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Answers to 3 Key Questions About the Remediation of Superfund and Brownfield Sites Under President Trump's Infrastructure Proposal.

In addition to addressing the repair of roads and bridges, President Trump's infrastructure proposal addresses a decidedly less popular infrastructure element — Superfund Sites and Brownfield Sites. It is worth looking at how President Trump's proposed changes to Brownfield and Superfund revitalization may impact future infrastructure proposals. Additionally, with the House of Representatives passing the Brownfields Enhancement, Economic Redevelopment, and Reauthorization Act of 2017 late last year, President Trump's infrastructure proposal could impact land revitalization before anything else.

What are the key questions municipalities and companies should be thinking about as they examine the President's proposed changes to Brownfield and Superfund reform? Here are the top three.

What are the biggest changes to current Brownfield and Superfund cleanup funding proposed by President Trump's Infrastructure Plan?
The overall goal with the President's Infrastructure Plan as it relates to Brownfield and Superfund Sites is to incentivize contaminated property redevelopment and find ways to mitigate legal and financial risks for those seeking to do so.

Currently, the Environmental Protection Agency ("EPA") Brownfields Program has a revolving loan/grant fund that can be used for the cleanup of a variety of projects. But under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Superfund Sites are not eligible to receive funds for the program, and National Priorities List (NPL) Sites are not eligible for Brownfield grants. President Trump's plan would change that by expanding the types of projects eligible for the EPA Brownfields Program grant funding and allowing Superfund Sites to access that money. The plan would also amend the law to allow NPL Sites or portions of them to be eligible for Brownfield grants.

In addition to proposed eligibility changes, part of President Trump's proposal includes the establishment of an Incentives Program, which would receive up to $100 billion to fund a number of different projects, including Brownfield and Superfund Sites. More funding for Superfund and Brownfield Sites would also come from changes to the Water Infrastructure Finance and Innovation Act (WIFIA) lending program and from $10 billion of the EPA's portion of the Rural Infrastructure Program, which would provide grants for cleaning up Brownfield Sites.

While it remains to be seen how exactly each of those funds would be divided up to support remediation efforts, Superfund and Brownfield Sites should at least, in theory, have greater access to those types of funds than they did before.

Will the Infrastructure Proposal's liability relief make Superfund Site cleanups more likely?

Perhaps the most interesting — and likely the most challenging to navigate — aspect of President Trump's proposed changes to Superfund Site cleanups is the additional liability relief it gives to states and municipalities that acquire contaminated property. Currently, states and local governments may be exempt from CERCLA liability as an "owner or operator" if they acquire ownership or control of contaminated property involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances under which the state or local government involuntarily acquires the property. But there exists much confusion about what exactly qualifies as "involuntary acquisition" or who would be free of liability if the property fell into government hands.

President Trump's plan would clarify and expand CERCLA liability relief and make public entities eligible for grants as long as they did not contribute to the contamination and as long as they meet the obligations imposed on bona fide prospective purchasers (BFPPs) as described in CERCLA.

However, eliminating liability entirely could be a tricky move, especially when the state/municipality plans to sell or transfer ownership of a formerly contaminated site. There may not be enough protections in the proposal as it stands to make purchasing these properties attractive enough for private businesses or investors given third party liability concerns. The full extent to which these liability protections will extend is not yet clear.

How will the Infrastructure Plan's proposed expanded EPA authority impact the cleanup and reuse of Superfund Sites?
Under existing law, CERCLA provides only the President with the authority to enter into an administrative settlement agreement with any person to perform a response action. Additionally, it requires that when the EPA enters into a settlement for a remedial action with a potentially responsible party, the settlement must be approved by the Department of Justice and entered into the United States District Court as a consent decree.

Along with expediting the permitting process on infrastructure projects overall, President Trump's proposal would amend the law to give the EPA express authority to enter into administrative settlement agreements with BFPPs or other third parties who wish to remediate and reuse Superfund Sites, including partial and early remedial actions. In theory, this would expand the ability to cleanup and reuse Superfund Sites and eliminate delays due to negotiations in court.

For the time being, municipalities and companies will want to actively monitor the development of Brownfield and Superfund Site reform proposals. Further, as the Senate considers the House's version of the Brownfields Enhancement, Economic Redevelopment, and Reauthorization Act of 2017, it is worth keeping a close eye on how the President's proposal with regard to Superfund and Brownfields Sites will impact any final legislation.

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