing environmental behaviors, and the intersection between that and environmental big data. Sensor technology is becoming cheaper and cheaper, the amount of information about what's happening at a fairly granular level is in the process of exploding, and we're probably not too far away from having environmental sensors on our cell phones. That information will be telling stories about what's happening in the environment; it will be accessible everywhere through social media platforms, and it will move lightning-fast in a way that will completely outstrip government's ability to verify it. And I don't think industry will be able to sit comfortably in that space. So, I think there'll be behavioral changes and anticipatory work that's done within industry that responds to this phenomenon that will also be just as influential in terms of what people are doing relative to the environment as anything that's happening in government.

Audience Member: I had a question more on the New Jersey legislative agenda, particularly with respect to ISRA. You brought up some interesting points with freeing up land for use. One of the problems that I have a number of clients dealing with in South Jersey is ISRA-subject properties where you have vacant or underdeveloped land that is ISRA-subject only because of common ownership with an industrial site. So, you might have land where, let's say, it's maybe even five acres apart from where there's industrial activity, but to sell that land, that is an ISRA-triggering event and then all of a sudden you've subjected the entire industrial establishment to the entire kit and caboodle of an ISRA investigation.

On the legislative agenda for 2.0 with any of these laws, is there any talk about revisiting some of the applicability categories and exemptions for ISRA?

Irene Kropp: Yes. There are some people who are saying with the current SRRA statutory and regulatory time frame, do you really need ISRA anymore? And then, there are all those complicated processes with document transfers, and so on, for which, even if ISRA isn't taken off the books completely, some of those triggers could be taken away. There are definitely discussions, and it's one of the things that will absolutely be coming up in any stakeholder sessions going forward.

Audience Member: I'm one of the people who clean up the sites when it eventually goes in the field. We experienced in the first half of this year that we had five or six big projects, contracts ready to go, and then our client said, "Let's wait a minute. Let's hold off just a little bit." So, we had a really bad first half of the year. And now, we are busier than we have ever been. We have eight or nine projects we have to put in the field at the same time. Do you have any idea of whether that hesitation that came after the election will continue? Is it going to happen again next year, that we're going to wait until the funding cycle is such that people have to burn their budgets? Or, what is your impression? Is the environmental market for cleanup back on track at a pace, or do you think this is going to be still slowed down on average for the years to come?

William H. Hyatt Jr.: My advice would be to stay nimble.

Irene Kropp: My advice would be to meet your mandatory and regulatory time frames if there's a client. Are you representing a seller? Who doesn't want to get rid of his property, right? If a property owner is determined to be contaminated—and this gets back to who has to notify—then they trigger all these time frames. So, their financial situation is going to be that it's not an EPA CERCLA site, it's just a New Jersey site. But the market is going to determine when they say "I'm going to go." And how big their property is—if it's really big, now is the time—will determine warehousing; everything that's happening in North Jersey is all about supply and demand and making things move. But once those samples get into the hands of the DEP, then you're going to have a lot of work.

William H. Hyatt Jr.: You know, I think you're describing a generic problem: the lack of predictability. Business is all based upon the ability to predict what's going to happen tomorrow, next month, and next year, and that's what we lack. Because we have an Administration that sort of shoots from the hip and you don't know what you're going to get tomorrow, you can't plan on the basis of what you've seen, and that's why I say stay nimble.

Scott Fulton: I would say that, challenging though it may be, it's probably best to assume that 2018 will not be all that different from 2017. I think there's room for hope that 2019 might be different because by then, this next tier of political appointees should be fully in place and will by

then have found their footing so that things start to regularize and normalize.

William H. Hyatt Jr.: And we might have either Senator or Governor Pruitt.