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ARTICLES

ACHIEVING "SOME" UPFRONT CERTAINTY AND RESOLVE IN SUPERFUND SETTLEMENTS

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SUMMARY

Superfund practitioners are waiting to see whether the U.S. Environmental Protection Agency (EPA) will designate perfluorooctanoic acid and perfluorooctane sulfonate, two chemicals in the per- and polyfluoroalkyl substances (PFAS) group, as CERCLA hazardous substances. Such a designation may lead to selected remedies being modified and further work being required at Superfund sites where remedies were believed to be complete. This Article explores potential future liability by reviewing provisions of the 2021 Remedial Design/Remedial Action (RD/RA) Model Consent Decree. It helps potentially responsible parties (PRPs) that have entered into RD/RA consent decrees understand what their future liability may be, and offers advice for PRPs that are considering entering into RD/RA consent decrees so that they can achieve the most upfront certainty and resolve possible.

The U.S. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[1] also known as Superfund,[2] more than 40 years ago.[3] Its goals were straightforward: remedy the threats associated with releases of hazardous substances into the environment, and hold those responsible for the releases accountable.[4] Significant progress has been made over the past four decades,[5] all while amendments[6] and court decisions[7] have helped develop our understanding of CERCLA as it exists today.

Author's Note: Thank you to the practitioners who generously dedicated their time to discussing the topics in this Article and to the many colleagues and friends that I have had the privilege of working with and learning from on my journey so far. Also, thank you to my Mom, Dad, sisters, brothers-in-laws, and nieces. You inspire and motivate me to continually strive to be the best version of myself that I can be and to navigate life with kindness, positivity, humor, and purpose.

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1. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
2. Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335, 1345, 50 ELR 20101 (2020).
3. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§9601 et seq.).
4. *See*, *e.g.*, 42 U.S.C. §§9604(a)(1), 9607(a); *see also Christian*, 140 S. Ct. at 1345; CTS Corp. v. Waldburger, 573 U.S. 1, 4, 44 ELR 20125 (2014); Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599, 602, 39 ELR 20098 (2009); United States v. Bestfoods, 524 U.S. 51, 55-56, 28 ELR 21225 (1998).
5. So far, 448 sites have been deleted from the national priorities list (NPL). *See* 40 C.F.R. §300.425(e); U.S. Environmental Protection Agency (EPA), *Superfund: National Priorities List (NPL)*, https://www.epa.gov/superfund/superfund-national-priorities-list-npl (last updated Mar. 11, 2022) [hereinafter U.S. EPA, *NPL*]; U.S. EPA, *Superfund: NPL Deletion Guidance and Policy*, https://www.epa.gov/superfund/superfund-npl-deletion-guidance-and-policy (last updated Feb. 22, 2022). For the most recent annual accomplishments report, see U.S. EPA, Superfund FY 2020: Annual Accomplishments Report (2021), https://semspub.epa.gov/work/HQ/100002803.pdf.
6. *E.g.*, Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613; Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).
7. Exxon Corp. v. Hunt, 475 U.S. 355, 16 ELR 20396 (1986) (language interpreted repealed in SARA §114(c)); Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 ELR 20974 (1989), *abrogated by* Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996); Key Tronic Corp. v. United States, 511 U.S. 809, 24 ELR 20955 (1994); *Bestfoods*, 524 U.S. 51; Cooper Indus. v. Aviall Servs.,

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But even despite our nation's progress, work remains: there are currently 1,333 active and 43 proposed sites on the national priorities list (NPL) (though remedy construction is complete at a majority of the active sites).[8] Fortunately, with an increase in appropriations for fiscal year 2022,[9] and the Infrastructure Investment and Jobs Act,[10] the U.S. Environmental Protection Agency (EPA) will have more funding to carry out its CERCLA responsibilities than it has had in quite some time.[11]

Though complicating the task at hand, despite occasional clarifications by the U.S. Supreme Court,[12] circuit courts continue to disagree over unresolved legal issues.[13] And amidst lingering legal uncertainties, contaminants of emerging concern (CECs) may become CERCLA hazardous substances,[14] cleanup standards may become more stringent,[15] new and preferred remedial strategies may come to light,[16] and more prevalent and intense natural disasters may undermine the protectiveness of remedies at sites that were believed to be complete.[17] This is all while shifts in administrative priorities, such as an increased focus on environmental justice, may influence how EPA and the U.S. Department of Justice (DOJ) carry out and enforce CERCLA.[18]

Perhaps the most significant potential CERCLA developments of 2022 are related to per- and polyfluoroalkyl substances (PFAS).[19] PFAS are a group of manufactured chemicals known for their ubiquity in the environment,

543 U.S. 157, 34 ELR 20154 (2004); United States v. Atlantic Rsch. Corp., 551 U.S. 128, 37 ELR 20139 (2007); *Burlington N. & Santa Fe Ry.*, 556 U.S. 599; *CTS Corp.*, 573 U.S. 1; *Christian*, 140 S. Ct. 1335; Guam v. United States, 141 S. Ct. 1608, 51 ELR 20092 (2021).

8. 42 U.S.C. §9605(a)(8)(B); 40 C.F.R. pt. 300, app. B; U.S. EPA, *NPL*, *supra* note 5. Although the major focus of this Article is NPL sites, most hazardous waste sites are not on the NPL. *See generally* Environmental Law Institute, An Analysis of State Superfund Programs: 50-State Study, 2001 Update (2002), https://www.eli.org/sites/default/files/eli-pubs/d12-10a.pdf.
9. Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49 (providing EPA with, inter alia, $750,174,000 for "science and technology, including research and development activities, which shall include research and development activities" under CERCLA, $2,964,025,000 for "environmental programs and management," $1,232,850,000 for "necessary expenses to carry out" CERCLA, and "up to $1,232,850,000 as a payment from general revenues to the Hazardous Substance Superfund").
10. Pub. L. No. 117-58, 135 Stat. 429 (2021). The Act invests $3.5 billion in NPL site cleanup work. U.S. EPA, Bipartisan Infrastructure Law: Environmental Remediation at Superfund Sites (2022), https://www.epa.gov/system/files/documents/2022-03/bipartisan-infrastructure-law-fact-sheet_investments-in-superfund-remedial-program_0.pdf. It also reinstates the Superfund excise tax, expected to add $14.5 billion into the Superfund program over 10 years. Pub. L. No. 117-58, §80201; I.R.S. Notice 2021-66 (Dec. 14, 2021); Anthony A. Cilluffo & David M. Bearden, Congressional Research Service, Superfund Tax Legislation in the 117th Congress (2021), https://crsreports.congress.gov/product/pdf/IF/IF11982. Funds raised from the excise tax will not be restricted to NPL sites.
11. *See* U.S. PIRG, Superfund Underfunded: How Tax Payers Have Been Left With a Toxic Financial Burden 3-6 (2021) (noting that "[a]s appropriations have decreased over the past two decades, cleanup has slowed"); Katherine N. Probst, *Superfund at 40: Unfulfilled Expectations*, *in* Looking Back to Move Forward: Resolving Health & Environmental Crises 187, 223-38 (Hampden T. Macbeth ed., Env't L. Inst. 2020) (explaining the issues associated with lack of funds); U.S. Government Accountability Office (GAO), Superfund: Trends in Federal Funding and Cleanup of EPA's Nonfederal National Priorities List Sites (2015) (GAO-15-812).

    On December 17, 2021, EPA "announced a $1 billion investment from the Bipartisan Infrastructure Law [aka the Infrastructure Investment and Jobs Act] to initiate cleanup and clear the backlog of 49 previously unfunded Superfund sites and accelerate cleanup at dozens of other sites across the country." News Release, U.S. EPA, EPA Announces Plans to Use First $1B From Bipartisan Infrastructure Law Funds to Clear Out the Superfund Backlog (Dec. 17, 2021), https://www.epa.gov/newsreleases/epa-announces-plans-use-first-1b-bipartisan-infrastructure-law-funds-clear-out. According to EPA Administrator Michael S. Regan, "[the] work is just beginning." *Id.*
12. In the most recent case, the Court clarified that for a settlement to trigger a person's right to bring a contribution action, it has to resolve that person's CERCLA-specific liability. *Guam v. United States*, 141 S. Ct. at 1612.
13. For example, when does a settlement "resolve" a person's liability, thus triggering that person's right to bring a contribution action? *See* Guam v. United States, 341 F. Supp. 3d 74, 86-92 (D.D.C. 2018) (providing an overview in dicta of the circuit split between the U.S. Courts of Appeals for the Sixth and Seventh Circuits and the U.S. Court of Appeals for the Ninth Circuit and siding with the Sixth and Seventh Circuits), *rev'd*, 950 F.3d 104 (2020), *rev'd*, 141 S. Ct. 1608 (2021); Jacob Podell, *Resolving "Resolved": Covenants Not to Sue and the Availability of CERCLA Contribution Actions*, 119 Mich. L. Rev. 205 (2020).
14. Jerry Diamond & G. Allen Burton Jr., *Moving Beyond the Term "Contaminants of Emerging Concern,"* 40 Env't Toxicology & Chemistry 1527, 1527 (2021) (explaining that the number of CECs is growing); Kristin Robrock & Sarah Bell, *Emerging Contaminants: Coming to an NRD Site Near You!*, A.B.A. (Mar. 12, 2019), https://www.americanbar.org/groups/environment_energy_resources/publications/snrdl/20190312-emerging-contaminants/; Jeff B. Kray & Sarah J. Wightman, *Contaminants of Emerging Concern: A New Frontier for Hazardous Waste and Drinking Water Regulation*, 32 Nat. Res. & Env't 36 (2018); Wendell P. Ela et al., *Toward Identifying the Next Generation of Superfund and Hazardous Waste Site Contaminants*, 119 Env't Health Persps. 6 (2011).
15. Sites must be cleaned up pursuant to cleanup standards that are "legally applicable to the hazardous substance or pollutant or contaminant concerned or [are] relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant." 42 U.S.C. §9621(d)(2); *see also, e.g.*, 40 C.F.R. §§300.400(g), 300.430(e)(9)(iii)(B), (f)(i)(A), (f)(ii)(B). These cleanup standards are referred to as applicable or relevant and appropriate requirements (ARARs). U.S. EPA, *Applicable or Relevant and Appropriate Requirements (ARARs)*, https://www.epa.gov/superfund/applicable-or-relevant-and-appropriate-requirements-arars (last updated Mar. 3, 2022).
16. *See*, *e.g.*, Alazne Galdames et al., *Development of New Remediation Technologies for Contaminated Soils Based on the Application of Zero-Valent Iron Nanoparticles and Bioremediation With Compost*, 3 Res.-efficient Techs. 166 (2017).
17. Climate change may undermine existing remedies. *See generally* U.S. EPA, *Superfund Climate Resilience*, https://www.epa.gov/superfund/superfund-climate-resilience (last updated July 25, 2022); *see also* Ozzy Rodriguez, *Adapting Superfund Remedial Plans for Climate Change*, Harv. Env't & Energy L. Program (Mar. 12, 2021), https://eelp.law.harvard.edu/2021/03/adapting-superfund-remedial-plans-for-climate-change/; Lindsey Dundas, *CERCLA: It's Time to Prioritize Climate Threats*, 91 U. Colo. L. Rev. 283, 285-90 (2020); GAO, Superfund: EPA Should Take Additional Actions to Manage Risks From Climate Change (2019) (GAO-20-73); Katrina Fischer Kuh, *Climate Change and CERCLA Remedies: Adaptation Strategies for Contaminated Sediment Sites*, 2 Seattle J. Env't L. 61, 70-82 (2012).
18. Promoting environmental justice has been a priority of the Joe Biden Administration. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021); Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021). In a recent memorandum, Lawrence E. Starfield, the acting assistant administrator of EPA, set out steps to advance environmental justice goals through cleanup enforcement at Superfund sites. Memorandum from Lawrence E. Starfield, Acting Assistant Administrator, U.S. EPA, to Office of Site Remediation Enforcement Managers et al. (July 1, 2021), https://www.epa.gov/system/files/documents/2021-07/strengtheningenvirjustice-cleanupenfaction070121.pdf.
19. *See* U.S. EPA, *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas (last updated Mar. 16, 2022).

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including in drinking water, and potentially negative effects on human health.[20] As of June 11, 2020, EPA has identified 233 NPL sites with PFAS detected in the groundwater.[21] In EPA's 2021 PFAS Strategic Roadmap,[22] the Agency announced "bold actions that [it] plans to take from 2021 through 2024 on PFAS."[23]

Inter alia, EPA plans to regulate perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS), two chemicals in the PFAS group, as CERCLA hazardous substances,[24] develop a national primary drinking water regulation for PFOA and PFOS under the Safe Drinking Water Act (SDWA),[25] which will result in maximum contaminant levels (MCLs) for these chemicals,[26] and develop national recommended ambient water quality criteria for PFOA and PFOS under the Clean Water Act (CWA).[27] In addition to these administrative developments, the U.S. House of Representatives recently passed the PFAS Action Act of 2021.[28] The Act is now in the U.S. Senate and, if enacted, will require EPA to take actions similar to those delineated in the PFAS Strategic Roadmap but within specified deadlines.[29]

If PFOA and PFOS become CERCLA hazardous substances, potentially responsible parties (PRPs) will become liable for their cleanup and the associated cleanup costs.[30] If MCLs and water quality criteria are established for these chemicals, sites may have to be cleaned up in accordance with these cleanup standards if they are "relevant and appropriate under the circumstances."[31] Ultimately, new hazardous waste sites may be created,[32] new PRPs may be identified,[33] remedies at existing sites may need to be modified,[34] and PRPs that have already settled with the government may be liable for additional site work and cleanup costs.[35]

This is perhaps symbolic of a new era in Superfund. As science and technologies advance, leading to the detection, study, and eventual regulation of CECs, the imposition of more stringent cleanup standards, and new and preferred remedial strategies, and should remedies fail, Superfund

20. *Id.*; *see also* Environmental Working Group, *PFAS Contamination in the United States (June 8, 2022)*, https://www.ewg.org/interactive-maps/pfas_contamination/map/ (last visited Aug. 9, 2022) [hereinafter *PFAS Map*]; Annie Sneed, *Forever Chemicals Are Widespread in U.S. Drinking Water*, Sci. Am. (Jan. 22, 2021), https://www.scientificamerican.com/article/forever-chemicals-are-widespread-in-u-s-drinking-water/ (explaining that "scientists estimated that more than 200 million people—the majority of Americans—have tap water contaminated with a mixture of PFOA [perfluorooctanoic acid] and PFOS [perfluorooctane sulfonate] at concentrations of one part per trillion (ppt) or higher").
21. Addressing PFOA and PFOS in the Environment: Potential Future Regulation Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act 5 (Jan. 14, 2021), https://www.epa.gov/sites/default/files/2021-01/documents/frl-10019-13-olem_addressing_pfoa_pfos_anprm_20210113_admin-508.pdf [hereinafter Draft Proposed Rule] (draft of proposed rule sent to the White House Office of Management and Budget (OMB) for review).
22. U.S. EPA, PFAS Strategic Roadmap: EPA's Commitment to Action 2021-2024 (2021), https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf [hereinafter PFAS Strategic Roadmap].
23. *Id.* at 10.
24. *Id.* at 17. On January 10, 2022, the proposed rule was forwarded to OMB for review. Draft Proposed Rule, *supra* note 21. On September 6, 2022, EPA published the proposed rule in the *Federal Register*, commencing a 60-day comment period. 87 Fed. Reg. 54415 (Sept. 6, 2022). A final rule is expected in the summer of 2023. PFAS Strategic Roadmap, *supra* note 22, at 17. EPA is also developing an Advance Notice of Proposed Rulemaking to seek public input on whether to designate other PFAS. *Id.*
25. 42 U.S.C. §§300f to 300j-26, ELR Stat. SDWA §§1401-1465.
26. PFAS Strategic Roadmap, *supra* note 22, at 12-13. The proposed regulation is expected in the fall of 2022, and a final rule is expected in the fall of 2023. *Id.* On March 3, 2021, EPA made a regulatory determination to regulate PFOA and PFOS, which will begin the process to propose and promulgate the regulation. Regulatory Determinations, Announcement of Final Regulatory Determinations for Contaminants on the Fourth Drinking Water Contaminant Candidate List, 86 Fed. Reg. 12272 (Mar. 3, 2021).
27. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607. Aquatic life criteria were expected in the winter of 2022, and human health criteria are expected in the fall of 2024. PFAS Strategic Roadmap, *supra* note 22, at 15. On May 3, 2022, EPA issued draft recommended aquatic life ambient water quality criteria for PFOA and PFOS. 87 Fed. Reg. 26199 (May 3, 2022).
28. H.R. 2467, 117th Cong. (2021).
29. *See id.*
30. 42 U.S.C. §§9606, 9607(a).
31. *See id.* §9621(d)(2). EPA has already issued a drinking water health advisory level of 0.004 ppt for PFOA and 0.02 ppt for PFOS, but these are not enforceable. Lifetime Drinking Water Health Advisories for Four Perfluoroalkyl Substances, 87 Fed. Reg. 36848 (June 21, 2022), *available at* https://www.govinfo.gov/content/pkg/FR-2022-06-21/pdf/2022-13158.pdf.

    Amidst the current federal void, some states are regulating PFOA and PFOS in drinking water. John Kindschuh et al., *PFAS Update: State-by-State Regulation of PFAS Substances in Drinking Water*, JD Supra (Mar. 4, 2022), https://www.jdsupra.com/legalnews/pfas-update-state-by-state-regulation-4639985/. These state regulations may be considered ARARs at the NPL sites within those states. *See* 42 U.S.C. §9621(d)(2). A federal ARAR would displace a less stringent state ARAR at a site. *See id.*
32. *See PFAS Map*, *supra* note 20.
33. *See* 42 U.S.C. §9607(a)(1)-(4). Inter alia, PRPs may include parties that have manufactured PFAS, parties that have incorporated PFAS into their products, parties that use PFAS-containing aqueous film-forming foam, like airports and military bases, and parties associated with wastewater treatment plants and landfills. Thomas A. Bloomfield et al., *PFAS Litigation: Emerging Trends for the Latest Emerging Contaminant*, A.B.A. (Sept. 17, 2021), https://www.americanbar.org/groups/environment_energy_resources/publications/natural_resources_environment/2021-22/summer/pfas-litigation-emerging-trends-the-latest-emerging-contaminant/; *see also* Draft Proposed Rule, *supra* note 21, at 7-8.

    If enacted, the PFAS Action Act would exempt airports from liability resulting from PFAS-containing aqueous film-forming foam if such use was required by the Federal Aviation Administration and carried out in accordance with applicable standards and guidelines. H.R. 2467, §2(c); *see also* E.A. (Ev) Crunden & Hannah Northey, *PFAS Pose "Watershed" Moment for Superfund Liability*, E&E News (May 24, 2022, 1:27 PM), https://www.eenews.net/articles/pfas-pose-watershed-moment-for-superfund-liability/ ("Members of the water and waste sectors are ramping up pressure on Congress and EPA to shield them from an upcoming proposal as the agency makes progress on addressing PFAS contamination.").
34. *See* 42 U.S.C. §9617(c)-(d); 40 C.F.R. §300.435(c)(2); *see also* U.S. EPA, Model Remedial Design/Remedial Action Consent Decree 9, ¶ 21 (rev. 2022), https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81 [hereinafter 2021 Model RD/RA Consent Decree] ("Modifications to the Remedial Action and Further Response Actions") (Word document can be downloaded from top of page); Memorandum from Stephen D. Luftig, Director, Office of Emergency and Remedial Response, U.S. EPA & Barry N. Breen, Director, Office of Site Remediation Enforcement, U.S. EPA, to Director, Office of Site Remediation and Restoration, Region 1 et al. (Sept. 27, 1996), https://semspub.epa.gov/work/HQ/175393.pdf.
35. Liability will depend, in part, on their settlements' provisions. *See generally* 2021 Model RD/RA Consent Decree, *supra* note 34; *see also*, *generally*, Frederick W. Addison II, *Reopener Liability Under Section 122 of CERCLA: From Here to Eternity*, 45 Sw. L.J. 1081, 1082 (1991). It is not uncommon that, upon evaluation, additional site work may be required at sites. *See*, *e.g.*, Memorandum from James E. Woolford, Director, Office of Superfund Remediation and Technology Innovation, U.S. EPA & Reggie Cheatham, Director, Federal Facilities Restoration and Reuse Office, U.S. EPA, to Superfund National Policy Managers, Regions 1-10 (Dec. 3, 2012), https://semspub.epa.gov/work/HQ/176385.pdf (discussing the potential need for further site work at sites to address vapor intrusion).

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sites may be revisited. It can be hard to find upfront certainty and resolve.[36] This can be frustrating.

Really in any regulatory environment, but particularly one such as CERCLA, where cleanups are costly[37] and PRPs are retroactively, strictly, and jointly and severally liable for site work and cleanup costs,[38] the best approach may seem clear: settle with the government. In fact, early settlements are encouraged by CERCLA as a mechanism to clean up sites more efficiently and not on the public's dime.[39] To entice PRPs to come to the table, they are offered benefits, including contribution protection,[40] the ability to bring contribution actions against nonsettling PRPs, assuming certain statutory triggers are satisfied,[41] and the potential resolution of liability.[42] However, settling with the government is by no means a panacea.[43]

Notwithstanding covenants not to sue,[44] cleanup settlements must generally include reservations of rights or reopeners, which allow the government to sue the settling PRPs for future releases or threats of releases in certain circumstances.[45] Also, settling PRPs remain subject to contribution actions regarding costs associated with matters not addressed in their settlements[46] and private cost recovery actions.[47] The reality that settlements do not necessarily promote upfront certainty and resolve is evidenced by a circuit split between the U.S. Courts of Appeals for the Sixth and Seventh Circuits and the U.S. Court of Appeals for the Ninth Circuit, in which there is disagreement over when settlements "resolve" a person's liability for the purpose of triggering that person's right to bring a contribution action.[48]

Nonetheless, settlements remain, and will continue to be, at "the heart" of CERCLA.[49] Moreover, as PFOA, PFOS, and other once-CECs become CERCLA hazardous substances, as cleanup standards become more stringent, as new and preferred remedial strategies come to light, and should remedies fail, whether PRPs that have already settled with the government will be liable for additional site work and cleanup costs or not will depend, in part, on their settlements' provisions.[50] Certain provisions will become increasingly important as PRPs seek to retrospectively understand or prospectively limit future liability.

Part I of this Article puts future liability in context by providing an overview of the delicate balance Congress struck between promoting upfront certainty and resolve, on one end, and CERCLA's goals on the other. Part II then explores future liability in action by reviewing provisions of the Model Remedial Design/Remedial Action Consent Decree (Model Consent Decree)[51] that are becoming increasingly important in terms of their impact on future liability. It then explores PRPs' options should EPA or DOJ come after them to compel the performance of additional site work or recover additional cleanup costs predicated on purported future liability. Part III offers advice for PRPs that may enter into remedial design/remedial action (RD/RA) consent decrees with the government in the future, so that they can achieve the most upfront certainty and resolve possible. Part IV concludes.

I. Upfront Certainty and Resolve and CERCLA's Goals

Embedded in CERCLA's design is Congress' recognition that, given the complexity and unpredictability of cleanups, giving PRPs upfront certainty and resolve can be in conflict with the Act's goals. Thus, whenever CERCLA promotes upfront certainty and resolve, there are statutory safeguards to ensure that they promote, rather than undermine, the Act's objectives. Understanding this balance is crucial in CERCLA's evolving landscape.

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36. *See* United States v. Akzo Coatings of Am., 949 F.2d 1409, 1450 n.47, 22 ELR 20405 (6th Cir. 1991) ("Most industries seek agreements which impose a definable cap on their potential liability. Uncertain potential liability seriously frustrates corporate planning and needed bank financing."). This is nothing new in environmental law. *See, e.g.*, Petition for Writ of Certiorari at 28, Sackett v. Environmental Prot. Agency, 142 S. Ct. 896 (2022) (No. 21-454) (citation omitted) (noting the consequence of legal uncertainty associated with which wetlands are subject to EPA's jurisdiction under the CWA: "average citizens seeking to do normal, everyday activities—like building a family home—are left adrift, uncertain if their sometimes 'soggy' property may be regulated").
37. *See, e.g.*, Danielle Kaeding, *$1B Cleanup of Lower Fox River Complete*, Wis. Pub. Radio (Sept. 2, 2020, 5:35 AM), https://www.wpr.org/1b-cleanup-lower-fox-river-complete ("Federal, state and tribal officials are hailing the completion of a more than $1 billion cleanup of contaminated sediments in the Lower Fox River. The cleanup is considered one of the largest and most expensive in the nation.").
38. Though there are legal mechanisms for apportionment and contribution. Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599, 613-15, 39 ELR 20098 (2009); Duke Energy Fla., LLC v. FirstEnergy Corp., 731 F. App'x 385, 389 (6th Cir. 2018).
39. *See, e.g.*, Emhart Indus. v. U.S. Dep't of the Air Force, 988 F.3d 511, 528 (1st Cir. 2021) ("CERCLA, after all, is designed to facilitate early settlement, which supplies a key mechanism by which efficient cleanup of Superfund sites occurs."); ASARCO, LLC v. Union Pac. R.R. Co., 762 F.3d 744, 749, 44 ELR 20187 (8th Cir. 2014); In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1026-27 (D. Mass. 1989) (explaining the benefits of settlements in terms of carrots and sticks); Justin R. Pidot & Dale Ratliff, *The Common Law of Liable Party CERCLA Claims*, 70 Stan. L. Rev. 191, 213-14 (2018); Lynnette Boomgaarden & Charles Breer, *Surveying the Superfund Settlement Dilemma*, 27 Land & Water L. Rev. 83, 90-95 (1992).
40. 42 U.S.C. §§9613(f)(2), 9622(g)(5), (h)(4).
41. *Id.* §9613(f)(3)(B); Cooper Indus. v. Aviall Servs., 543 U.S. 157, 167, 34 ELR 20154 (2004).
42. 42 U.S.C. §9622(c)(1).
43. *See* Boomgaarden & Breer, *supra* note 39, at 95-107; Addison, *supra* note 35, at 1081-82.
44. 42 U.S.C. §9622(f)(1)-(5).
45. *Id.* §9622(f)(6). As a recent district court decision put it, when the covenant not to sue takes effect, the PRP "is not off the hook." *See* New York v. Environmental Prot. Agency, 525 F. Supp. 3d 340, 347 (N.D.N.Y. 2021).
46. 42 U.S.C. §9613(f)(2); *see generally* Memorandum from Bruce S. Gelber, Deputy Chief, Environmental Enforcement Section (EES), Environment and Natural Resources Division, U.S. Department of Justice & Sandra L. Connors, Director, Regional Support Division, Office of Site Remediation Enforcement, U.S. EPA, to All EES Attorneys and Paralegals & EPA Regional Counsel Branch Chiefs, Regions I-X (Mar. 4, 1997), https://www.epa.gov/sites/default/files/2013-09/documents/defin-cersett-mem.pdf [hereinafter Matters Addressed Memorandum].
47. There is no cost recovery protection. *See* 42 U.S.C. §9613(f)(2).
48. *See supra* note 13.
49. Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335, 1345, 50 ELR 20101 (2020); GAO, Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements 23-25 (2009) (GAO-09-656).
50. *See generally* 2021 Model RD/RA Consent Decree, *supra* note 34.
51. *Id.*

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A. Upfront Certainty and Resolve and Statutory Safeguards

The balance between upfront certainty and resolve and CERCLA's goals can be gleaned from statutory provisions governing both the cleanup itself and settlements. While permanent, one-and-done cleanups are preferred, remedy modification and further site work may be warranted at sites where the final remedy has already been selected or believed to be complete. This reality is incorporated in the settlement context where there are statutory safeguards, including reopeners in cleanup settlements, and the constraint that contribution protection only extends to the matters addressed in the settlement, which can undermine the upfront certainty and resolve purportedly offered by covenants not to sue.

1. The Cleanup Itself

The preference for permanent, one-and-done cleanups is evidenced by several of CERCLA's provisions. Response actions must, *at the very least*, "protect the public health or welfare or the environment."[52] Also, "remedy" or "remedial action" is defined as "those actions consistent with a *permanent* remedy."[53] Accordingly, remedies "in which treatment which *permanently* and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are . . . preferred."[54]

The extensiveness of the pre-remedial action phase of the national contingency plan (NCP) process—the remedial site evaluation and the remedial investigation/feasibility study (RI/FS) and selection of remedy—reflects this statutory preference: data are collected, releases are identified, risks to human health and the environment are evaluated, remedial alternatives are developed and analyzed, and a "final remedy" is selected, documented in a record of decision (ROD).[55] The NCP provides that each remedial action must "utilize *permanent* solutions . . . to the maximum extent practicable."[56]

Nonetheless, CERCLA's provisions make clear that permanent, one-and-done cleanups are not always realistic. For example, when selecting a remedy at the end of the RI/FS stage, EPA must take into account "the potential for future remedial action costs if the alternative remedial action in question were to fail."[57] Accordingly, the NCP provides that residual risk remaining at a site post-remedy and the adequacy and reliability of site controls are factors that must be considered when analyzing remedial alternatives in terms of their long-term effectiveness and permanence.[58]

The *most* permanent remedial alternative may not be the selected one. Assuming that certain threshold criteria are met, the NCP provides that long-term effectiveness and permanence is *only one* of five primary balancing criteria—others being the reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost—that must be considered in selecting the final remedy; modifying criteria, state and community acceptance, must be considered too.[59] While this "balancing" is constrained by the requirement that each remedial action "utilize permanent solutions . . . to the maximum extent practicable," it is also constrained by the requirement that each remedial action is "cost-effective."[60]

The recognition that permanence is not always realistic is especially evidenced by CERCLA and NCP provisions governing the post-remedy selection phase. For example, the "final remedy" may not actually be final; it may need to be modified. CERCLA acknowledges that after the adoption of the ROD, remedial actions taken, enforcement actions under §106 taken, or consent decrees entered into under §106 or §122 may "differ[ ] in . . . significant respects from the [ROD]."[61] The NCP states that this difference may be "with respect to scope, performance, or cost."[62] The process that EPA must go through to accommodate departures from the ROD depends on whether they are nonsignificant or minor, significant but not fundamental, or fundamental.

If only nonsignificant or minor changes are made, EPA guidance suggests that they need only be recorded in the post-decision document file.[63] If EPA "significantly change[s] but do[es] not fundamentally alter the remedy selected," CERCLA and the NCP provide that EPA is required to publish an explanation of significant differences (ESD).[64] If EPA "fundamentally alter[s] the basic features of the selected remedy," the NCP provides that EPA must propose an amendment to the ROD, which requires public

52. *See* 42 U.S.C. §§9604(a)(1), 9622(d)(1) ("Remedial actions . . . shall attain a degree of cleanup . . . and of control of further release at a minimum which assures protection of human health and the environment."); 40 C.F.R. §300.430(e)(9)(3)(A), (f)(i)(A), (f)(2)(A).
53. 42 U.S.C. §9601(24) (emphasis added); *see also* 40 C.F.R. §§300.430(a)(1)(i) (emphasis added) ("The national goal of the remedy selection process is to select remedies that are protective of human health and the environment, that *maintain* protection over time, and that minimize untreated waste."), 300.430(e)(7)(i), (e)(9)(3)(C), (f)(2)(E).
54. 42 U.S.C. §9621(b)(1) (emphasis added); *see also* 40 C.F.R. §300.430(e)(3)(i), (e)(9)(iii)(D).
55. *See generally* 40 C.F.R. §§300.420, 300.430; *see also* MPM Silicones, LLC v. Union Carbide Corp., 966 F.3d 200, 230 (2d Cir. 2020) (quoting New York State Elec. & Gas Corp. v. FirstEnergy Corp., 766 F.3d 212, 236 (2d Cir. 2014)) (explaining "that the remediation that emerges from this process" is at least "'designed to be a final, once-and-for-all cleanup of a site'").
56. 40 C.F.R. §300.420(f)(ii)(D) (emphasis added).
57. 42 U.S.C. §9621(b)(1)(F).
58. *See* 40 C.F.R. §300.430(e)(9)(iii)(C).
59. *See generally id.* §300.430(e)-(f); In re Gen. Elec. Co., 17 E.A.D. 434, 451 (EAB 2018).
60. 40 C.F.R. §300.420(f)(ii)(D)-(E).
61. 42 U.S.C. §9617(c).
62. 40 C.F.R. §300.435(c)(2).
63. U.S. EPA, Guide to Addressing Pre-ROD and Post-ROD Changes (1991), https://semspub.epa.gov/work/06/1010106.pdf [hereinafter Modification Guidance].
64. 42 U.S.C. §9617(c); *see also id.* §9617(d); 40 C.F.R. §300.435(c)(2)(i); Modification Guidance, *supra* note 63; *e.g.*, United States v. P.H. Glatfelter Co., 768 F.3d 662, 671-73 (7th Cir. 2014); United States v. Akzo Coatings of Am., 949 F.2d 1409, 1421, 22 ELR 20405 (6th Cir. 1991); United States v. Atlantic Richfield Co., No. CV 89-039-BU-SEH, 2020 U.S. Dist. LEXIS 172497, at *16 (D. Mont. Sept. 16, 2020).

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notice-and-comment procedures[65] and can be a cumbersome process.[66]

Notably, the NCP provides that cleanup standards "promulgated or modified after ROD signature must be attained (or waived) only when determined to be applicable or relevant and appropriate and necessary to ensure that the remedy is protective of human health and the environment."[67] It goes on to explain that if EPA decides to issue an ESD or amend the ROD, the updated ROD "must attain (or waive) [cleanup] requirements that are identified as applicable or relevant and appropriate at the time" the amendment or ESD is signed.[68]

Just as the remedy set forth in the ROD may need to be modified, PRPs may be responsible for further site work at sites that were believed to be complete. CERCLA's five-year review provision provides that if the remedial action "results in any hazardous substances, pollutants, or contaminants remaining at the site," EPA is required to review the remedy "no less often than each 5 years after [its] initiation . . . to assure that human health and the environment are being protected by the remedial action being implemented."[69] If EPA concludes that further "action is appropriate," it "shall take or require such action."[70]

Moreover, the mixed-funding provision states that when cleanup settlements provide for reimbursement from the Hazardous Substance Superfund, "the Fund shall be subject to an obligation for subsequent remedial actions . . . but only to the extent that such subsequent actions are necessary by reason of the failure of the original remedial action."[71] It goes on to state that "[s]uch obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the Fund for the original remedial action."[72] This reality that the original remedial action may fail is further highlighted by the fact that "[w]henever there is a significant release from a site deleted from the NPL" (deletion occurs when "no further response action is appropriate"), "the site shall be restored to the NPL."[73] The possibility that the remedy may need to be modified and that further site work may be required at sites that were believed to be complete is incorporated in the settlement context too.[74]

2. Settlements

When entering into cleanup settlements, EPA "may" include "covenants not to sue concerning any liability to the United States . . . , including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action."[75] Given that upfront certainty and resolve promoted by covenants not to sue may undermine CERCLA's goals, there are statutory safeguards. Covenants not to sue may be included in cleanup settlements if, inter alia, they are in the public interest and including them will expedite response action consistent with the NCP.[76] EPA shall decide whether a covenant not to sue or any condition to be included in it is in the public interest on the basis of such factors as:

> (A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.
>
> (B) The nature of the risks remaining at the facility.
>
> (C) The extent to which performance standards are included in the order or decree.
>
> (D) The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.
>
> (E) The extent to which the technology used in the response action is demonstrated to be effective.
>
> (F) Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.
>
> (G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.[77]

In determining the breadth of a covenant not to sue, EPA "shall be guided by the principle that" when "a more permanent remedy [is] undertaken by [the] parties" to the settlement, "a more complete covenant . . . shall be provided."[78] Thus, consistent with CERCLA's preference

65. 40 C.F.R. §300.435(c)(2)(ii).
66. *See, e.g.*, *P.H. Glatfelter Co.*, 768 F.3d at 671-73; *Akzo Coatings of Am.*, 949 F.2d at 1421-22; *Atlantic Richfield Co.*, 2020 U.S. Dist. LEXIS 172497, at *16-17; *see also* National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8771-73 (Mar. 8, 1990), *available at* https://www.govinfo.gov/content/pkg/FR-1990-03-08/pdf/FR-1990-03-08.pdf.
67. 40 C.F.R. §300.430(f)(ii)(B)(1).
68. *Id.* §300.430(f)(ii)(B)(2).
69. 42 U.S.C. §9621(c); *see also* 40 C.F.R. §300.430(f)(4)(ii).
70. 42 U.S.C. §9621(c).
71. *Id.* §9622(b)(4).
72. *Id.*
73. *See* 40 C.F.R. §300.425(e).
74. 42 U.S.C. §9622.
75. *Id.* §9622(f)(1); *see also id.* §§9622(g)(2) (stating that EPA "may provide [one] with respect to the facility concerned to any party who has entered into a [de minimis] settlement"), 9622(j)(2) (stating that natural resource damages (NRD) settlements "may contain [one] . . . for damages to natural resources under the trusteeship of the United States resulting from the release or threatened release of hazardous substances that is the subject of the agreement"). There is no provision in the subsection governing cost recovery settlements, subsection (h), that permits EPA to include covenants not to sue in such settlements. *See id.* §9622(h).
76. *Id.* §9622(f)(1)(A)-(D). There are safeguards for de minimis and NRD settlements too. EPA may provide covenants not to sue in de minimis settlements if doing so is not "inconsistent with the public interest." *Id.* §9622(g)(2). They are appropriate for NRD settlements if "the Federal natural resource trustee agrees in writing to" include one, which it may do "if the [PRP] agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by [the] release or threatened release of hazardous substances." *Id.* §9622(j)(2).
77. *Id.* §9622(f)(4); *see also* United States v. Akzo Coatings of Am., 949 F.2d 1409, 1450-51, 22 ELR 20405 (6th Cir. 1991) (weighing these factors and finding that covenant not to sue was reasonable and in the public interest).
78. *See* 42 U.S.C. §9622(c)(1).

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for permanence, covenants not to sue are most beneficial for PRPs that agree to undertake more permanent cleanups. Reflective of this, there is an exception to the general discretionary covenant not to sue, and EPA is *required* to include covenants not to sue with respect to future liability to the United States for the portions of remedial actions that involve off-site disposal or treatment.[79]

Additionally, covenants not to sue are subject to the settling PRP's satisfactory performance of its obligations under the settlement, and covenants not to sue concerning future liability do not take effect until EPA certifies that the remedial action is complete.[80] According to a recent district court decision, *New York v. Environmental Protection Agency*,[81] an affirmative finding that a site is "protective" is not required by CERCLA for a remedial action to be "complete" for the purpose of triggering the covenants not to sue concerning future liability to take effect.[82] The court further found that the government did not unreasonably construe CERCLA as permitting certification, and thus the covenant to take effect, prior to a PRP finishing ongoing maintenance and monitoring requirements at a site.[83]

The most significant safeguard when it comes to covenants not to sue in cleanup settlements, though, is the unknown conditions reopener.[84] But first, there are narrow exceptions. It does not apply to covenants not to sue pertaining to portions of remedial actions that involve off-site disposal or treatment,[85] in "extraordinary circumstances,"[86] and to de minimis settlements.[87] Whether extraordinary circumstances are present will depend on EPA's "assessment of relevant factors such as those referred to in [CERCLA §122(f)(4)][88] and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors."[89]

It will also depend on whether "other terms, conditions, or requirements of the agreement are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility."[90] A de minimis settlement is appropriate if a PRP's relative contribution to the hazardous condition of the facility is minimal or if the PRP is a current owner of the property, has no association with a hazardous substance at the facility, and did not purchase the property with knowledge that it was associated with any hazardous substance.[91]

If none of these narrow exceptions apply, the unknown conditions reopener provides:

> [A] covenant not to sue a person concerning future liability to the United States shall include an exception . . . that allows the [EPA] to sue such person concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the [EPA] certifies . . . that remedial action has been completed at the facility concerned.[92]

And finally, there is the discretionary sledgehammer: "[EPA] is authorized to include any provisions allowing future enforcement action under [CERCLA §§106 and 107] that in the discretion of the [EPA] are necessary and appropriate to assure protection of public health, welfare, and the environment."[93]

With regard to contribution protection, persons that enter into settlements that "resolve[ ]" their "liability to the United States or a State for some or all of a response action or for some or all of the costs of such action shall not be liable for claims for contribution regarding matters addressed in the settlement."[94] This is constrained by the fact that any protection afforded is limited by the "matters addressed,"[95] which is not defined by CERCLA or the NCP.

In sum, the balance between certainty and resolve and CERCLA's goals is evidenced in both the cleanup and settlement contexts. To ensure that any upfront certainty and resolve provided for by a cleanup settlement do not undermine CERCLA's goals, EPA may be required to, or

79. *See id.* §9622(f)(2).
80. *Id.* §9622(f)(3), (5).
81. 525 F. Supp. 3d 340 (N.D.N.Y. 2021).
82. *Id.* at 352-53 (finding that the government's interpretation of CERCLA, allowing it to issue certification of remedial action completion notwithstanding EPA's classification of the site as "Protectiveness Deferred," was reasonable).
83. *Id.* at 354. The consent decree excluded monitoring activities from its definition of "remedial action," thus permitting certification prior to the PRP finishing ongoing maintenance and monitoring requirements. *Id.* at 353. The court found that the government did not unreasonably construe CERCLA in deciding not to include ongoing maintenance and monitoring in the consent decree's definition of a "remedial action," notwithstanding the fact that CERCLA's definition includes "any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment." *Id.* at 353-54. It reasoned that the CERCLA definition provides a non-exhaustive list of examples of what may constitute remedial action and that the factors that the government must consider in deciding whether to include a covenant not to sue suggests that the government has flexibility when deciding whether to grant the covenant, a flexibility that extends to the government's capacity to frame a remedial action. *Id.*; *see also* United States v. Akzo Coatings of Am., 949 F.2d 1409, 1450-53, 22 ELR 20405 (6th Cir. 1991) (upholding covenant not to sue despite it taking effect prior to the actual remedial action being completed).
84. *See* Garrison Southfield Park LLC v. Closed Loop Refin. & Recovery, Inc., No. 2:17-cv-783, 2020 U.S. Dist. LEXIS 137785, at *72 (S.D. Ohio Aug. 3, 2020) (explaining that CERCLA takes "extra precautions to guard against" the certainty and resolve promoted by discretionary covenants not to sue).
85. 42 U.S.C. §9622(j)(2).
86. *Id.* §9622(f)(6)(B).
87. *Id.* §9622(f)(6)(A). There is no provision in the subsection governing NRD settlements, subsection (j), that permits EPA to include reopeners in such settlements. *See id.* §9622(j).
88. *Id.* §9622(f)(4).
89. *Id.* §9622(f)(6)(B).
90. *Id.* According to EPA guidance, the "extraordinary circumstances" exception should be narrowly applied. *See* Superfund Program; Covenants Not to Sue, 52 Fed. Reg. 28038, 28042 (July 27, 1987), *available at* https://www.epa.gov/sites/default/files/2013-10/documents/vol52-no143-fr.pdf [hereinafter Reopener Guidance].
91. *See* 42 U.S.C. §9622(g)(1)(A)-(B).
92. *Id.* §9622(f)(6)(A).
93. *Id.* §9622(f)(6)(C).
94. *Id.* §9613(f)(2); *see also id.* §§9622(g)(5) (contribution protection for de minimis settlements), 9622(h)(4) (contribution protection for cost recovery settlements).
95. *See generally* Matters Addressed Memorandum, *supra* note 46.

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authorized to, include certain provisions in settlements. To provide a starting point for striking the right balance between upfront certainty and resolve and CERCLA's goals, EPA and DOJ created the Model Consent Decree,[96] a settlement template used by EPA and DOJ staff when negotiating RD/RA consent decrees, agreements with PRPs to perform work associated with a site's cleanup that must be entered in court.[97] The Model Consent Decree is designed to be used in conjunction with the RD/RA statement of work (SOW).[98] Reviewing the Model Consent Decree can be helpful to PRPs seeking to retrospectively understand their future liability.

II. Future Liability Under the Model Consent Decree

Newly regulated hazardous substances, more stringent cleanup standards, new and preferred remedial strategies, and remedy failure may necessitate additional site work. Whether PRPs that have entered into RD/RA consent decrees at the site will be liable for the additional work and associated cleanup costs will depend, in part, on their settlements' provisions.

A. *The Covenant Not to Sue*

When analyzing future liability, it is necessary to determine whether the covenant not to sue is broad enough to encompass such liability and, if so, whether the covenant will be in effect. The Model Consent Decree contains a covenant not to sue that states that "the United States covenants not to sue or to take administrative action against Settling Defendants under sections 106 and 107(a) of CERCLA regarding the Site."[99] While the definition of "Site" will certainly affect the covenant's scope,[100] the covenant is broad in two ways.

First, it applies on a site-wide basis. Thus, the covenant is likely broad enough to encompass a hypothetical future suit or administrative action predicated on liability arising from newly regulated hazardous substances, more stringent cleanup standards, new and more preferred remedial strategies, and remedy failure so long as such liability arises from the same site that the cleanup settlement was reached with respect to.

Second, it applies to both present and future liability. EPA guidance explains that present liability is a PRP's obligation to pay response costs already incurred by the United States and to complete the remedial activities set forth in the ROD, including meeting performance standards or other measures established through the remedial design process.[101] Future liability refers to a PRP's "obligation to perform any additional response activities at the site which are necessary to protect public health and the environment."[102]

The Model Consent Decree goes on to say that the covenant concerning present liability takes effect when a court approves the decree, but the covenant concerning future liability does not take effect until EPA certifies that the remedial action is complete, as is statutorily required.[103] "Remedial Action" is defined as "the remedial action selected in the [ROD]."[104] The SOW provides that the remedial action is "complete" for certification purposes when it has been fully performed and the performance standards have been achieved.[105] Thus, if a future suit or administrative action is predicated on future liability (i.e., additional site work beyond the work set forth in the ROD), the covenant will only be in effect if the suit or action is brought after certification of remedial action completion. The Model Consent Decree then includes the statutory mandate that the covenant is "conditioned, respectively, on the satisfactory performance" by the settling PRP of the requirements of the decree, and specifies that the covenant extends to the settling defendants' successors.[106]

B. *Contribution Protection*

It is also necessary to determine whether the contribution protection will protect against contribution actions predicated on the future liability. The Model Consent Decree provides that "each Settling Defendant and each Settling Federal Agency is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the 'matters addressed' in this Decree."[107] It goes on to define "matters addressed" broadly in that "'matters addressed' . . . are [all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person."[108]

This broad contribution protection may include under its umbrella costs associated with additional site work to address newly regulated hazardous substances, more stringent cleanup standards, new and more preferred remedial

96. 2021 Model RD/RA Consent Decree, *supra* note 34.
97. U.S. EPA, *RD/RA Consent Decree*, https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81 (last updated Aug. 16, 2022).
98. *Id.*; U.S. EPA, Model Remedial Design/Remedial Action Statement of Work (rev. 2022), https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=543 [hereinafter SOW] (Word document can be downloaded from top of page).
99. 2021 Model RD/RA Consent Decree, *supra* note 34, at 28, ¶ 68. Note that the covenant in a RD/RA consent decree for an operable unit will likely be more specific.
100. *Id.* at 8 (defining "Site"). According to the NCP, "site" may be defined to include not just the "areal extent of contamination," but also "all suitable areas in very close proximity to the contamination necessary for implementation of the response action." 40 C.F.R. §300.400(e)(1).
101. Reopener Guidance, *supra* note 90, at 28040.
102. *Id.*
103. *See* 2021 Model RD/RA Consent Decree, *supra* note 34, at 28, ¶ 70.
104. *Id.* at 8.
105. SOW, *supra* note 98, at 18, ¶ 5.8(a).
106. 2021 Model RD/RA Consent Decree, *supra* note 34, at 28, ¶ 70.
107. *Id.* at 32, ¶ 82.
108. *Id.*; *see also, e.g.*, ASARCO, LLC v. Union Pac. R.R. Co., 762 F.3d 744, 749, 44 ELR 20187 (8th Cir. 2014) (explaining that the definition "plainly cover[ed] all Superfund remediation costs, whether incurred before or after the consent decree's effective date," so the contribution defendant was protected). Note that the definition of "matters addressed" in a RD/RA consent decree for an operable unit will likely be more specific.

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strategies, and remedy failure, so long as they are at or in connection with the same site that the cleanup settlement was reached with respect to. But even if the covenant not to sue appears broad enough and in effect, and the contribution protection appears broad enough, a PRP may still be liable for the additional site work and associated cleanup costs.

C. *Remaining Liability*

EPA or DOJ can compel performance of additional site work through the consent decree itself. The Model Consent Decree provides that "[n]othing in this Decree limits EPA's authority to modify the Remedial Action . . . in accordance with the requirements of CERCLA and the NCP."[109] The settled PRP is required to implement a modification if its purpose is "to achieve or maintain the Performance Standards, or both, or to carry out and maintain the effectiveness of the Remedial Action," and the modification "is consistent with the Scope of the Remedy."[110] "Performance Standards" are defined as "cleanup levels and other measures of achievement of the remedial action objectives, as set forth in the [ROD]."[111] "Scope of the Remedy" is defined as "the scope of the remedy set forth in ¶ [1.3] of the SOW."[112] That paragraph states that the scope of the remedy includes the actions described in the ROD, including any contingency remedies.[113]

If the remedy modification is associated with a newly regulated hazardous substance like PFOA or PFOS, and the substance is not addressed in the ROD, including any contingency remedies, it is unlikely that the PFAS-triggered remedy modification will be considered consistent with the scope of the remedy, especially if remediating the substance will require employing an entirely separate remedial approach.[114] But even if the modification is not consistent with the remedy's scope, the Model Consent Decree provides that "[n]othing in this Decree limits EPA's authority to . . . select further response actions for the Site in accordance with the requirements of CERCLA and the NCP."[115] A settled PRP is required to implement further response action if one of the reopeners is satisfied.[116]

The main reservation of rights, or reopener, reserves the United States' "right to issue an administrative order or to institute proceedings in this action or in a new action seeking to compel Settling Defendants . . . to perform further response actions relating to the Site, to pay the United States for additional costs of response, or any combination thereof."[117] Though it is limited,

> [t]he United States may exercise this reservation only if, at any time, [(1)] conditions at the Site previously unknown to EPA are discovered [statutorily required unknown conditions reopener], or information previously unknown to EPA is received [unknown information reopener], and [(2)] EPA determines, based in whole or in part on these previously unknown conditions or information, that the Remedial Action is not protective of human health or the environment.[118]

EPA added the unknown information reopener pursuant to its statutory authority to include any provisions in settlement agreements that are necessary and appropriate to assure protection of public health, welfare, and the environment.[119] EPA justifies this reopener based on "'the current state of scientific uncertainty on the impacts of hazardous substances, our ability to detect them, and the effectiveness of remedies'"[120] and CERCLA's mixed-funding and five-year review provisions, which purportedly evidence Congress' intent that settling PRPs remain liable for additional site work necessary to address remedy failure.[121] EPA or DOJ may invoke the reopeners either before or after certification of remedial action completion.

Before certification of remedial action completion, only the covenant not to sue concerning present liability, not future liability, is in effect.[122] Thus, EPA or DOJ only has to invoke a reopener to again sue or take administrative action against a settled PRP if the suit or action is related to the PRP's present liability—that is, the PRP's obligation to pay response costs already incurred by the United States and to complete the remedial activities set forth in the ROD; if the suit or action is related to future liability in that it seeks to compel the performance of additional response activities at the site beyond what is set forth in the ROD, invoking the provision is unnecessary.[123] The conditions and information known by EPA is what was known as of the date that the ROD was signed, determined based on what was set forth in the ROD and administrative record supporting it.[124]

After certification of remedial action completion, the covenant not to sue concerning future liability takes effect. Thus, EPA or DOJ will need to invoke a reopener if it plans to require a settled PRP to perform additional site work

109. 2021 Model RD/RA Consent Decree, *supra* note 34, at 9, ¶ 21.a.
110. *Id.* at 10, ¶ 21.b.
111. *Id.* at 7.
112. *Id.* at 8.
113. SOW, *supra* note 98, at 3, ¶ 1.3; *see also* U.S. EPA, A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents 8-3 to 8-4 (1999), https://www.epa.gov/sites/default/files/2015-02/documents/rod_guidance.pdf.
114. *See, e.g.*, John Horst et al., *Water Treatment Technologies for PFAS: The Next Generation*, 38 Groundwater Monitoring & Remediation 13, 13 (2018) (noting limitations on the effectiveness of most conventional water treatment technologies to address PFAS).
115. 2021 Model RD/RA Consent Decree, *supra* note 34, at 9, ¶ 21.a. Also, the general reservations provision reserves all rights against settling defendants regarding "liability, prior to achievement of Performance Standards, for additional response actions that EPA determines are necessary to achieve and maintain Performance Standards or to carry out and maintain the effectiveness of the Remedial Action," but that are not within the scope of the remedy. *Id.* at 30, ¶ 72.j.
116. *Id.* at 10, ¶ 21.c.
117. *Id.* at 28, ¶ 71.a.
118. *Id.*
119. Reopener Guidance, *supra* note 90, at 28041.
120. *Id.* (citation omitted).
121. *See id.*
122. *See id.*
123. *Id.*
124. 2021 Model RD/RA Consent Decree, *supra* note 34, at 29, ¶ 71.b.

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or recover cleanup costs. The conditions and information known by EPA is what was known as of the date of certification of remedial action completion, determined based on what was set forth in the ROD, the administrative record supporting it, the post-ROD administrative record, or other information received by EPA in accordance with the requirements of the decree prior to certification of remedial action completion.[125]

As newly regulated hazardous substances, more stringent cleanup standards, new and preferred remedial strategies, and remedy failure necessitate further site work, it is important to remember that EPA or DOJ cannot invoke the reopeners unless EPA determines that the remedial action is no longer protective.[126] As such, EPA guidance clarifies that reopeners are not meant to permit EPA to require settled PRPs to implement a more permanent remedy, such as more effective remedial technologies, when the existing remedy is protective.[127] Thus, the existence of a new and preferred remedial strategy in itself would not trigger the unknown information reopener. Notably, though, it may be in the best interest of PRPs and PRPs may even advocate to perform further site work to implement new remedial strategies that come to light post-ROD that are equally if not more effective where there will be significant cost savings.

Assuming, arguendo, that EPA determines that remedies are no longer protective at some sites due to, for example, PFOA or PFOS, there is little guidance as to the outer contours of what may constitute previously unknown conditions or information sufficient to satisfy the reopeners.[128] It seems clear that if EPA was unaware of the presence of PFOA or PFOS at the site prior to the ROD or certification of remedial action completion, the unknown conditions reopener will be satisfied. However, in cases where EPA was arguably aware of their presence, the unknown information reopener may be determinative. EPA guidance suggests that new information must actually be new; it cannot simply be "a new analysis of the same information."[129]

Does the designation of a CERCLA hazardous substance in itself constitute previously unknown information? Will more stringent cleanup standards? Will new and preferred remedial strategies? Will remedy failure, or the factors leading to it, constitute previously unknown conditions or information? EPA's position will likely be yes.[130] For example, with regard to more stringent cleanup standards, EPA guidance states that the Agency can invoke the unknown information reopener "should health effects studies reveal that health-based performance levels relied upon in the ROD are not protective of public health or the environment."[131] In the years to come, as what were once CECs become CERCLA hazardous substances, cleanup standards become more stringent, new and preferred remedial strategies come to light, and should remedies fail, necessitating invocation of the reopeners, their outer contours may get further defined.

For now, it is worth simply noting that if the additional site work is associated with a remedy modification that is consistent with the scope of the remedy, or if one of the reopeners is satisfied, the settled PRP will likely be liable for the work and associated cleanup costs under the consent decree itself. The Model Consent Decree provides that:

> Settling Defendants shall modify the SOW, or related work plans, or both in accordance with the Remedial Action modification or further response action. . . . The Remedial Action modification or further response action, the approved modified SOW, and any related work plans will be deemed to be incorporated into and enforceable under this Decree.[132]

Though there is one caveat. If EPA selects further site work because one of the reopeners is satisfied, as opposed to further site work pursuant to a remedy modification that is consistent with the scope of the remedy, the further work will not automatically be incorporated into and enforceable under the consent decree; the decree itself will need to be modified too.[133]

No matter what, modifications to the consent decree must be in writing and are effective when signed by the parties. If a modification is material—which is the case if, for example, it is incorporating a remedy modification that fundamentally alters the basic features of the remedial action (requires an ROD amendment)—the modified decree must be approved by a court too.[134] A court will approve the modified decree if it remains fair, reasonable, and consistent with CERCLA's goals.[135]

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125. *Id.* at 29, ¶ 71.c. EPA guidance states that completion of the remedial action is the date when remedial construction has been completed. Reopener Guidance, *supra* note 90, at 28041. "Where a remedy requires operational activities, remedial construction [is] . . . judged complete when it can be demonstrated that the operation of the remedy is successfully attaining the requirements set forth in the ROD and RD." *Id.*
126. 2021 Model RD/RA Consent Decree, *supra* note 34, at 28, ¶ 71.a.
127. *See* Reopener Guidance, *supra* note 90, at 28041.
128. *See* Addison, *supra* note 35, at 1088-91 ("The universe of information which could result in reopening a settlement under the additional information provision is incalculable.").
129. *See* Reopener Guidance, *supra* note 90, at 28041; *cf.*, *e.g.*, New York v. Environmental Prot. Agency, 525 F. Supp. 3d 340, 353 (N.D.N.Y. 2021) (suggesting that any change from a finding of "Protectiveness Deferred" to a finding of "Not Protective" at the site "would have to rely on new data," likely triggering the unknown information reopener).
130. *See* Reopener Guidance, *supra* note 90, at 28041.
131. *Id.*
132. 2021 Model RD/RA Consent Decree, *supra* note 34, at 10, ¶ 21.d.
133. *See id.* at 10, ¶ 21.c; Modification Guidance, *supra* note 63.
134. 2021 Model RD/RA Consent Decree, *supra* note 34, at 36, ¶ 96:

> Material modifications to [the decree] must be in writing, signed . . . by the Parties, and are effective upon approval by the Court. As to changes to the remedy, a modification to the Decree, including the SOW, to implement an amendment to the Record of Decision that 'fundamentally alters the basic features' of the Remedial Action . . . will be considered a material modification.

see, *e.g.*, Frey v. Environmental Prot. Agency, 751 F.3d 461, 464-65, 44 ELR 20102 (7th Cir. 2014); Joint Stipulation and Order Modifying the Consent Decree With Central Sprinkler Corporation at 3, United States v. Parker Hannifin Co., No. 2:05-cv-1351 (E.D. Pa. Jan. 10, 2022), https://www.justice.gov/enrd/consent-decree/file/1461691/download.
135. *See*, *e.g.*, Emhart Indus., Inc. v. U.S. Dep't of the Air Force, 988 F.3d 511, 523 (1st Cir. 2021); Citizens Dev. Corp. v. County of San Diego, No. 12CV00334 GPC-KSC, 2021 U.S. Dist. LEXIS 26666, at *15 (S.D. Cal. Feb. 11, 2021); United States v. Goodrich Corp., No. 5:20-CV-00154-TBR, 2021 U.S. Dist. LEXIS 16288, at **3-4 (W.D. Ky. Jan. 27, 2021);

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Finally, if EPA or DOJ chooses not to compel performance of additional site work through the consent decree itself, EPA or DOJ, assuming a reopener is satisfied, can instead go outside the consent decree by filing a new suit or administrative order, which may culminate in a new consent decree.[136] Notably, the Model Consent Decree states that "if the United States exercises rights under the [reservations], the 'matters addressed' . . . will no longer include those response costs or response actions [or natural resource damages] that are within the scope of the exercised reservation."[137] This suggests that if EPA or DOJ invokes a reopener and again sues or takes administrative action against settled PRPs to recover, for example, PFAS-related cleanup costs or compel PFAS-related site work, the settled PRPs will no longer be immune from contribution actions regarding such costs or work.

D. A Settled PRP's Options

Given that the covenant not to sue does not take effect with respect to future liability until after the remedial action has been certified complete, and given the broad scope of the reopeners, it may seem like settled PRPs are at the mercy of EPA's whim when it comes to future liability. But PRPs have various options, should EPA or DOJ come after them to compel the performance of additional site work or recover additional cleanup costs predicated on purported future liability.

In most cases, formulating and commenting on the modified or new remedy, negotiating and commenting on the associated consent decree, if applicable, and complying present the best approach. But if the stakes are high enough and EPA's actions appear to be in violation of the consent decree or otherwise ultra vires or arbitrary and capricious, a settled PRP may decide it is in its best interest to push back and initiate dispute resolution under the decree, or if a new §106 or §107(a) enforcement action is brought against it, to proceed accordingly in court.

1. Formulating and Commenting on Modified or New Remedies

As what were once CECs become CERCLA hazardous substances, cleanup standards become more stringent, new and preferred remedial strategies come to light, and should remedies fail, EPA may modify existing remedies or propose new ones. PRPs can and should help formulate and can comment on these modified or new remedies. CERCLA states that EPA "shall provide for the participation of" PRPs "in the development of the administrative record on which the [EPA] will base the selection of remedial actions and on which judicial review of remedial actions will be based."[138] Inter alia, PRPs must be given "[a] reasonable opportunity to comment and provide information regarding the [remedy]."[139]

CERCLA also provides that before the adoption of the ROD, EPA shall "[p]rovide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue."[140] The NCP incorporates these requirements,[141] and further provides that when a remedy modification "fundamentally alter[s] the basic features of the selected remedy with respect to scope, performance, or cost," EPA shall provide a reasonable opportunity for public comments, as well.[142] The Model Consent Decree clarifies that "[n]othing in this Decree limits Settling Defendants' rights . . . to comment on any modified or further response actions proposed by EPA."[143]

2. Negotiating and Commenting on Modified or New Consent Decrees

If EPA wants a settled PRP to implement further site work because one of the reopeners is purportedly satisfied, the existing RD/RA consent decree will need to be modified (which will require the settled PRP's signature), or a new consent decree must be entered into. The PRP may enter into negotiations with EPA regarding the modified or new consent decree.[144] If the modification is material, or if a new consent decree is entered into, it must be approved by a court, and there will be a period for non-named parties to comment on the proposed judgment before its entry.[145] Other PRPs at the site should carefully evaluate the consent decree's language, consider how the decree may impact their own rights and liabilities, and, if necessary, submit comments.[146] Ultimately, the court will approve the modified decree if it remains or is fair, reasonable, and consistent with CERCLA's goals.[147]

3. Complying

After a remedy is modified or a new remedy is chosen, a settled PRP may simply comply with EPA's request that it implement the remedy modification or perform the additional site work. In most cases, complying will be in the settled PRP's best interest. For example, complying may be best when the PRP is satisfied with the modified or new

United States v. NCR Corp., No. 1:19-CV-1041, 2020 U.S. Dist. LEXIS 250187, at **7-8 (W.D. Mich. Dec. 2, 2020).

136. This is likely to be the case if EPA selects a new remedy at the site, as opposed to modifying the preexisting remedy.

137. 2021 Model RD/RA Consent Decree, *supra* note 34, at 32, ¶ 82.

138. *See* 42 U.S.C. §9613(k)(2)(B).

139. *See id.* §9613(k)(2)(B)(ii).

140. *See id.* §9617(a)(2); *see also* 40 C.F.R. §300.430(c), (f)(3).

141. *See* 40 C.F.R. §300.430(c), (f)(3).

142. *See id.* §300.435(c)(2)(ii); *see also* General Elec. v. Jackson, 610 F.3d 110, 114-15 (D.C. Cir. 2010).

143. 2021 Model RD/RA Consent Decree, *supra* note 34, at 9, ¶ 21.a.

144. *See* 42 U.S.C. §9622(e)(2).

145. *Id.* §9622(d)(1)(A); 2021 Model RD/RA Consent Decree, *supra* note 34, at 10, ¶ 21.c. & 36, ¶ 96.

146. *See* New York v. Environmental Prot. Agency, 525 F. Supp. 3d 340, 355-57 (N.D.N.Y. 2021) (explaining that New York failed to use the proper mechanism to challenge the consent decree).

147. *See supra* note 135.

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remedy and, if applicable, the modified or new consent decree. Such satisfaction may result from strategic advocacy and negotiations during the remedy modification or selection process and, if applicable, the consent decree negotiation process.[148] Also, complying may be best when it appears that the remedy modification is arguably consistent with the scope of the remedy or, assuming the covenant not to sue applies and is in effect, one of the reopeners is arguably satisfied, and the PRP does not want to run the risk of the accrual of stipulated penalties that may result from initiating dispute resolution.[149]

Finally, regardless of dissatisfaction with the modified or new remedy, dissatisfaction with the associated proposed modified or new consent decree, or a colorful argument against future liability, complying may be best to develop rapport with EPA,[150] avoid public relations issues,[151] and expedite, rather than prolong, the cleanup process so that what purportedly needs to get done gets done.[152] But if the stakes are high enough, and EPA's actions appear to be in violation of the consent decree or otherwise ultra vires or arbitrary and capricious, a settled PRP may decide that it is in its best interest to push back and initiate dispute resolution.

4. Initiating Dispute Resolution and Seeking Judicial Review

If EPA wants a settled PRP to implement a remedy modification purportedly consistent with the scope of the remedy, or to implement further site work because one of the reopeners is purportedly satisfied, the Model Consent Decree provides that the PRP has the right to initiate dispute resolution.[153] PRPs should be cognizant of the accrual of stipulated penalties when deciding whether to do so.[154] Informal negotiations must follow, and if they fail, the position advanced by EPA is binding unless the PRP initiates formal dispute resolution.[155]

Formal dispute resolution will culminate in the director of the Superfund and Emergency Management Division of the appropriate EPA region issuing a formal decision resolving the dispute, a decision that is binding on the PRP unless it seeks judicial review.[156] On judicial review, the PRP bears the burden of demonstrating, on the administrative record, that EPA's formal decision was arbitrary and capricious or otherwise not in accordance with the law.[157]

5. Defending Against New §106 or §107(a) Enforcement Actions

Finally, if EPA or DOJ, invoking a reopener, files a new suit or administrative order against a settled PRP, as opposed to compelling performance through the consent decree itself, in addition to the argument that the covenant not to sue applies and is in effect, and a reopener is not satisfied (which may include an argument that the site remains protective), the PRP can assert other common defenses. The settled PRP likely will not have any new defenses to liability because liability extends to "all costs."[158] As is always the case, a PRP who receives and complies with a unilateral administrative order (UAO) can petition EPA for reimbursement from the Hazardous Substance Superfund.[159] If EPA denies the petition, the PRP can file suit in court seeking reimbursement on the basis that, on the administrative record, EPA's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with the law.[160]

Moreover, if the settled PRP has "sufficient cause," it may refuse to comply with the UAO.[161] But if DOJ then sues the PRP to enforce the order, the PRP will have to show that it did in fact have sufficient cause, or risk significant fines.[162] If enforcement action is brought under §107(a), the settled PRP can argue that the costs of remedial action incurred were inconsistent with the NCP.[163] The cost recovery statute-of-limitations defense may come into play here too.[164] For example, if the new costs incurred by EPA were arguably within the scope of a prior ROD, and DOJ brings a new cost recovery action more than six years after the initiation of that ROD's remedial action, an argument can be made that the new action is time barred.[165]

III. Achieving the Most Upfront Certainty and Resolve Possible

Achieving upfront certainty and resolve may be a higher priority for PRPs in this new era of Superfund. This part will provide a brief, non-exhaustive list of considerations when it comes to doing so.

148. *See supra* Sections II.D.1-2.
149. 2021 Model RD/RA Consent Decree, *supra* note 34, at 26, ¶ 61.
150. For example, PRPs that interact with EPA on a consistent basis to carry out their business objectives should be cognizant of the potential impact that not complying will have on their relationship with the Agency, the deterioration of which may impact other, unrelated dealings with the Agency.
151. *See generally* Larry J. Zaragoza, *The Environmental Protection Agency's Use of Community Involvement to Engage Communities at Superfund Sites*, 16 Int'l J. Env't Rsch. & Pub. Health 4166 (2019).
152. And, of course, one of CERCLA's primary goals is to ensure that sites are cleaned up promptly. *See*, *e.g.*, United States v. Sterling Centrecorp Inc., 977 F.3d 750, 756, 50 ELR 20235 (9th Cir. 2020) (citation omitted).
153. 2021 Model RD/RA Consent Decree, *supra* note 34, at 10, ¶ 21.d.
154. *See id.* at 26, ¶ 61.
155. *Id.* at 25, ¶ 57.
156. *Id.* at 25, ¶ 58.b.
157. *Id.* at 25, ¶ 59.b.
158. *See* 42 U.S.C. §9607(a)(4)(A); Pennsylvania Dep't of Env't Prot. v. Trainer Custom Chem., LLC, 906 F.3d 85, 93-94 (3d Cir. 2018) (interpreting "all costs" broadly).
159. 42 U.S.C. §9606(b)(2)(A)-(B).
160. *Id.* §9606(b)(2)(D).
161. *See id.* §9606(b)(1).
162. *See id.*; *see also* General Elec. v. Jackson, 610 F.3d 110, 114-15 (D.C. Cir. 2010).
163. 42 U.S.C. §9607(a)(4)(A).
164. *E.g.*, *id.* §9613(g)(2)(B).
165. *See*, *e.g.*, MPM Silicones, LLC v. Union Carbide Corp., 966 F.3d 200, 230-31 (2d Cir. 2020).

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A. Buyout/Cash Out Settlements

During the early stages of the remedial process, PRPs whose relative contribution to the contamination at sites is small should consider entering into private-party buyout/cash out settlements if there is a private allocation[166] or, if they qualify, de minimis settlements with EPA.[167] These smaller contributor PRPs may more easily be able to achieve upfront certainty and resolve given that a common component of these settlements is that, in exchange for a sum of money or "premium," the PRPs may resolve their liability, receive certain protections, and not be responsible for the site work.[168]

Notably, CERCLA provides that EPA does not need to include the unknown conditions reopener in de minimis settlements[169]; however, pursuant to EPA policy, reopeners may be included in these settlements to, inter alia, protect EPA from the risk of remedial action cost overruns and the risk that further site work, beyond the work specified in the ROD, will be necessary.[170] When EPA has sufficient information to evaluate the likelihood of cost overruns or the potential need for further site work, de minimis contributors may be able to offer a premium in lieu of these reopeners.[171] They may also be able to negotiate out of the reopeners when other factors ensure that cost overruns and the costs associated with further site work will be taken care of by the major PRPs at the site.[172]

B. More Permanent Remedies

When it comes to reducing future liability, a more permanent remedy (i.e., one "in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element") is preferred.[173] A remedy involving treatment, as opposed to engineering controls like on-site containment,[174] may make it less likely that future issues will arise necessitating further site work. And as explained above, CERCLA provides that EPA is *required* to include covenants not to sue with respect to future liability to the United States for the portions of remedial actions that involve off-site disposal or treatment; the more permanent the remedy, the more complete the covenant not to sue will be, and EPA does not need to include the unknown conditions reopener for the portions of settlements that involve off-site disposal or treatment.[175]

Of course, treatment may not always be the selected remedy; it may not be practical, or it may be less cost effective than other remedial alternatives.[176] But when treatment is practical, even if not as cost effective, PRPs should seriously consider whether paying less upfront is worth the increased risk of being subject to future liability down the road.

C. Addressing CECs in Remedy Selection

PRPs should also consider the extent to which not-yet-regulated contaminants should be addressed in remedy selection. CERCLA liability is predicated on the presence of a CERCLA hazardous substance at a site, and PRPs are not liable under CERCLA for site work or cleanup costs associated with other, nonhazardous pollutants or contaminants present at a site unless the pollutants or contaminants are associated or comingled with the hazardous substance or substances.[177] So, what should PRPs do when there are CECs at a site? There is no easy answer, and what is best will ultimately depend on the facts of the case and state that the site is in.

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166. *See generally* American Bar Association, Superfund Allocation and Mediation: The Allocators' Answers (2019), https://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/Events/2019/masterclass/course_materials/1_allocators_speak_on_allocation.pdf (discussing the private allocation process).
167. *See* 42 U.S.C. §9722(g) (de minimis settlements); *see also id*. §9607(o) (de micromis exemption).
168. *E.g.*, *id*. §9622(g)(2), (g)(5); *see also*, *e.g.*, Memorandum from Thomas L. Adams Jr., Assistant Administrator for Enforcement and Compliance Monitoring, U.S. EPA & J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, U.S. EPA, to Regional Administrators et al. 14-15 (June 19, 1987), https://www.epa.gov/sites/default/files/2013-09/documents/demin-122g-settle-87.pdf [hereinafter De Minimis Contributor Guidance].
169. *See* 42 U.S.C. §9722(f)(6)(A), (f)(6)(C).
170. *See* De Minimis Contributor Guidance, *supra* note 168, at 15-19; U.S. EPA, Model CERCLA Section 122(g)(4) De Minimis Contributor Administrative Settlement Agreement and Order on Consent 10-11 (2021), https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=375 (Word document can be downloaded from top of page).
171. De Minimis Contributor Guidance, *supra* note 168, at 17.
172. *Id*. at 18-19.
173. 42 U.S.C. §9621(b)(1); *see also* 40 C.F.R. §300.430(a)(1)(iii)(A).
174. For some general information on remedies, see Linda Fiedler & Carlos Pachon, *Recent Trends in the Selection of Remedies for Groundwater, Soil, and Sediment at Superfund Sites*, 38 Groundwater Monitoring & Remediation 13 (2018).
175. *See supra* Section I.A.2; *see also* Reopener Guidance, *supra* note 90, at 28042-43.
176. *See*, *e.g.*, United States v. BNSF Ry. Co., No. CV 20-126-M-DLC, 2020 U.S. Dist. LEXIS 225825, at **81-82 (D. Mont. Nov. 30, 2020); *see also* In re Gen. Elec. Co., 17 E.A.D. 434, 577-82 (EAB 2018) (noting cost and effectiveness elements of dispute between nonprofit and EPA regarding EPA's failure to select thermal desorption and bioremediation as part of Resource Conservation and Recovery Act (RCRA) corrective action remedy).
177. *See* 42 U.S.C. §§9607(a)(4)(A)-(B) (stating that PRPs are liable to the U.S. government, states, and Indian tribes for "all costs of removal or remedial action" and to "any other person[s]" for "any other necessary costs of response"), 9601(23) (defining "remove" or "removal"), 9601(24) (defining "remedy" or "remedial action"), 9601(25) (defining "respond" or "response"), 9601(14) (defining "hazardous substance"); Eagle-Picher Indus., Inc. v. Environmental Prot. Agency, 759 F.2d 922, 932, 15 ELR 20460 (D.C. Cir. 1985) (explaining the different legal consequences that "flow" from substances constituting a "hazardous substance" versus substances constituting a "pollutant or contaminant"); Colorado v. United States, 867 F. Supp. 948, 951-52, 25 ELR 20583 (D. Colo. 1994) (rejecting Colorado's argument that once a party is found liable, it is liable for all cleanup costs, even those addressing non-CERCLA hazardous substances and concluding that PRPs are only liable for response actions "taken in relation to [CERCLA] hazardous substances or 'associated' contamination"); Jastram v. Phillips Petroleum Co., 844 F. Supp. 1139, 24 ELR 21157 (E.D. La. 1994) (similar); United States v. United Nuclear Corp., 814 F. Supp. 1552, 1557-58, 23 ELR 20887 (D.N.M. 1992) (explaining that mine tailings containing hazardous substances should be treated as hazardous substances rather than pollutants or contaminants). Moreover, while the degree of cleanup may be controlled by state standards, liability still only attaches if the substance being remediated is a CERCLA hazardous substance. *See* Mid Valley Bank v. N. Valley Bank, 764 F. Supp. 1377, 1389, 22 ELR 20614 (E.D. Cal. 1991).

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PRPs may understandably be reluctant to perform site work when doing so is not required by law. When there are only CECs at a site, it may make most sense to not address the CECs until, if, and when they become CERCLA hazardous substances or parties become liable for their cleanup and associated costs under other law.[178] However, when there are both CECs and CERCLA hazardous substances at a site, PRPs should consider whether and, if so, how, the CECs should be addressed in remedy selection.[179]

When a remedial alternative addressing the hazardous substances can feasibly and cost effectively be adjusted to also address the CECs, selecting such alternative may be the best approach, especially where CECs are likely to pose a significant risk to human health. However, when no remedial alternative can feasibly and cost effectively be adjusted to address the CECs, it may be best to not address them until doing so is required by law. Regardless of the approach taken, PRPs should examine whether CECs are at the site and evaluate the risks associated with their presence and the potential courses of action.

D. Strategic Consent Decree Negotiation

The consent decree language matters, as it will dictate a settling PRP's obligations and liabilities at the site moving forward. Therefore, settling PRPs and other relevant parties should pay close attention to what the language is and what it will mean for future liability. Failure to successfully negotiate or comment on the language at the front-end may lead to consequences later.[180] While EPA officials may be hesitant to change the boiler plate provisions of the Model Consent Decree, PRPs should approach the negotiation process in a strategic manner, keeping in mind the following.

When entering into negotiations with EPA, PRPs should frame their goals for upfront certainty and resolve as in the public interest and consistent with the NCP. They should also take advantage of the Model Consent Decree's broad covenant not to sue and contribution protection.

Because the scope of the covenant not to sue is constrained by the definition of "Site," PRPs should seek to define "Site" as expansively as possible.[181] They should consider, for example, the potential that contaminants may migrate outside a site's boundaries. Moreover, because the covenant not to sue with respect to future liability does not take effect until EPA certifies that the remedial action is complete, PRPs should consider how "remedial action" is defined. For example, if the definition of "remedial action" excludes maintenance and monitoring activities, the covenant can take effect sooner.[182]

Because the scope of contribution protection will depend on the scope of "matters addressed," PRPs should seek to define "matters addressed" as broadly as possible too, and consider EPA guidance. EPA guidance provides that, "[a]t a minimum, [matters addressed] will be the response actions or costs the settling parties agree to perform or pay; however, 'matters addressed' can be broader if the settlement is intended to resolve a wider range of response actions or costs, regardless of who undertakes the work or incurs those costs."[183] If the settlors

> bear the bulk of the site costs, . . . so long as the costs borne by other PRPs are known (or can be reasonably estimated), and were considered in determining how much the final RD/RA settlors should be required to do and pay, those earlier PRP costs should be included in "matters addressed" along with all of the United States' costs.[184]

However, if EPA "is unable to conclude that the settlors are paying an appropriate portion of all costs, . . . it may be appropriate either to limit 'matters addressed' to costs reimbursed or work performed under the decree or to list specifically the matters for which the settlor is to receive contribution protection."[185] For partial operable unit consent decrees, the definition is "likely to be limited to the portion of the cleanup which the settlors are performing or funding."[186]

Moving on to the reopeners, the unknown conditions reopener is not statutorily required in "extraordinary circumstances."[187] Thus, PRPs should consider whether extraordinary circumstances are present, considering the public interest factors and additional ones.[188] Also, the unknown information reopener is not statutorily required, and EPA justifies it based on scientific uncertainty on the impacts of hazardous substances, our ability to detect them, and the effectiveness of remedies.[189] If these justifications are weak at a specific site, PRPs can attempt to negotiate out of this reopener. At the very least, considering a future where newly regulated hazardous substances, more stringent cleanup standards, new and preferred remedial strategies, and remedy failure may become more common, PRPs should seek to further define the outer contours of the reopeners.

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178. *See*, *e.g.*, Erin Carter & Harry Weiss, *New Jersey Sets Stringent PFAS Standards*, JD Supra (June 7, 2020), https://www.jdsupra.com/legalnews/new-jersey-sets-stringent-pfas-standards-12809/ (noting that "New Jersey's new rules create liability for PFOA and PFOA discharges under the New Jersey Spill Compensation and Control Act").

179. *See* ECOS-DoD Sustainability Workgroup, Initiation of Emerging Contaminants Characterization and Response Actions for Protection of Human Health (2016), https://www.ecos.org/wp-content/uploads/2016/05/Resource-Triggers-Paper-finalized-8-12-08-endorsed-9-21-08.pdf (evaluating how the U.S. Department of Defense may address emerging contaminants in response actions).

180. *See*, *e.g.*, New York v. Environmental Prot. Agency, 525 F. Supp. 3d 340, 357 (N.D.N.Y. 2021) (dismissing New York's lawsuit and explaining that "the State passed up an opportunity to correct the language of the consent decree before it was first adopted").

181. *See supra* note 100 and accompanying text. Once again, note that the covenant in a RD/RA consent decree for an operable unit will likely be more specific.

182. *E.g.*, *New York v. Environmental Prot. Agency*, 525 F. Supp. at 353-54.

183. *See* Matters Addressed Memorandum, *supra* note 46, at 4.

184. *See id*. at 8.

185. *Id*.

186. *Id*. at 8-9.

187. 42 U.S.C. §9622(f)(6)(B).

188. *Id*.

189. Reopener Guidance, *supra* note 90, at 28041 (citation omitted).

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E. Legacy Sites

Finally, PRPs at sites with remedies that result in hazardous substances, pollutants, or contaminants remaining at the sites should make sure that the sites are under control and that they are fulfilling their operation and maintenance obligations in accordance with the site's consent decree and SOW.[190]

IV. Conclusion

Environmental cleanups are no easy feat. While in the 1980s the necessity for further site work at sites with remedies that were believed to be complete might have appeared a distant reality, this is no longer the case. As science and technologies advance, leading to the detection, study, and eventual regulation of CECs, the imposition of more stringent cleanup standards, and new and preferred remedial strategies, and should remedies fail, future liability is here.

PRPs that have entered into RD/RA consent decrees with EPA may be interested in understanding their future liability. This Article reviewed the provisions of the 2021 RD/RA Model Consent Decree that most pertain to such liability; though it is important to note that PRPs may have settlements that were based off of prior models. In sum, notwithstanding a broad covenant not to sue and contribution protection, settled PRPs may remain liable under the consent decree itself for additional site work to implement a remedy modification that is consistent with the scope of the remedy and for further site work selected by EPA because a reopener is satisfied.

But importantly, for a reopener to be satisfied, EPA must determine that a site is no longer protective due to the reopener-triggering condition or information. If EPA selects further site work because a reopener is purportedly satisfied, the consent decree itself will need to be modified, which will require the signature of the PRP, and if the modification is material, court approval too. Also, assuming a reopener is satisfied, EPA or DOJ can go outside the consent decree by filing a new suit or administrative order against the settled PRP, which may result in a new consent decree.

Whatever the chosen path, PRPs have various options, including formulating and commenting on remedies, negotiating and commenting on consent decrees, complying, initiating dispute resolution, and, if necessary, defending against new enforcement actions. PRPs seeking to prospectively limit future liability should consider the potential benefits of buyout/cash out settlements, selecting more permanent remedies, addressing CECs in remedy selection, and strategic consent decree negotiation. They should also ensure that their legacy sites are under control. If they do the above, they can attempt to at least achieve "some" certainty and resolve in these unsettling, but important, times.

190. *See* 42 U.S.C. §9621(c); 40 C.F.R. §300.435(f); *see generally* Memorandum from James E. Woolford, Director, Office of Superfund Remediation and Technology Innovation, U.S. EPA, to National Superfund Program Managers, Regions 1-10, at 32-38 (Feb. 7, 2017), https://semspub.epa.gov/work/HQ/196829.pdf.