BROWNFIELD REDEVELOPMENT AND CONTAMINATED SITE REFORM AND ACTION AGENDA FOR 2017

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I. Overview

Clearly, Democrats, Republicans and the media have demonstrated a tremendous ability to argue about numerous policy changes, especially during the first 100 days of the Trump administration. In many instances, significant policy differences already have resulted in heated debate regarding the federal government's impact on both the economy and the environment. Given President Trump's campaign pledge to "dismantle" U.S. EPA, combined with initial budget proposals to drastically cut funding to the Agency, a litany of liberal voices contend that the new administration will do nothing but "roll-back" environmental laws to the dawn of the nation's industrial revolution. Conservative sentiment counters that "crushing" environmental regulations and entrenched bureaucrats have stifled both business and the economy, without providing meaningful incremental environmental benefits or protections. While the debate undoubtedly will rage, with predictable arguments on both sides, tweaking federal environmental laws, to adopt well-established "best-practices" currently utilized under state voluntary cleanup programs, would generate tremendous progress toward reducing America's contaminated site inventory, with a focus on pragmatism, bipartisan areas of agreement and results.

Unlocking America's vast inventory of brownfield sites can – and should: (1) protect human health, safety and the environment; (2) dramatically reduce regulatory burdens; (3) increase the speed, efficiency and uniformity of remedial programs; (4) provide substantial clarity and finality to program participants; and (5) deliver overwhelming economic benefits and job creation to both businesses and communities. Simply stated, U.S. EPA needs to embrace and to broadly adopt evolutionary approaches already proven to work in state voluntary cleanup programs targeting brownfield redevelopment and contaminated properties. Further, despite the inevitable fights across the aisle involving environmental policy, enhanced approaches to encourage brownfield redevelopment should be the one signature environmental issue which all stakeholders can support. However, while pragmatic reform has been successfully implemented at the state level for decades, federal law has been stuck with the same cumbersome regulatory structures, and without meaningful change, since the passage of our nation's main cleanup programs during the late 1970s and early 1980s.

The primary complaints with current U.S. environmental laws and regulations aimed at remediating contaminated sites have been widely-identified. In summary, the remediation process is:

1. Too slow;
2. Too complex; and
3. Too expensive.

Fortunately, state voluntary cleanup programs have filled this vast regulatory void, by providing a more efficient and streamlined approach to remediating impacted sites and to encouraging new investment in communities plagued by brownfield properties. Arguably, since the early 1990s, the rise of state voluntary cleanup programs has been the most significant set of environmental regulatory enactments to remediate contaminated sites in the United States. Therefore, U.S. EPA should embrace existing state voluntary cleanup programs to reform static and complex federal programs, which were passed in an era of environmental "crisis" and were not designed to implement streamlined and cost-effective remedial objectives.

Already existing state voluntary cleanup programs provide a comprehensive and robust framework to address both brownfield redevelopment specifically and contaminated site remediation in general. Hence, federal environmental law and policy must evolve to prioritize state voluntary programs as the primary means to remediate contaminated sites, as well as to provide a meaningful set of federal incentives to encourage

voluntary cleanups, in lieu of relying principally on enforcement-oriented, "command and control" programs which were not crafted to promptly or pragmatically remediate impacted properties. To the contrary, current federal laws often encourage endless legal wrangling, needlessly require excessive public and private expense and strand attractive properties for years, if not decades. Amending current federal environmental laws to allow responsible parties to utilize state voluntary cleanup programs would: (1) increase the number of successful cleanups exponentially; (2) reduce regulatory burdens on both the regulated community and regulators, alike; and (3) deliver catalytic economic development opportunities and job creation in impacted communities.

II. The Fundamental Questions

Comprehensive federal reform to streamline and simplify remediating America's contaminated site inventory should readily address the following questions:

1. Why do we need multiple, complex and often overlapping sets of environmental laws and regulations to determine how a site should be remediated?

2. Why does it take so long (often decades) to remediate contaminated sites subject to federal jurisdiction?

3. Why can't private parties responsible for or desiring to remediate contaminated sites implement voluntary cleanups, lead by highly-qualified and licensed private environmental consultants, at a much faster pace, with appropriate governmental regulatory oversight?

4. Why can't we adopt regulatory reforms to encourage parties which own or are liable for contaminated sites to investigate these sites? Shouldn't all owners of contaminated sites be required to investigate and remediate these properties rather than merely sit on them?

5. Why are the federal incentives for developers to invest in brownfield redevelopment opportunities so limited? Wouldn't a comprehensive set of federal financial and regulatory incentives, combined with an "enforcement stick," dramatically reduce America's portfolio of impacted sites and put these sites back into productive reuse?

Providing simple answers to these long-standing questions should be the new administration's goal.

III. Brownfield Redevelopment and Contaminated Site Reform and Action Agenda

Federal environmental laws must evolve to directly embrace existing state voluntary cleanup programs as the primary means for remediating contaminated properties in the United States. These amendments also must include more comprehensive policies and incentives to encourage the prompt, cost-effective and thorough remediation of brownfield and contaminated sites, while maintaining appropriate regulatory oversight and approvals. Consequently, this reform program's basic elements should include the following:

1. **Broad Eligibility to Existing State Voluntary Cleanup Programs:** All contaminated properties should be both eligible and encouraged to participate in existing state voluntary cleanup programs. Sites currently subject to enforcement under federal cleanup programs, including the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Resource Conservation and Recovery Act ("RCRA") and the Toxic Substances Control Act ("TSCA") should be provided an ability to "opt-into" state voluntary cleanup programs.

2. **One Cleanup Program:** State voluntary cleanup programs should be the primary mechanism for remediating contaminated sites in each state. There is no logical reason for sites impacted by the same type of contamination to be subject to different and/or overlapping regulatory approaches or requirements.

   A. **Risk-Based Cleanup Standards:** Federal cleanup standards should be risk-based and tied to a property's intended reuse. Remedial endpoints must focus on the site's overall risk to human health, safety and the environment, rather than merely prescriptive criteria.

   B. **Implement a Results-Based Remedial Orientation:** Investigation and remedial activities must emphasize results rather than process.

      (1) **Require More Efficient Investigations:** Programs must eliminate endless rounds of data gathering. Rather, the need for data gathering should be based on a clear, scientific and risk-based need, instead of a specific regulator's preferences or regulatory interpretation. When questions between regulators and participants exist, resolve these differences of opinion through technical assistance. For example, a "Technical Assistance Committee" could be established to resolve these issues on an expedited basis and avoid the significant delays attendant to such disputes.

      (2) **Eliminate Conflicting Investigation and Remedial Approaches:** Creating streamlined remedial programs will allow a more uniformed approach to both remedial investigations and regulatory interpretations. Currently, significant variations in regulatory interpretations often drive different approaches to addressing the same contaminants of concern.

3. **Evolved Regulatory Oversight:** Regulators should transition to the role of providing auditing, enforcement oversight and technical assistance, rather than directing or participating in each and every step of the investigation and remediation process. Federal regulators should utilize "Certified Professionals" or "Licensed Site Remediation Professionals," as licensed in a number of successful state voluntary cleanup programs, as the primary participants to implement investigation and remedial activities. Certainly, regulators should ensure these professionals are highly-qualified and appropriately licensed, meet applicable cleanup standards and pursue remedial activities on a timely basis. In fact, U.S. EPA might consider federally licensed "Certified Professionals" who meet federally-based qualifications, and are then able to lead remedial projects in states across the U.S. However, shifting oversight to "Certified Professionals" or "LSRPs" will: (1) acknowledge existing practice "in the field" (both federal and state regulators already rely on third-party private consultants to perform most detailed investigation and remedial implementation – while overseeing and approving this work); (2) dramatically increase the speed of regulatory investigations and remedial activities; and (3) allow U.S. EPA to more efficiently manage the remedial process and to reallocate federal resources to the highest priority projects. Finally, new laws should increase accountability in both the public and private sectors by establishing clear benchmarks for performing investigation and remedial activities, as well as for regulators to respond to submittals.

4. **True Regulatory Safe Harbors and Finality:** Program participants must receive clear legal protections through enforceable safe harbors for "innocent" voluntary participants and

definitive covenants not to sue that "run with the land" after cleanups are successfully completed.

5. **Meaningful Tax and Regulatory Incentives:** At their essence, brownfield redevelopments are real estate deals, not simply cleanup projects and should be a significant part of our nation's program to rebuild urban infrastructure. Therefore, the power of the private market should be unleashed to spur redevelopment activity. Further, a comprehensive program of federal tax incentives, modeled after long-standing and proven federal programs, such as the low-income housing tax program, should be implemented to leverage brownfield investment. Current federal brownfield incentives are not market-based and provide far too much emphasis on supporting non-government organizations and generic community-based programs, resulting in limited market impact to a problem plaguing every community. Finally, these tax incentives should be managed by an agency whose mission is economic development rather than environmental protection.

IV. Conclusion

Adopting "common sense," well-tested environmental reforms to expedite the remediation of brownfield sites, which have historically been supported by all political stakeholders, should be a signature environmental policy for U.S. EPA. This approach would leverage the power of private industry and investment to more swiftly remediate contaminated sites, and put brownfields back into productive reuse. Amending federal cleanup programs to embrace already existing and proven state voluntary cleanup programs, would simplify current regulatory approaches without compromising the protection of human health, safety or the environment. Federal resources then can be "re-tasked" to more-efficiently oversee and ensure prompt cleanups which currently require inordinately-long timeframes to complete. Remediating contaminated properties should be "results-oriented" instead of "process-focused." Further, remediating contaminated properties based on a site's intended future use more quickly, more efficiently, more cost-effectively and with more focused resources must be a goal for evolving and constantly improving environmental programs. Ultimately, despite Washington's fundamental disagreements over environmental policy, adopting these long-needed reforms should remain an area of bipartisan agreement and a focus of the new Trump administration.

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